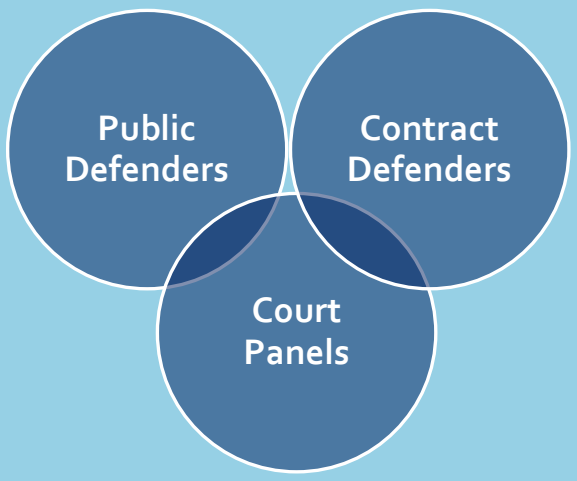
Funding and Fees Review Project

Reporting on the Use of Public Funds and the Seizure of Private Assets to Pay for Legal Services in Conservatorships

PART ONE

Public Funding of Legal Services in Conservatorship Proceedings



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Full Report

Sept. 7, 2021

Contents

AB 1194 Incorporates the Right to Counsel Provisions of SB 724

This report makes numerous references to Senate Bill 724 which strengthens the right to counsel for conservatees and proposed conservatees. Just days before the release of this report, the substance of SB 724 was incorporated into Assembly Bill 1194. This report is being released on September 7. The legislative session is adjourned on September 10. Because there was no opposition to either bill, it is anticipated that both houses of the legislature will pass AB 1194 before the session ends. As a result, the bill should be on the governor's desk by September 11, be signed into law by October 10 and become effective on January 1, 2022.

Wherever reference in this report is made to SB 724, it is actually referring to the right to counsel provisions of AB 1194.

Many thanks to the principal author (Assemblymember Low), principal co-author (Senator Allen), and another co-author (Senator Laird) for carrying this legislation to fruition.

This report was produced by Spectrum Institute,
a nonprofit private operating foundation with
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Spectrum Institute

Website:
https://spectruminstitute.org/

Executive Summary:
https://spectruminstitute.org/public-funding-summary.pdf

Report:
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Preface

The Time for Change is Now

Indigent legal defense services in probate conservatorship proceedings are provided through a fragmented patchwork of local providers. Mandated by the state, counties fund legal services by government lawyers, nonprofit organizations, or private lawfirms. Most of the delivery systems lack transparency or meaningful accountability. The attorneys who defend clients with mental and developmental disabilities in these cases do not have formal performance standards to guide them. Because appeals are rare, appellate courts are deprived of an opportunity to issue published opinions correcting systemic flaws and calling out judicial abuses or attorney malpractice. Access to justice is therefore largely a matter of chance in probate conservatorship proceedings.

In contrast, indigent legal defense services in adult criminal, juvenile delinquency, and child dependency proceedings are highly regulated. In all of these areas of law, attorneys have clearly defined performance standards. There are a fair number of appeals, thereby allowing appellate courts to routinely establish binding precedents that create guardrails protecting litigants from deficient practices and unjust results.

The time has come for officials to provide checks and balances for conservatorship legal services – just as they have done for adults and juveniles accused of crimes and for children and parents whose family relationships are placed in jeopardy. Seniors and people with disabilities also deserve zealous and competent legal defense services.

Changes need to be made *now* to provide adequate funding, impose caseload limits, adopt performance standards, and implement quality assurance controls. Without significant improvements, access to justice in conservatorship proceedings may continue to be nothing more than an illusory promise for tens of thousands of seniors and people with disabilities.

Thomas F. Coleman

Foreword

There is Much Work to be Done

by Tony Chicotel

A familiar refrain in conservatorship law practice is that conservatorship is not meant to be an adversarial process; rather, it should be collaborative and result in the "best interests" of the proposed conservatee. As happens a lot in conservatorship matters, this refrain disregards the proposed conservatee's perspective.

For an average conservatee, conservatorship is absolutely adversarial. From the outset of the case, conservatorship is a significant imposition. The proposed conservatee is served with papers, probed with personal questions asked by strangers, and has their life and decisions examined in a public forum. The proposed conservatee's personal freedoms are at stake: their right to control their health care, choose where they live, how they spend their money, and who they associate with. If conservatorship is granted, the conservatee is relegated to the legal status of a child and there will almost certainly be no appeal.

Often, a proposed conservatee's only hope for avoiding conservatorship or for at least avoiding an overbroad conservatorship, is their defense attorney. All of the other players in a conservatorship case: the judge, court investigator, conservator, conservator's attorney, and guardian ad litem, are charged with pursuing the best interests of the proposed conservatee. The defense attorney, on the other hand, performs the singular and crucial role of fighting for the conservatee's preferences. Without a robust defense, conservatorship fails the due process requirements designed to lead the case to the "right" result.

Good conservatorship defense, which is essential to honoring the constitutional rights of proposed conservatees, covers a large number of important concerns: scrutinizing capacity determinations, cross-examining witnesses, forcing the conservator to meet their burden, and pushing for less restrictive alternatives, in addition to considering the conservatee's placement, the extent of the conservator's powers, and who would best serve as a conservator. Overworked and underprepared defense attorneys cannot adequately address all of these concerns.

Many years ago, I researched over 300 conservatorship files in ten different courts and found that only 1% of all cases went to trial, despite the fact that the conservatee actively opposed

the conservatorship at least 25% of the time. Even more telling, proposed conservatees who had an attorney were slightly *more* likely to be conserved than proposed conservatees who had no attorney at all. This naturally leads to wondering what exactly the defense attorneys are adding to the conservatorship process.

Thanks to the groundbreaking research of the Spectrum Institute, we know that conservatorship defense is set up to be second-rate in many parts of the state. We know the county-provided conservatorship defense attorneys are not generally hired because of demonstrated competence but rather because they are inexpensive. Working cheap is often a proxy for poor quality. We also know the defense attorneys have huge caseloads that stretch them thin, diminish the quality of their work, and erode the zealous advocacy meant to be their true value-add. Finally, we know many of the contracted conservatorship defense attorneys have little training and guidance as well as discordant missions,* causing significant variation in the quality of defense throughout the state. The Spectrum Institute has exposed the state's recipe for injustice.

There is much work to be done to improve the quality of conservatorship defense in California. These efforts will be pivotal to the conservatorship reform movement that is growing throughout the state. It is high time for the state to improve the quality of conservatorship defense and make the conservatorship system more just.

Tony Chicotel is the Senior Staff Attorney with California Advocates for Nursing Home Reform. For the last 15 years he has worked as a staff attorney for he organization. His primary roles at CANHR have included counseling and representing long term care consumers and advocating for statutory and regulatory policy improvements. His areas of expertise include nursing home residents rights, dementia care, capacity and decision making, and conservatorships. Prior to working at CANHR, he was a rights attorney for older residents of San Diego and Imperial Counties at Elder Law & Advocacy, a legal services organization. He saw over 1,000 clients annually regarding a wide variety of legal subjects, including conservatorship. Representing proposed conservatees in conservatorship cases was part of his practice. Tony Chicotel is the author of California Conservatorship Defense: A Guide for Advocates .

*** Email to Spectrum Institute regarding conservatorship defense in Lake County**

"Here is the 2017 contract that I signed regarding provision of Conservatorship representation to Lake Indigent Defense LLP (LID). A copy of the LID contract with the County of Lake is attached. Note that LID is primarily concerned with Defense of Criminal cases. Conservatorships are a 'minor' consideration in both the county and the criminal defense bars view." – Mary Heare Amodio (August 25, 2021)

Ms. Heare Amodio is responsible for conservatorship and probate matters with LID. She is also the current president of the Lake County Bar Association.

Suggestions for Improvement

- Set Caseload Limits with Appropriate Funding
- Create an Office for Conservatorship Defense

"Jurisdictions are reluctant to do so but I think setting a case cap and making sure appropriate funding is allocated for the number of cases handled would be a huge improvement. However, I do see some merit in a separate office that does this work within the county because it is different than core criminal defense practice that public defenders primarily specialize in. It could also remain a function of the public defender with training and perhaps making sure there is proper cross training and having it be an assignment that is occupied for a longer period of time."

Brendon Woods - August 25, 2021

ALAMEDA COUNTY
PUBLIC DEFENDERS

Key Findings

✔ The quality of legal services for seniors and adults with mental or developmental disabilities in probate conservatorship proceedings may vary widely among counties.

✔ There is a lack of transparency and accountability by providers of conservatorship indigent legal defense services. Funding decisions for these services are made by elected county supervisors. Unlike many other constituencies with political power, adults ensnared in conservatorship proceedings largely lack the ability to lobby or influence these politicians.

✔ Standards for legal defense services in these cases are governed by state law. Inadequate funding by counties may make it impossible for attorneys to deliver the quality of services to which the clients are constitutionally and statutorily entitled.

✔ Further investigation, including auditing, of these legal services programs is necessary.

✔ Shifting funding responsibility from counties to the state may be constitutionally required.

The State's Imprint on Legal Services

Probate conservatorship proceedings are a function of state statutes. Cases are processed by state courts. Judges in the cases are state employees. State laws require or authorize the appointment of attorneys in these cases. State mandates require counties to provide or fund indigent legal defense services in these cases. Attorneys who deliver these legal services are licensed by the State Bar. State law requires them to abide by the state constitution as they fulfill their duties as lawyers. The Supreme Court has adopted Rules of Professional Conduct with standards to which these attorneys must conform. Given these parameters, it is clear that state "laws of a general nature" form the foundation and contours of conservatorship indigent legal defense services.

Local Implementation of Legal Services

Supervisors in each county have three alternatives to provide indigent legal defense services in probate conservatorship proceedings: (1) 22 counties use a county public defender department; (2) 24 counties contract with law firms often referred to as contract public defenders; and (3) 12 counties allow the superior courts to appoint attorneys from panels or on an ad hoc basis in individual cases and then pay the attorneys pursuant to a court order.

Lawyers providing conservatorship legal services in some county departments have excessive annual caseloads ranging from 350 to 450 clients. Caseloads of other county public defender departments are unknown due to the refusal of department heads to share information in response to public records requests.

Some county public defender departments lack materials to guide attorneys in delivering these legal services. No county public defender has disclosed performance standards or caseload limits in response to

public records requests for them.

Agreements between counties and contract public defenders vary greatly. Some have detailed performance standards while most are vague or silent on this matter. Some have specific mandates prohibiting disability discrimination in the delivery of services. Some are silent on this issue. Some authorize performance audits by county officials but there is no evidence that such audits ever occur.

Lack of Uniformity Raises Constitutional Concerns

The California Constitution requires that laws of a general nature are uniform in operation. Because recipients of legal services in each county are similarly situated, they are entitled to equal protection in terms of the quality of these services. Due process requires attorneys, no matter where they are located, to provide clients with effective and competent representation. Due to a lack of transparency and accountability, no evidence has been discovered to show that these constitutional mandates are being fulfilled in actual practice.

Further Investigation is Needed

The study of publicly-funded conservatorship indigent legal defender services conducted by Spectrum Institute has raised more questions than it has provided answers. County departments, county contractors, and court-operated programs have no incentive to share information that might disclose deficiencies in their operations.

The 70,000 adults living under ongoing conservatorship orders, and the 5,000 or more adults who are targeted by new conservatorship petitions annually – and their families and supporters – are entitled to full disclosure about the policies and practices of the providers of these services. County taxpayers are also entitled to know if they are funding legal services that are deficient or that violate state and federal laws governing such services.

Because the funding and delivery of such legal services are fragmented and localized, there is currently no state oversight of such services. Each county operates independently, with political and financial considerations guiding the decisions of county supervisors. Chief public defenders are political appointees, with the exception of one county that elects the public defender.

California's method of delivering indigent legal defense services in probate conservatorship proceedings is long overdue for an audit. The "system" if it can be called that, has been operating on "auto pilot" for decades.

The judiciary committees of both houses of the Legislature can conduct oversight hearings. With direction from the Legislature, the State Auditor could conduct such audits in a sample of counties. The State Bar, with direction and oversight by the Supreme Court, could do the same. At the local level, civil grand juries in any or all of the 58 counties could investigate conservatorship indigent legal defense programs as part of their agenda for next year. The California Grand Jury Association has already been alerted to this problem and has been asked to encourage local civil grand juries to take up this matter. Many civil grand juries have investigated deficiencies in the services of county public guardian departments and some have issued reports documenting major defi-

ciencies. They could do the same for indigent legal defense services in probate conservatorship proceedings, especially when those services are provided by county public defender departments or by contract public defenders with county funds.

Federal Intervention May Be Necessary

A complaint against the Los Angeles Superior Court for ADA non-compliant legal defense services by the panel of attorneys operated by the court is pending with the United States Department of Justice for investigation. The DOJ could open an investigation into that complaint but broaden it statewide due to evidence from this and other reports indicating that people with disabilities are receiving deficient legal services – services which are vital to their liberty interests and about which they have no recourse to complain.

Shifting Funding to the State May Be Constitutionally Required

Funding for local schools formerly was provided by local governments. Because the tax base and financial abilities varied greatly among school districts due to the wealth of residents, some schools were well funded while others were not. This had a significant impact on the quality of education students received – all because of where their parents happened to live.

In a landmark case in the 1970s, the California Supreme Court declared that local funding of public schools was unconstitutional. Education is a fundamental constitutional right of young people in California. State law mandates they attend school. Receiving a good or poor education as a child has lifelong effects. Based on the principle of equal protection and the constitutional requirement that laws of a general nature are uniform in operation, the Supreme Court declared that the State of California must assume responsibility for funding public schools and must distribute the funds equitably.

A shift in funding from counties to the state occurred about two decades ago for indigent legal services in juvenile dependency cases. These proceedings involve children who have been taken from their parents due to alleged abuse or neglect. Since fundamental rights are involved in such family separations, the appointment of counsel for children and for indigent parents is constitutionally required. State legislators, partly due to federal financial incentives and mandates in child welfare proceedings, shifted responsibility to the state to provide such legal services. As a result, a higher degree of uniformity of quality of such services was achieved, regardless of what area of the state a family lived. The Legislature and the Judicial Council imposed caseload limits and performance standards for the attorneys paid by state funds in these cases. Quality assurance controls and monitoring mechanisms were developed.

The time may have come for such a shift in funding for indigent legal services in conservatorship proceedings. These cases also jeopardize liberty and place fundamental constitutional rights at risk. They also may cause family separations.

Allowing local political and financial considerations to determine the level of funding for conservatorship indigent legal defense services may violate the same constitutional principles that caused the California Supreme Court to require a shift from local to state funding of the public education of children.

Distribution & Recommendations

California Supreme Court

with a renewed request for the Court to convene a Workgroup on Conservatorship Right to Counsel Standards

California Legislature

with requests to pass AB 1194 (right to counsel) and AB 625 (caseload study) and to direct the Judicial Council to study options for shifting the funding of indigent legal defense services in probate conservatorships from counties to the state similar to dependency cases

California Judicial Council

with a request to amend court rules to clarify that courts must provide accommodations to litigants with known cognitive disabilities that prevent meaningful participation in a case and that appointment of counsel may be a necessary accommodation for such litigants to ensure access to justice

California State Bar

with a request to conduct a quality assurance audit of a sample of cases in three counties – one with public defender representation, one with contract public defender representation, and one with a court-appointed counsel program – to evaluate whether indigent legal defense services in probate conservatorship proceedings are being conducted in a manner consistent with the requirements of due process, rules of professional conduct, and disability nondiscrimination laws, and to report its findings to the Supreme Court

State Public Defenders Association

with requests: to adopt guidelines, consistent with ABA and California State Bar indigent legal defense principles, for caseload limits for conservatorship defense attorneys; to develop performance guidelines for conservatorship indigent defense counsel consistent with the outline contained in this report

California County Executives

with a request 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 statutory requirements, state and federal nondiscrimination mandates, and rules of professional conduct with the dual purpose of improving the quality of services for recipients of legal services and reducing the county's risk of liability for substandard services

Civil Grand Juries

with a request that they review indigent legal defense programs operated by public defender departments and contract public defenders to determine whether there are caseload limits, performance standards, and quality assurance monitoring to ensure that recipients of such services receive effective assistance of counsel as required by federal and state law

United States Department of Justice

with a request to take action on pending complaints regarding ADA non-compliant legal services in probate conservatorship proceedings in Los Angeles County and to open a formal statewide investigation into deficient legal services being provided to litigants with serious cognitive and communication disabilities in such cases

Overview

Spectrum Institute has been studying legal services in the context of probate conservatorship proceedings for several years. The Funding and Fees Review Project builds on previous reports that called into question whether conservatees and proposed conservatees are receiving the quality of legal representation to which they are entitled by the constitutional guarantee of due process and the equal access promises of federal and state disability nondiscrimination laws.

The deeper we have explored the intricacies of the probate conservatorship system, the more cause there has been for concern that these guarantees and promises are not being implemented by those who fund or provide legal services – especially to indigent adults who cannot afford private legal counsel. Ironically, indigent respondents in these cases must rely on legal defense services being provided to them by the same government that conducts these legal proceedings which place their cherished freedoms in jeopardy.

Our research has found no evidence that public funds are being used to support legal defense services that provide these vulnerable adults with effective assistance of counsel or that the attorneys who deliver these services are consistently complying with ethical duties and professional standards.

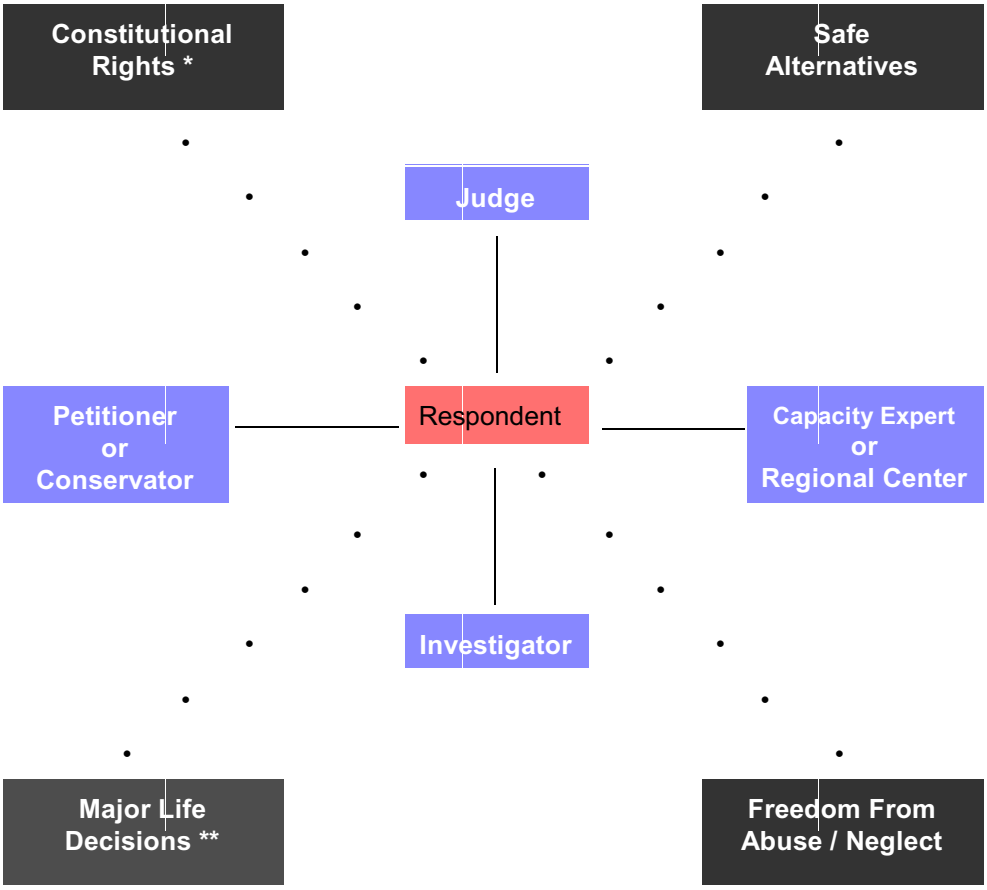
This study raises more questions than it provides answers. It reinforces suspicions from previous research that public funds are supporting service delivery methods that lack transparency, have no accountability, and that are devoid of meaningful performance standards to guide the lawyers on whom clients with significant disabilities depend to defend their fundamental rights.

The time has come for the officials who license the attorneys (State Bar), who promulgate the rules of professional conduct (Supreme Court), who fund indigent defense services (county governments), and who enforce disability nondiscrimination protections (United States Department of Justice and California Department of Fair Employment and Housing) to fulfill their duties to protect involuntary litigants who depend on them to ensure that they will receive access to justice. To that end, this report is being transmitted to these officials. It is also being sent to the Legislature to emphasize that SB 724 is a necessary, but not sufficient, step in the right direction.

State rather than local funding of these legal services ultimately may be necessary – with performance standards and monitoring attached – to ensure that conservatorship legal services are provided uniformly throughout the state so that all indigent adults receive due process and equal protection of the law.

Participants & Issues in Probate Conservatorships

Appointing and Funding Competent Counsel is a Necessary ADA Accommodation to Ensure that Respondents with Cognitive Disabilities Have Access to Justice



Respondents with cognitive disabilities are unable to represent themselves in conservatorship proceedings. Appointing an attorney is a necessary accommodation under the Americans with Disabilities Act to enable a respondent to have meaningful participation in a case. Once an attorney is appointed, counsel must provide *effective* advocacy services. To ensure effective assistance of counsel, courts that appoint counsel and counties that fund these legal services both have obligations to adopt ADA-compliant performance standards, require proper training of the attorneys, and create methods to monitor their actual performance. The duty of courts and counties regarding appointment, training, and monitoring of ADA-accommodation attorneys stems from Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, Government Code Section 11135, Welfare & Institutions Code Section 4502, and implementing regulations.

Advocacy services of an appointed attorney include: examining capacity assessments in all areas of decision making, determining whether less restrictive and safe alternatives are viable, vetting the proposed conservator, insisting on a care plan that provides safety and reduces the risk of abuse, and making sure that the judge, petitioner, guardian ad litem (GAL) or court investigator, capacity experts, and conservator follow statutory directives. A respondent is unable to perform these essential functions without an attorney.

** Constitutional rights include intimate association (sex), the right to travel, the right to marry, the right to contract, the right to vote, and freedom of choice in personal decisions. ** Major life decisions include choices regarding residence, occupation, education, medical care, social life, finances, etc.*

Thomas F. Coleman, Legal Director, Spectrum Institute

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About the Project

Research for this project began nearly two years ago. It was focusing on the seizure of the private assets of conservatees to pay for the legal fees of attorneys appointed by the court to represent them as well as paying for the fees of the attorneys for their adversaries, namely, petitioners and conservators. The awards of attorney fees made by judges often seemed excessive. The method of assessing fees seemed rather arbitrary. The courts that are supposed to conserve the assets of vulnerable adults were presiding over a "fee for all" that was depleting rather than preserving these funds.

In the process of doing this research, it became apparent that the problem of funding legal services in conservatorship proceedings was not limited to conservatees with assets. There is also a problem with the manner in which public funds are being used to pay for legal services for indigent adults who are conservatees or proposed conservatees. Issues of under funding of public defenders, excessive caseloads, and deficient legal services for indigent adults also needed to be addressed. Added to the mix is the problem of the judges who decide cases managing legal service programs involving the very attorneys who appear before them in cases and who depend on future appointments from the judges for an income stream.

With limited time and staffing, the question was which area to tackle first: the "fee for all" that harms people with assets or the deficient services which harm those without assets. The legal director decided that in this case the priority would be given to indigent defense services. The equally important problem of the seizure of private assets would come later.

Individuals with personal or professional experience helpful to this study were invited to serve as advisors to the project. Some had personally experienced the pain often associated with probate conservatorship proceedings. Others are government officials whose constituents are sometimes entangled in these cases. A former superior court judge accepted the invitation as did attorneys who have defended the rights of proposed conservatees. The draft of this report was sent to the advisors to review and provide comment to the project director. The full list of advisors appears at the end of this report.

The project was managed and the report was written by attorney Thomas F. Coleman, legal director of Spectrum Institute. He was assisted by John DiPietro, an attorney who formerly represented municipal governments. Benjamin Dishchyan, a summer intern from Loyola Law School in Los Angeles, provided valuable assistance with the investigation.

Once this first report on public funding is distributed, the research on the second report on the seizure of private assets will resume. We anticipate that the second report will be ready for release in the spring of 2022.

About the Author

Criminal Defense • Civil Rights Advocacy • Conservatorship Reform

The affinity of Thomas F. Coleman for criminal defense advocacy began in 1972 during his second year of law school. Tom and students from several schools in Los Angeles formed the nation's first gay law student association. They met at the Gay and Lesbian Community Center. Their mentor was attorney Stephen Lachs.*

Steve was the supervising public defender at the arraignment division of the Los Angeles Municipal Court. This was during an era when undercover vice officers would arrest thousands of men each year in Los Angeles for verbal conversations about noncommercial sex or for engaging in consenting sex out of public view. If convicted of lewd conduct, the men would have to register as sex offenders (like child molesters or rapists), would lose their jobs and professional licenses, and sometimes be jailed.

With Steve's help, Tom and another law student started an arraignment intervention project through which they gathered statistics to prove that the lewd conduct law was being enforced in a discriminatory manner against men in a homosexual context. It was rarely used to arrest men for heterosexual speech or conduct. They also developed arguments that the lewd conduct law was unconstitutionally vague and the solicitation portion violated freedom of speech and thus the law should be invalidated.

This study and these arguments later became the basis for the landmark decision of the California Supreme Court voiding the solicitation aspect of the law and reinterpreting the lewd conduct portion in a manner that made enforcement by undercover vice officers nearly impossible. Tom was the attorney who won that case. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238) That was after six years of criminal defense work representing clients who were targeted for arrest and prosecution under this homophobic and oppressive statute.

Tom's criminal defense work shifted to the appellate level in 1985 when he started accepting appointments from the Court of Appeal to represent clients in felony appeals. This included convictions for crimes such as murder, robbery, burglary, and other serious felonies. Tom handled dozens of criminal appeals until 1999 when the primary focus of his law practice shifted to civil rights advocacy.

Since 2012, Tom's attention has been directed to probate conservatorship cases in which the liberty of adults with mental and developmental disabilities are placed at risk. He has done extensive research, writing, and educating in this area of the law and has published many commentaries and policy reports.

Tom has been consulted by private attorneys and public defenders, filed amicus curiae briefs in conservatorship appeals, and has conducted bar association webinars. He developed model jury instructions for use in the rare cases that go to trial. Lawyers who have consulted Tom have graciously expressed their appreciation.

Tom is currently a member of the California Public Defender Association.

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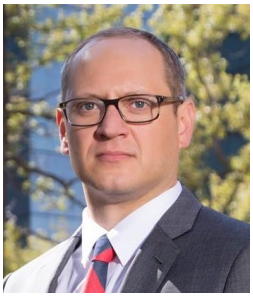
* Former public defender Stephen Lachs, now a retired Superior Court Judge, is an advisor to the Funding and Fees Review Project. Santa Barbara deputy public defender Susan Sindelar is also a project advisor. The first phase of the project focuses heavily on conservatorship defense services by county public defenders, contract public defenders, and court-appointed counsel.

Advisors to the Funding & Fees Review Project



Attorney Brook Changala challenged the payment of fees to a court-appointed attorney who was arguing against the client's wishes. He sees systemic problems in the fee-award process.

Roz Alexander-Kasparik was only allowed to be the conservator for her fiancé David Rector after the court depleted David's assets with payments of fees to the conservator and attorneys.

Attorney Evan Nelson saw Catherine Dubro's assets being drained when at one point the there were five attorneys being paid from her estate, while Catherine herself had no attorney.

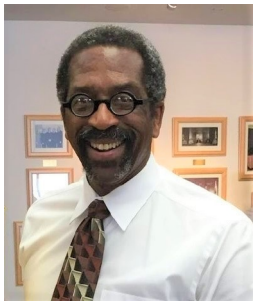
Sharon Holmes saw Theresa Jankowski suffer "legalized extortion" when lawyers wanted hundreds of thousands of dollars in fees in exchange for a dismissal of her conservatorship case.

Attorney Ben Bartlett is a member of the Berkeley City Council. He is working with constituents to reform conservatorship proceedings in the probate court in Alameda County.

Deputy Public Defender Susan Sindelar has handled scores of conservatorship cases. She brings to the fee study the perspective of a legal advocate who is paid from county funds.

Attorney Cheryl Mitchell is an academic and legal educator with a passion for justice. She would like to see systemic reforms in the way that attorney fees are calculated and awarded.

Antony Chicotel is a staff attorney with California Advocates for Nursing Home Reform. He is the author of *California Conservatorship Defense: A Guide for Advocates*.



Alameda County Supervisor Nate Miley is an honorary member of the team. He will participate through his representative to identify solutions to the attorney fee problem.

Alameda County Public Defender Brendon Woods (photo) is represented on the team by John Plaine, the attorney assigned to the office's probate conservatorship desk.

Dr. Gloria Duffy, CEO of the Commonwealth Club of California, personally witnessed her mother's assets being depleted by ongoing court-authorized attorney fee awards.

Hon. Stephen Lachs, a former public defender and retired superior court judge, brings to the study the perspective of a jurist with 20 years of experience on the bench.

Research Associates

Attorney John Adam Di Pietro is a research associate for the Funding & Fees Review Project. He is working closely with the project's legal director to investigate how public funds are being used to provide indigent legal defense services in probate conservatorship proceedings. He will continue assisting the project as it moves into phase two to study how assets of seniors and people with disabilities are being confiscated to pay fees for attorneys in these cases. His background in municipal law brings a unique perspective to the study. John's legal practice for the past 44 years has involved legal representation of businesses as well as local governments.

After earning a B.B.A. in finance from Loyola Marymount University, Ben Dishchyan made the decision to attend law school. He recently completed his first-year as a law student at Loyola Law School in Los Angeles. Prior to attending law school, Ben worked in the elder care industry, placing elders in affordable board and care facilities that met their medical and personal demands. Being a licensed insurance broker, he also has knowledge in the sales and consulting of the insurance market. Ben has been assisting the study by researching the workings of and gathering information from indigent legal service programs in all 58 counties in California.

Project Director

Attorney Thomas F Coleman is directing the Funding & Fees Review Project. Prior to formally launching the project, Tom spent nearly a year gathering research materials and legal precedents that should guide and govern the assessment and awarding of attorney fees in probate conservatorship cases. That information will help guide phase two of the study. He is the author of a report containing the findings and recommendations for phase one of the study which focuses on the use of public funds for indigent legal defense services. Tom's background involves nearly five decades of civil rights advocacy.

Findings

Over the past several years, Spectrum Institute has been researching the law and conducting factual investigations to determine the policies and practice of judges and attorneys in probate conservatorship proceedings in California.

The legal research focused on constitutional and statutory provisions, judicial decisions, court rules and scholarly articles. The factual investigations involved audits of court records and training programs of appointed attorneys, interviewing lawyers who practice in probate court, and communicating with conservatees, proposed conservatees, and their families. Based on this legal and factual research, the legal director has published dozens of articles, commentaries, and policy reports. https://spectruminstitute.org/publications/ This research is foundational to the findings in this report.

In addition to these years of study and analysis, the research team of the Funding and Fees Review Project has been investigating how public funds are being used to provide legal services to indigent adults who are targeted by probate conservatorship petitions or who are living under an ongoing order of conservatorship. This included communications with public officials in all 58 counties in California.

The findings that appear below are based on the current and past research activities.

Conservatorship Statistics

1. Approximately 70,000 adults in California are living under an order of probate conservatorship. About 5,000 new petitions for probate conservatorship are filed annually in the state. These numbers are estimates because neither the Judicial Council nor the superior courts keep accurate records of ongoing conservatorships or new petitions.

2. Conservatees and proposed conservatees generally fall into one of three categories: seniors who are in cognitive decline; adults of all ages with developmental disabilities; and adults of all ages who have cognitive disabilities caused by injuries or medical conditions.

Types of Probate Conservatorships

3. There are various types of probate conservatorships. General conservatorships of the person are for all adults who are unable to provide for their own personal needs of food, shelter, clothing, or medical. Limited conservatorships of the person are exclusively for adults with developmental disabilities who are unable to provide for such needs. General conservatorships of the estate are for all adults who are substantially unable to manage their financial affairs or who are susceptible to undue influence with respect to their finances.

Limited conservatorships of the estate are for adults with developmental disabilities who have such financial limitations or vulnerabilities.

4. The Legislature created limited conservatorships in 1980 specifically for adults with developmental disabilities recognizing that the needs and concerns of this population would often be quite different than those of seniors in their declining years. This new system provided these adults with additional protections. Appointment of counsel is mandatory if they do not have their own privately retained attorney. An assessment of abilities and disabilities by a regional center is required. Various decision-making rights are automatically retained unless there is evidence justifying removal of a specific right.

Tactics to Bypass Counsel

5. To bypass these special protections for adults with developmental disabilities, and to expedite the process of obtaining an order of conservatorship, some petitioners file for a general conservatorship instead of a limited conservatorship. One regional center reported that up to 80% of their clients who were cited with a conservatorship petition were placed in general conservatorships – often without the benefit of an appointed attorney to defend them. A letter from Alta Regional Center is attached to this report.

Right to Contest

6. When an adult receives a citation to appear in a conservatorship proceeding – whether general or limited – the citation form specifies that they have the right to retain their own attorney, to contest the proceeding, to demand a jury trial, and to have the court appoint an attorney for them if they do not have a private attorney.

Right to Counsel

7. The Probate Code requires the appointment of an attorney for those who do not have one if any one of the following conditions are met: (1) a petition for a limited conservatorship has been filed; (2) medical decision-making powers are being sought by the petition; (3) the proposed conservatee requests an attorney; or (4) appointment of an attorney is necessary to protect the interests of the proposed conservatee.

8. Many proposed conservatees do not request an attorney because the nature of their disability precludes them from doing so, or they have been influenced by a petitioner to believe that an attorney is not needed, or they do not understand the value of an attorney to defend their rights.

9. Most proposed conservatees, due to their disabilities, would not be able to have meaningful participation in a conservatorship proceeding, or to engage in effective communication with the judge, court personnel, and other participants without the assistance of a competent attorney who is trained in representing clients with such disabilities.

Failure to Appoint Counsel

10. Despite knowing that conservatees and proposed conservatees in such proceedings have such limitations, some judges do not appoint counsel to represent these involuntary litigants, thereby requiring the litigants to represent themselves. The financial cost of these legal services is not the motivating factor for the judges not appointing counsel for conservatees and proposed conservatees since payment of the legal fees would not come from the court's budget. Rather, litigants with assets would pay the fees themselves and those who are indigent would have the fees paid for by the county. The motivating factor for judges to deny counsel to adults with serious cognitive and communication disabilities is unknown.

Counties Fund Indigent Legal Defense

11. The legislature has mandated that the cost of indigent legal defense services for various proceedings that substantially affect liberty interests, including probate conservatorships, are paid by the counties.

12. The supervisors in each county have three options to fund legal defense services for conservatees and proposed conservatees. They can create a public defender's office as a county department and direct that office to provide such services. Alternatively, they can outsource such services to a vendor – usually a private law firm – which is often referred to as a "contract public defender." Another option is to allow the superior court to make appointments to conservatorship cases on an ad hoc basis with payments made by the county to the private attorneys on a case by case basis as ordered by the court.

Providers of Legal Services

13. Legal defense services for probate conservatorships are provided by public defender county departments in 22 counties in California. Contract public defenders provide such services in 24 counties. In the remaining 12 counties, the superior courts either have "panels" of attorney who are appointed to cases on a rotating basis or attorneys are assigned to cases on an ad hoc basis without any formal policies or procedures for doing so.

Alameda County

14. Spectrum Institute started its research into legal services by county public defender departments with Alameda County. We anticipated this office would be receptive since the head public defender was an advisor to the Funding and Fees Review Project. What felt to us like a lack of transparency and defensiveness by that office was later explained as staff and management coping with covid-related pressures and a lack of resources. (See Alameda County Public Defender Comments at pp. 125-127 of this report.)

15. After we had a very successful zoom interview with the Legal Aid Center of Southern Nevada regarding their policies, practices, performance standards, and monitoring

mechanisms for quality assurance, we wanted to have a similar interview with the deputy public defender who handles probate conservatorship legal defense in Alameda County. On May 13, 2021, we sent him a set of questions we wanted to ask and scheduled a zoom call for June 7. The head public defender insisted that he and his head deputy also be part of the call. When the call started, we wanted to ask questions – and record it as we had with the Nevada interview – only to be informed that recording would not be allowed. In fact, we were not given answers to any of our questions. Instead, the head public defender used the entire hour to ask us questions about our motives and methods. He later characterized his interrogation as a form of "due diligence."

16. We were able to gain some basic data from a public presentation that had previously been made by the deputy public defender to a joint committee of the Alameda County Board of Supervisors. We learned that the deputy had 362 active conservatorship cases. This is double the caseload that attorneys have who defend clients in criminal misdemeanor cases. This number, however, does not include the hundreds of post-adjudication cases which remain open for years and which, from time to time, require legal services. In contrast to the heavy caseload of the deputy public defender who handles conservatorship cases for indigent adults, the attorneys for Legal Assistance for Seniors who are appointed by the court to represent adults who have assets only have 50 cases per attorney.

17. A subsequent communication was sent to the head public defender in Alameda County on July 21 asking for cooperation so that we could obtain the answers to our questions regarding training, performance standards, quality assurance monitoring, and other matters relevant to whether clients are receiving effective representation consistent with constitutional requirements, nondiscrimination laws, and Rules of Professional Conduct. Although we have not received this information, we did receive some suggestions: (See Alameda County Public Defender Comments at pp. 125-127 of this report.)

> "Jurisdictions are reluctant to do so but I think setting a case cap and making sure appropriate funding is allocated for the number of cases handled would be a huge improvement. However, I do see some merit in a separate office that does this work within the county because it is different than core criminal defense practice that public defenders primarily specialize in. It could also remain a function of the public defender with training and perhaps making sure there is proper cross training and having it be an assignment that is occupied for a longer period of time."

Other Counties

18. Spectrum Institute sent two public records requests to all 22 counties where public defender departments provide legal defense services to indigent litigants in probate conservatorship cases. The first request asked about caseloads. Only a few departments responded to the first request. The second request asked about training materials, performance standards, quality assurance controls, and outcome statistics in cases.

A. The Orange County Public Defender responded to the first request by providing the names of two attorneys who handled probate conservatorship cases but said they had no documents relevant to caseloads of these attorneys, new cases handled in 2020, or post-adjudication open cases for which these attorneys are responsible; there was no response to the second request.

B. The Nevada County Public Defender sent a letter with alternate responses. First, it claimed the department is exempt from providing documents about this information. Second, it said that it had no public records responsive to the request.

C. The Shasta County Public Defender responded to our first records request. It provided us the names of the attorneys handling these cases. Caseloads for each of the attorneys ranged from 370 to 427 annually.

D. The Sikiyou County Public Defender gave us the name of the attorney handling these cases. Otherwise, with respect to the first request it said it had no responsive records.

E. The San Juaquin County Public Defender raised legal objections similar to those raised in Nevada County. It did provide the names of the attorneys handling these cases. As for statistics, it said it was "working on providing the information."

F. The Sonoma County Public Defender was responsive to the first request. The head public defender handles these cases. She had a total annual caseload in 2020 of 47 cases of all types, which included 16 probate conservatorship cases. She was attorney of record for 82 post-adjudication cases in 2020.

G. The Solano County Public Defender was responsive to both requests, both in a formal response from the head public defender and additional information provided by one of the lawyers handling these cases. The department does have training materials. However, there are no performance standards for these cases. One staff attorney reported that his caseload in 2020 ranged between 300 and 450 cases.

H. The Humboldt County Public Defender responded that the office does not have performance standards for attorneys assigned to probate conservatorship cases. The attorneys create their own checklists of services to be provided. The office does not track whether cases are concluded through contested hearings or settlements. In 2019, 14% of the petitions were dismissed. In 2020, only 3% were dismissed.

I. The Shasta County Public Defender indicated that although the office does annual performance evaluations of attorneys, it did not disclose any performance standards that guide the attorneys in their representation of clients in conservatorship cases. The only quality assurance control disclosed was "supervisor oversight" although there was no indication of what that entails. In 2019, 8% of petitions were dismissed. In 2020, only 4% were dismissed. Almost all outcomes occur as the result of settlements. There were no contested hearings in 2019 and only 1 contested hearing in 2020.

19. One public defender who was cooperative, informed us that our public records requests to these other public defender departments had caused an "uproar" – her words.

20. With few exceptions, we have found a lack of transparency and a high degree of resistence from these departments to sharing basic information about the manner in which they represent these clients. As a result, we are unable to verify whether caseloads are excessively high, whether these departments have performance standards, or whether there are any quality assurance controls to ensure that assigned attorneys are delivering the quality of legal services to which clients are constitutionally entitled.

Contract Public Defender

21. Spectrum Institute examined the written agreements in all 24 counties with "contract public defenders" who represent indigent clients in probate conservatorship cases. Each one is summarized in a section of this report. The terms of the contracts vary widely.

22. Most of the contracts contain a provision that requires the vendor to comply with state and federal disability nondiscrimination statutes and regulations in the delivery of services. Thus, the services must be ADA-compliant so that the client may benefit to the greatest extent reasonably possible from the judicial proceeding. The vendor would also be required to take affirmative steps, even without request, to ensure that communication between the client and the attorney is effective.

23. Many of these contracts contain basic performance standard requirements. These require the vendor to provide effective assistance of counsel as constitutionally required and in conformity with professional standards enunciated in the Business and Professions Code and the Rules of Professional Conduct. Some contracts contain very specific performance standards which list some of the activities that attorneys must perform in these cases.

24. Some contracts have minimal requirements mostly designed to protect the county and without much regard to the needs of the clients. These contracts have no performance standards and do not require the vendor to comply with disability nondiscrimination laws.

Court Appointed Counsel Programs

25. In 12 counties, the superior courts themselves have assumed responsibility for providing legal services to indigent conservatees and proposed conservatees. A list of those counties is included in this report. Spectrum Institute previously filed a report with the Supreme Court questioning whether judges operating a legal services program violates judicial ethics.

26. In one smaller county, the court has only one attorney it appoints to these cases. In another county, the court has 11 attorneys on a panel. In a third county, the court has 28 attorneys on its list. None of these courts reported having any performance standards or effective method to assure competent representation by these attorneys – both in and out of the courtroom. Some have local rules that expect attorneys to act as de facto guardians ad litem by filing reports to advise the court of what the attorney thinks is in the client's best interest – an activity which conflicts with ethical duties of confidentiality and loyalty.

Standards for Legal Services

27. Regardless of whether an attorney for a conservatee or proposed conservatee is a county employee, a county vendor, or appointed from a court-operated panel, the legal services of the attorneys must comply with constitutional due process, disability nondiscrimination requirements, ethical duties, and professional standards. They have a general obligation to be zealous advocates for their clients. A portion of this report explains these duties, and their legal underpinnings, in great detail.

28. Title II of the Americans with Disabilities Act, the state-law equivalent of Title II (Government Code Section 11135), and the Lanterman Developmental Disabilities Service Act (Welfare and Institutions Code 4502) place obligations on state courts and county governments to ensure that conservatees and proposed conservatees are represented by counsel and that counsel provides competent and effective legal services. First, the court must appoint competent counsel if the litigant does not have an attorney. Second, the county must attach quality assurance controls to ensure that clients with mental and developmental disabilities are not denied competent advocacy services. Liability under federal and state nondiscrimination laws cannot be avoided by delegating duties to an outside vendor.

29. Drawing from a variety of reputable sources, an outline of performance standards is included in this report. It contains a list of activities that an attorney should do or seriously consider while representing a client in a probate conservatorship proceeding. This outline could be used by entities such as the State Bar that licenses and disciplines attorneys, county governments that fund these legal services, superior courts that appoint attorneys to these cases, and appellate courts that evaluate performance when ineffective assistance of counsel is raised on appeal

Caseload Standards

30. Those who fund or manage such legal services programs – county supervisors, public defender departments, contract vendors, or court-run programs – must ensure that caseloads are not too large. The principles in a section of this report – taken from reports published by the American Bar Association and California Bar Association – should be used by county budget managers and human resource professionals to establish proper funding levels for public defender departments or contract vendors. County Counsel should have input due to risk management liability concerns. Heavy caseloads could cause negligent services and trigger malpractice lawsuits or complaints from clients or their surrogate advocates with state and federal civil rights enforcement agencies. Passage and funding of AB 625 (attached) would initiate a study to determine proper caseload standards for indigent defense attorneys.

Monitoring Procedures

31. Clients without mental or developmental disabilities generally are aware when their attorneys are shortchanging them in terms of adequate legal services. They can speak out and complain, whether their grievance is directed to their attorney, the attorney's supervisor, the presiding judge, or the State Bar. Clients in probate conservatorship proceedings, due to the nature of their cognitive and communication disabilities, can not. It is therefore essential for the entity which licenses the attorney, or which appoints the attorney, or which funds the legal services being provided, to adopt quality assurance controls. An effective monitoring mechanism is a necessary component of ADA-compliant legal services.

Senate Bill 724

32. Senate Bill 724 is pending in the California Legislature. It would remove ambiguities that may currently exist on the right to counsel and the role of counsel in probate conservatorship proceedings. The portions of SB 724 related to "zealous advocacy" are included in this report, as are excerpts from legal sources referenced in the bill, such as the Business and Professions Code and Rules of Professional Conduct. The passage of SB 724 is desirable but not essential since it is more of a clarification of existing constitutional and statutory requirements.

Uniform Operation of Law

33. The superior courts process probate conservatorship cases. The courts are state entities. The judges are state employees. The statutes which govern these proceedings were adopted by the state legislature. Conservatorship proceedings, in large measure, are operated with state funds.

34. The statutes which mandate appointment of counsel in these proceedings are state laws. The judges who appoint the public defender or private counsel to represent conservatees or proposed conservatees are state employees. The attorneys are licensed by the State Bar and

are required to comply with professional standards established by the state supreme court and state legislature.

35. Article IV, Section 16 of the California Constitution requires that law of a general nature are uniform in operation. The constitution also requires that conservatees and proposed conservatees receive equal protection of the law regardless of where they live or which superior court processes their cases.

36. State statutes place the burden on counties to fund legal services for indigents in probate conservatorship cases. This is similar to the funding scheme for public schools that was declared unconstitutional by the California Supreme Court because it resulted in significant disparities among local school districts in terms of the quality of education for children. (*Serrano v. Priest* (1976) 18 Cal.3d 728.)

37. Without proper oversight by the Supreme Court and State Bar, the same could be said regarding local funding for conservatorship legal services. Especially since fundamental constitutional rights are at risk in these leal proceedings, adults with mental or developmental disabilities are entitled to effective representation of counsel – consistent with constitutional due process requirements and mandates of the ADA and its state-law equivalent – no matter which county is funding the legal services. In view of the results of our research, and the questions that remain to be answered, whether the constitutional requirements of due process, equal protection, and uniform operation of laws are being violated by the current system of funding legal services in these cases requires further analysis.

38. Another element of the lack of uniform operation of the law and violation of due process is that in some courts the judges are not appointing attorneys to represent proposed conservatees with obvious and known disabilities that preclude effective self-representation. This stems from the failure of the Judicial Council to expand Rule 1.10 of the California Rules of Court to notify judges of their *sua sponte* duties under the Americans with Disabilities Act. Appointing counsel is a necessary accommodation for these litigants.

Background

Spectrum Institute has been studying the delivery of legal services in probate conservatorship proceedings in California for several years. This report builds on that research.

We have analyzed conservatorship defense and advocacy services from a public policy perspective: constitutional provisions, statutory mandates, ethical principles, professional standards, and nondiscrimination requirements. We have also studied it from a practical perspective: auditing training programs, researching court files, reviewing fee claims, examining scores of reports filed by appointed attorneys, and interviewing public defenders.

We have been listening to and documenting complaints made by clients, family members, court watchers, and advocates. We have sought advice from practitioners in other states and compared the legal services approach in California with that of other jurisdictions.

What we have discovered is a huge gap between what the law requires and what is happening in actual practice. The Funding and Fees Review Project is an attempt to close that gap.

When the project was first initiated, the intent was to focus on the judicial seizure of the assets of conservatees and proposed conservatees to pay for legal services. Not only for the attorney appointed to represent them, but judges order respondents to pay for the fees of the attorneys for other litigants: petitioners, conservators, and guardians as litem. We learned about an ad hoc system of attorney fee awards that diminish and often deplete the assets of the people the court is supposedly trying to protect. The fee award process oftentimes amounts to a judicially mandated seizure of property without due process of law.

We also heard about deficient legal services to vulnerable adults who do not have assets. The cases of indigent respondents are being processed with the utmost efficiency – in what appears to be an assembly line process – by lawyers in public defender offices, contract public defender law firms, and private attorneys on panels operated by the superior courts.

Although the Funding and Fees Review Project has a dozen advisors, the research is being done by the legal director of Spectrum Institute with the help of law student intern Ben Dishchyan and with ongoing consultations with attorney John DiPietro. The research team decided to divide the project into two phases. Phase One has focused on the use of public funds to provide legal services to indigent respondents. Phase Two will focus on the judicial seizure of the assets of respondents to pay for the legal services that are provided to all parties to these proceedings. Both phases of research are equally important. Both aspects of funding and fees need fixing.

Deficiencies in the delivery of legal services to respondents in conservatorship proceedings has been brought to the attention of federal, state, and local officials over the past several years. Complaints have been filed with the United States Department of Justice, the

California Department of Fair Employment and Housing (DFEH), the California Attorney General, the California Legislature, the California Supreme Court, the State Bar, and various superior courts in the state.

Responses have been minimal. Some five years after a complaint was filed, the federal DOJ says it is still pending for review. The Supreme Court referred a request for ethics reform to an advisory committee which took no action. DFEH declined to open an investigation. The Attorney General did not respond. The State Bar did nothing. There is some movement in the Legislature as SB 724 has passed two committees in the Senate and awaits a vote on the floor. Superior courts remain oblivious to calls for reform.

Hope springs eternal. Spectrum Institute filed a request with the California Supreme Court on July 21, 2021. It asks the court to convene a Workgroup on Conservatorship Right to Counsel Standards. That request, which was endorsed by ten other organizations, is pending on the court's administrative docket.

We asked the court to place the following issues on the agenda of the workgroup:

> The right to an attorney of choice; mandatory appointment of counsel for those without one; role of counsel as a loyal advocate; lack of performance standards for appointed counsel; caseloads of public defenders; adequacy of county funding for conservatorship legal defense services; role of the public defender for adjudicated conservatees in "life of the case" representation; local court rules that give counsel a dual role; the ethics of judges operating legal services programs; the adequacy of training programs; lack of quality assurance controls; the adequacy of funding for legal services for indigents; lack of accessibility of conservatees and proposed conservatees to the State Bar's complaint system; failure to appoint attorneys on appeal for conservatees; and adequacy of training of appellate counsel.

The first section of this report contains a review of applicable statutes, rules, and case law pertaining to the ethical and competent delivery of legal services. The last section addresses performance standards for attorneys, listing services that should be done or at least considered by legal practitioners in these cases. Both of these sections are relevant to duties of attorneys whether they are paid from public funds or through judicial awards from private assets.

Other sections of the report focus on policies and practices relevant to publicly-funded legal services, such as caseload standards and the terms of agreements between county governments and so-called "contract public defenders."

Part Two of the report – addressing the judicial seizure of private assets to pay for the fees of attorneys in probate conservatorship proceedings – will be developed in the coming months and should be published next year.

Mandates for Public Funding of Legal Services in Probate Conservatorship Proceedings

> "California is currently one of only four states that provides no state funding for trial-level public defense services and no mechanism for any state-level training or oversight of trial-level providers."
>
> – Kathleen Guneratne
> Senior Staff Attorney,
> ACLU of Northern California

Local administration
Cal. Gov. Code § 22770

"Indigent defense services in California are provided primarily at the county level, which may provide services through contract counsel, assigned counsel, or a public defender office. The board(s) of supervisors of one or more counties may establish an office of the public defender for the county or counties. When an office is established, it is determined whether the public defender is to be appointed or elected. Public defenders are appointed by and serve at the will of the county board(s) of supervisors."

"The boards of supervisors of two or more counties may authorize the respective public defenders to enter into reciprocal or mutual assistance agreements. Agreements allow counties to temporarily loan deputy public defenders to the county participating in the agreement to provide indigent defense services. The county receiving the loaned deputy public defender reimburses the county that provides services. A board of supervisors may also authorize the reciprocal or mutual assistance agreements with the state public defender. The county or counties is responsible for office expenses. A public defender will annually submit a report to the board(s) of supervisors on its activities and finances."

"Indigent Defense Services in the United States, FY 2008–2012 – Updated," United States Department of Justice, Technical Report (Revised April 21, 2015)

Government Code Section 27706(d)

Upon request, or upon order of the court, the public defender shall represent any person who is not financially able to employ counsel in [conservatorship] proceedings under Division 4 (commencing with Section 1400) of the Probate Code.

Probate Code Section 1471

(a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, 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 interest of that person in the following proceedings . . .

(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.

(c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if he or she is able.

Probate Code Section 1472

(a) If a person is furnished legal counsel under Section 1471:

(1) The court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel and shall make a determination of the person’s ability to pay all or a portion of that sum. The sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the date of the order appointing counsel.

(b) If the court determines that a person furnished private counsel under Section 1471 lacks the ability to pay all or a portion of the sum determined under paragraph (1) of subdivision (a), the county shall pay the sum to the private counsel to the extent the court determines the person is unable to pay.

Standards for Legal Services in Probate Conservatorships

Constitutional, Statutory, and Regulatory
Requirements for Appointed Attorneys

Senate Bill 724 is winding its way through the California Legislature with strong bipartisan support. The measure contains several provisions to strengthen the right to counsel in probate conservatorship proceedings.

The bill clarifies the right of proposed conservatees to be represented by an attorney of their choice. For those who have not privately retained an attorney, it mandates that an attorney be appointed in trial court and appellate court proceedings. The bill also defines the role of attorneys appointed to represent conservatees and proposed conservatees to be a "zealous advocate."

Although the bill does not explicitly define that term, the attributes of a zealous advocate and activities associated with zealous advocacy can be ascertained by reference to other statutory provisions, a legislative committee analysis, case law, and other sources.

In sum, the zealous advocacy mandate of SB 724 prohibits attorneys from advocating for what they think is in the client's best interests and requires them to advocate for what the client wants when that can be ascertained. Otherwise, the bill requires lawyers to serve in an adversarial rather than a paternalistic role while they provide zealous representation to clients. Attorneys must advocate with courage and devotion, exhibiting competence, diligence, and loyalty while always adhering to their duty of confidentiality.

Attorneys for conservatees or proposed conservatees must provide clients who have diminished capacity the same type of representation that would be required for clients without actual or perceived mental disabilities.

As one legal commentator stated: "A lawyer is a lawyer is a lawyer." ("A Lawyer is a Lawyer is a Lawyer," *California Trusts and Estates Quarterly* (Vol. 25, Issue 1 - 2019) This periodical is the official publication of the Trusts and Estates Section of the California Lawyers Association.

The commentary uses the terms "zealous advocate" several times as a way of explaining the duty of an attorney to a client or the role of an attorney in representing a client, including one with "diminished capacity."

> * [A]ttorneys have a general obligation to be zealous advocates for their clients.
>
> * The attorney's duties to be a confidential, loyal, and zealous advocate are fundamental.

* The conclusion that a California attorney appointed to represent a proposed conservatee must act as a zealous advocate for the client and not as a reporter to the court lies at the intersection of the two most basic ethical rules governing California attorneys.

* Attorneys must be zealous advocates and are not permitted to resolve their client's interests contrary to the client's wishes.

* Two cases, *Conservatorship of Schaeffer* and *Conservatorship of Cornelius,* illustrate the dangers of a system that requires attorneys to stray from their roles as loyal, confidential, and zealous advocates and to instead function as reporters to the court.

* The California attorney is required to be a loyal, confidential, and zealous advocate for the client regardless of the client's mental condition.

* [E]ven if the current state of the Probate Code prevents the appointment of a guardian ad litem before the determination of incapacity, the role of the appointed attorney remains the same: the appointed attorney must be a zealous advocate for his or her client.

* California law and Rules of Professional Conduct require appointed attorneys to be confidential, loyal, and zealous advocates for their clients. There is no exception to these ethical duties in the probate court.

Statutory Provisions

SB 724

Within SB 724 there are two provisions that are relevant to the role of an attorney representing a conservatee or proposed conservatee: (1) representing the interests of the conservatee or proposed conservatee; and (2) acting as a zealous advocate.

Representing the Client's Interests

With respect to the first provision, the bill would amend Probate Code Section 1471(b) to read: "If a conservatee or proposed conservatee has not retained legal counsel and does not plan to retain 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). (Emphasis added) This provision requires an exploration of what the interests of such a person are.

For a proposed conservatee, there is a presumption that the individual has the capacity to make decisions in all areas of his or her life. If a conservatorship of the person is being

sought, the petitioner has a burden of overcoming this presumption by producing clear and convincing evidence that the individual is unable to care for his or her basic personal needs. If a conservatorship of the estate is being sought, the petitioner has the burden of overcoming the presumption of capacity for financial decision-making and showing that the individual substantially lacks the ability to manage financial matters or is susceptible to undue influence. In both types of proceedings – person and estate – the petitioner must prove that no less restrictive alternatives to conservatorship are available to protect the individual from harm. A proposed conservatee should be vetted for suitability. The court must also give preference to the individual's choice of conservator should a conservatorship be required.

The individual has an interest in having all of these requisites followed and that all aspects of the proceeding comport with the requirements of due process. To be a zealous advocate, an attorney would need to take steps to ensure that all of these procedural requirements have been satisfied.

The individual also has an interest in maintaining his or her substantive constitutional rights. The right to chose one's residence, the freedom of association, the right to travel, the right of privacy, liberty, possessing and controlling one's property, the right to marry, freedom of intimate association, etc. To maintain these interests of the client, the attorney would test sufficiency of evidence supporting any encroachment on these rights and would file motions, make objections, produce evidence, and demand evidentiary hearings as may be necessary within the bounds of ethics and professional standards.

Other Statutes and Rules

A second provision of SB 724 states: "The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous advocate, consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct." The reference to the Business and Professions Code and the Rules of Professional Conduct was added to the bill as an amendment to provide additional meaning to the term "zealous advocate." As explained below, there are a lot of duties for a zealous advocate packed into that amendment.

<u>Business & Professions Code</u>

From this language, it is clear that whatever else is required of a "zealous advocate," the attorney must perform legal services consistent with the duties specified in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.

Constitutional Duties. Of utmost importance, Section 6068(a) imposes a duty on attorneys to "support the constitution and laws of the United States and of this state." Therefore, an attorney must perform services consistent with the requirements of the due process clauses of the state and federal constitutions.

A conservatee or proposed conservatee is entitled to due process of law in a conservatorship

proceeding. *(Conservatorship of Sanderson* (1980) 106 Cal.App.3d 607) If a litigant has a statutory right to an appointed attorney, due process entitles the litigant to "effective assistance of counsel." This right arises directly from the constitution. It is also "a result of the Legislature's creation of a statutory right to counsel." (*People v. Hill* (2013) 219 Cal.App.4th 646) "A prospective conservatee's statutory right to effective assistance of counsel is protected by due process." (*Conservatorship of David L*. (2008) 164 Cal.App.4th 701.)

Case law defining the basic requirements of effective assistance of counsel therefore form the foundation for what an attorney must do to be a zealous advocate in a probate conservatorship proceeding. (See section on Effective Assistance of Counsel.)

Confidentiality. Section 6068(c) directs attorneys "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Comments to the Rules of Professional Conduct explain that "The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source." Therefore, without the voluntary and informed consent of a conservatee or proposed conservatee, an attorney may not disclose orally or in writing, through reports or legal briefs, information adverse to the client's interests that was acquired by the lawyer during the course of representation, no matter what or who the source of the information was.

Communications. Section 6068(m) requires attorneys "To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." Keeping a client with cognitive or communication disabilities reasonably informed would require a professional assessment of : (1) the client's ability to understand; and (2) the best methods available to ensure meaningful communications between the attorney and client, and by the client with other participants in the legal proceeding such as the judge, court investigator, and experts. Furthermore, the duty to support the "laws of the United States and of this state" would require the attorney to comply with the nondiscrimination and reasonable accommodation requirements of the federal Americans with Disabilities Act and the state Unruh Civil Rights Act. This would trigger a duty to initiate an ADA needs assessment to determine what reasonable accommodations may be needed to enhance the client's ability to understand and communicate in order to have meaningful participation in the case to the greatest extent possible.

<u>Rules of Professional Conduct</u>

SB 724 specifies that zealous advocacy must be consistent with the Rules of Professional Conduct. This requires an exploration of the rules most applicable to probate conservatorship proceedings.

Competence. Rule 1.1(a) specified that: "A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence."

There are two elements of competency. One pertains to leaning and skill. The other involves mental, emotional, or physical abilities.

As for the latter, a zealous advocate for a client with developmental disabilities, dementia, or other cognitive challenges must be comfortable in relating to and representing someone with such conditions. Implicit biases may prevent an attorney from establishing a rapport with the client and gaining the client's trust.

As for the former, zealous advocacy for a special needs client or a client with diminished capacity – whether actual or perceived – is not possible unless the attorney has become educated on the issues involved in conservatorship advocacy and defense. In addition to understanding those issues, there must be an ability to articulate them and present them effectively in memos, briefs, and orally.

Rule 7.1103 requires attorneys to receive continuing education on the following topics. (1) state and federal statutes including the Americans with Disabilities Act, 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) the attorney-client relationship and lawyer's ethical duties to a client under the California Rules of Professional Conduct and other applicable law; and (3) special considerations for representing an older adult or a person with a disability, including: (a) communicating with an older client or a client with a disability; (b) vulnerability of older adults and persons with disabilities to undue influence, physical and financial abuse, and neglect; (c) effects of aging, major neurocognitive disorders (including dementia), and intellectual and developmental disabilities on a person's ability to perform the activities of daily living; and (d) less-restrictive alternatives to conservatorship, including supported decision-making.

Learning about these topics would not make an attorney a zealous advocate in conservatorship proceedings. To provide effective assistance of counsel as required by due process and to competently represent the interests of the client as required by the Rules of Professional Conduct, a zealous advocate may need to enlist of the assistance of an investigator or professional experts such as a psychologist or social worker or both. Zealous advocacy requires competence which in turn requires both learning and skill.

Diligence. Rule 1.3(a) states: "A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client." Subdivision (b) adds: "For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer."

Commitment and dedication to the interests of the client would require an attorney to be loyal to the client. There is no room for a dual role for an attorney representing a conservatee or proposed conservatee. The attorney must disregard attempts made by judges or opposing counsel for the attorney to step outside of his or her role as a zealous advocate.

The attorney should not act as "the eyes and ears of the court" as some judges would have it. A zealous advocate is not a de facto guardian ad litem who advocates for what he or she determines is in the client's best interests. Nor should the attorney perform the functions of a court investigator who is neutral and objective. The retained or appointed attorney must be committed to preserving and defending the client's rights and advocating for his or her expressed wishes when they are ascertainable. When they are not, they commitment and dedication to the interest of the client requires the attorney to advocate for less restrictive alternatives to conservatorship, or if such is not available then to vet the proposed conservatee and ensure that a continuing care plan is consistent with the client's wants and needs.

Communication and Confidentiality. Although the issues of communication and confidentiality are mentioned in the Rules of Professional Conduct, they will not be discussed further in this section since they were addressed in the section above on the Business and Professions Code.

Compensation. Rule 1.8.6 states: "A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless: (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship." A zealous advocate who is "supporting the constitution," acting "with competence" and acting with "diligence and commitment to the interests of the client" as required by other rules, may not compromise those duties because of the policies or practices of the source of the attorney's funding. Whether the funding source is the county's department of public defender, a contract with the county, or a court-operated panel for appointed attorneys, a zealous advocate should resist and oppose policies and practices which may cause the attorney to provide deficient services. Caseloads that are unreasonably large, funding that is inadequate to support effective assistance of counsel, or implicit pressure from judges to settle cases or move them along prematurely are examples of pressure from funding sources that should be resisted or opposed.

Lawyer as Witness. Rule 3.7 states: (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless: (1) the lawyer's testimony relates to an uncontested issue or matter; (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or (3) the lawyer has obtained informed written consent from the client."

By adhering to this rule, a zealous advocate would never submit a report to the court containing facts the lawyer has obtained through conversations with the client or observations of the client or from other sources about the client's capacities or incapacities. The practice of appointed counsel submitting reports, under penalty of perjury, in courts such as is routinely done in Los Angeles, advising the court of counsel's observations, beliefs, or opinions about the client's capacities or what is in the client's best interests runs contrary to the duty of zealous advocacy and violates Rule 3.7. Counsel is appointed under Section 1471 to represent the interests of the client as an advocacy attorney, not to be a guardian ad litem or de facto court investigator.

Supervisory Lawyers. Rule 5.1 states that a supervisor or manager of a lawyer "shall make reasonable efforts to ensure that the lawyer "complies with these rules and the State Bar Act." This would require a supervisor in the public defender's office or an attorney managing contract legal services or an attorney managing a panel of appointed attorneys to take affirmative steps to ensure the line attorney acts as a zealous advocate consistent with the duties described in this report.

Subordinate Lawyers. Rule 5.2 states: "(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person."

The comment to this rule explains: When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

The rule and the comment make it clear that "just following orders" is not an excuse to violate legal requirements for professional conduct. There is a duty of the subordinate to push back when what the supervisor is demanding violates ethical duties or professional responsibilities. A zealous advocate does not sacrifice the client's right to effective assistance of counsel because the supervisor gives the attorney an unreasonably large caseload or wants the attorney to cut corners due to inadequate funding or staffing.

Misconduct. Rule 8.4 states: "It is professional misconduct for a lawyer to: (a) violate these rules or the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through the acts of another; . . . (d) engage in conduct that is prejudicial to the administration of justice." The administration of justice depends on appointed lawyers acting as zealous advocates for clients consistent with constitutional duties, statutory directives, ethical obligations, and rules of professional conduct. The failure to provide effective assistance in an ethical manner with competence, diligence, and loyalty is prejudicial to the administration of justice in probate conservatorship proceedings.

Discrimination. Rule 8.4.1 states: "(a) In representing a client . . . a lawyer shall not . . . unlawfully discriminate against persons on the basis of any protected characteristic. . . (b) In relation to a law firm's operations, a lawyer shall not: (1) On the basis of any protected characteristic, (I) unlawfully discriminate or knowingly permit unlawful discrimination."

Actual or perceived mental disability is a protected characteristic within the meaning of this rule. By virtue of the allegations in a petition for conservatorship, a proposed conservatee has an actual or perceived mental disability. Adjudicated conservatees have an actual mental disability.

Whether an attorney's action constitutes unlawful discrimination is determined by reference to federal and state laws prohibiting discrimination. In the case of mental disabilities, those statutes would include the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the state Unruh Civil Rights Act, and the state Lanterman Developmental Disabilities Services Act. A supervising attorney who knowingly permits discrimination or fails to take correction action against such is considered to be in violation of this rule.

Disability discrimination occurs when an attorney who knows a client has a mental disability that impairs the client's ability to communicate or meaningfully participate in the litigation fails to conduct an assessment of the client's needs and fails to secure reasonable accommodations to maximize the potential for effective communication and meaningful participation in the case. A zealous advocate take actions to accommodate the needs of clients with mental disabilities.

Legislative Committee Analysis

The role and activities of a "zealous advocate" are also informed by the analysis of SB 724 by the Senate Judiciary Committee. This section of the report references and comments on excepts from that analysis.

"This bill . . . [p]rovides that the role of legal counsel of a conservatee or proposed conservatee is that of a zealous advocate. . . The author writes . . . SB 724 advances the due process rights of conservatees and proposed conservatees by providing them with the guarantee of legal counsel, the clear right to choose an attorney of their preference, and requiring that their attorney be a zealous advocate on their behalf." (p. 3)

This part of the analysis indicates that the zealous advocate provision is grounded in the constitutional principle of due process – the same principle that entitled the client in a conservatorship proceeding to effective assistance of counsel.

"While it may be expedient, there is cost to liberty if a conservatee appears before the court without legal representation. . . And there is a cost to permitting attorneys for conservatees to ignore their clients' wishes and instead advocate for what they perceive as their clients' best interests." (p. 4)

The state and federal constitutions both prohibit the state from depriving an individual of liberty or property without due process of law. By referencing the cost to liberty, this part of the analysis indicates that due process requires that an attorney for a conservatee or proposed conservatee zealously advocate for the client's expressed wishes rather than the attorney's perception of the client's best interests.

The analysis states that the bill "Seeks to enhance legal representation in conservatorship proceedings" and that by defining the "proper role" of the attorney as a zealous advocate, the bill makes "changes with respect to the quantity and quality of legal representation." (p. 12) The need for such change is partially prompted by existing practices where "conservatorship attorneys, especially those who are court-appointed, are often instructed by courts to serve a role that is more paternalistic than adversarial." (p. 12)

The requirement that counsel act as a zealous advocate, therefore, requires counsel to assume an adversarial role to test the sufficiency of the petitioner's evidence, develop evidence favorable to the client's retention of rights, and ensure that all participants in the proceeding follow statutory and constitutional requirements. Paternalist approaches and best interests considerations should be left to a guardian ad litem or court investigator. They are inappropriate for a zealous advocate.

"'The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law.' [Citations.] More particularly, the role of . . . attorney requires that counsel 'serve as . . . counselor and advocate with courage, devotion and to the utmost of his or her learning and ability . . . .' [Citation.]" (*People v. McKenzie* (1983) 34 Cal.3d 616, 631; italics omitted.) Lawyers owe clients duties of competence, diligence, and loyalty, including the obligation to avoid conflicts of interest and maintain confidentiality. (*See* Bus. & Prof. Code § 6808.)

"While an attorney generally may only represent clients who have legal capacity, probate conservatorship attorneys, particularly those appointed by the court, are in a different position because many clients have diminished capacity. Existing law is unclear with respect to the attorney's role in such cases." (p. 12)

The analysis discusses two schools of thought about proper advocacy methods by an appointed attorney in a conservatorship proceeding. One school believes the attorney should assume the normal adversarial role for all types of litigation. The other is more paternalistic and justifies the attorney advocating for what he or she believes is in the client's best interests even if this clashes with the client's expressed wishes. The analysis makes it clear that SB 724 is intended to resolve this tension by clarifying the role of an appointed attorney as a zealous advocate acting consistently with the requirements of Business and Professions Code 6068 (The State Bar Act) and the Rules of Professional Conduct.

The committee analysis cites with approval "A 2019 article entitled *A Lawyer is a Lawyer is a Lawyer* which argues that 'the practice of requiring or encouraging appointed attorneys to report to the court about what the attorney believes is in the best interests of the proposed conservatee should be ended, and California should instead follow state-wide, uniform procedures that encourage appointed attorneys to fulfill their duty to act solely and only as zealous advocates for their clients.'" (p. 15)

The analysis also emphasizes that the California Supreme Court specifically refused to adopt ABA Model Rule 1.14 which allows an attorney to treat a client with diminished capacity

differently than a client without mental disabilities. Under the Rules of Professional Conduct, to which the activities of a zealous advocate must adhere, clients in conservatorship proceedings must receive the same quality and type of representation as a client in any other type of civil proceeding.

The analysis observes that "The role that court-appointed attorneys play in some counties raises serious questions as to whether conservatees and proposed conservatees are getting adequate legal representation." It notes with disapproval "the fact that some courts rely on attorneys to behave more like investigators" and emphasizes that SB 724 will ensure "that clients get the robust legal representation they deserve." (p. 16)

The analysis quotes the author's words regarding the need for SB 724: "The author writes: A conservatorship is arguably the most consequential civil restriction levied against Californians. The court, acting in what it decides as the conservatees best interest, is effectively depriving an individual of fundamental rights—to manage property, to spend money, to handle their own medical affairs, even to make everyday decisions about what to eat or who to spend time with. Such consequential, life-altering restrictions should never be applied without the presence of attorneys who are constantly advocating for a conservatee's interests, and seeking the least restrictive alternatives to the abridgment of their civil rights. Furthermore, our courts and attorneys should never—for expediency or efficiency's sake—neglect to apply the fullest extent of best practices that California statute requires."

The analysis also quotes from Spectrum Institute's evaluation of the bill: "The Spectrum Institute applauds all aspects of the bill that would make conservatorship proceedings more adversarial, writing: SB 724 would require the court to allow a conservatee or proposed conservatee to be represented by the attorney of their choice. The bill implements the due process right of a civil litigant to be represented by a privately retained attorney. The bill is consistent with the legislative intent manifest in various sections of the probate code . . . Everyone with an attorney is entitled to have counsel be a zealous advocate defending their rights and promoting their stated wishes. Unfortunately, that often does not happen. In many cases, courts instruct appointed counsel to act as "the eyes and ears of the court" and to advocate for what counsel believes is in the client's best interests—even if this requires counsel to be disloyal to the client or violate their right to confidentiality. In places such as Los Angeles, local court rules such as Rule 4.125 give appointed counsel a dual role. Attorneys are told to represent the client but also to help the court resolve the case. SB724 would remove this ethical tension by clarifying that counsel has one duty: to be a zealous advocate." (p. 18)

Finally, the committee analysis explains why an amendment was made to the bill to define the role of "zealous advocate" as needing to be consistent with the Business and Professions Code and Rules of Professional Conduct.

"Additionally, while it is generally understood that an attorney's role is that of a zealous advocate, the term "zealous" is not used in Business and Professions Code section 6068, which governs the ethical duties of attorneys. To avoid confusion and make it clear that

counsel for a conservatee or proposed conservatee must act consistent with the general rules of ethics, the following changes will be made:

"Amend section 1471(e) and (f) as follows:
(e) The role of legal counsel of a conservatee or proposed conservatee *conservatee, proposed conservatee, or person alleged to lack legal capacity* is that of a zealous advocate, *consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.*" (p. 18)

Case Law

By requiring attorneys to act as a "zealous advocate," SB 724 is not introducing a new concept to the law. Judicial opinions in California and elsewhere often have referred to the role of attorneys as zealous advocates.

An attorney has duties "as a zealous advocate and as protector of his client's confidences." (*California State Auto Association v. Bales* (1990) 221 Cal.App.3d 227.

The term "zealous advocacy" is associated with the California rules of professional conduct. See *In re Zamer G* (2007) 153 Cal.App.4th 1253, 1267 where the Court of Appeal speaks of "an attorney's duties of loyalty, confidentiality, and zealous advocacy." Also see *People v. Wade* (1988) 44 Cal.3d 975, 1000-1 where the court stated: "The state and federal constitutional guarantees of the right to counsel require counsel 'to represent his client zealously within the bounds of the law and to refrain from arguing against [him].'" "An attorney who argues against his own client seriously undermines the factfinding process." (*United States v. Cronic* (1984) 466 U.S. 648, 659.)

"[T]he rationale and need for independent appointed counsel exists when a conservator or other representative proposes acts that would significantly affect the person's fundamental rights. " *Michelle K. v. Superior Court of Orange Cnty.* (2013) 221 Cal.App.4th 409, 447.)

"Like all lawyers, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf. " *San Diego County v. John L* (2010) 48 Cal.4th 131, 151-52.)

"Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner." (C*onservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037, fn. 6)

"Traditionally, an attorney is appointed to zealously advocate for a protected person's wishes, regardless of whether those wishes are in that person's best interests. A court representative [or guardian ad litem], on the other hand, is appointed to act in a protected person's best interests." (*Guardianship of Stevenson* (S.D. 2013) 825 N.W.2d 911)

"The Code of Professional Responsibility establishes that an attorney must zealously

represent the wishes of his or her client.... It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law." (*Orr. V. Knowles* (Neb. 1983) 337 N.W.2d 699)

"The governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences. This is true even if the Probate Court has appointed a conservator for the client." (*Gross v. Rell* (Conn. 2012) 40 A.3d 240)

Other Sources

Statements from conferences, professional associations, advocacy organizations, academic journals, and even judges in training programs, support the principle that appointed attorneys in guardianship and conservator proceedings should act as zealous advocates.

"Your client says 'I want a trial' or 'I want a hearing' or 'I don't want this particular person as my conservator,' the judge needs to know that. And maybe you shouldn't be saying, 'and by the way judge, even though my client says she doesn't want a conservatorship, she is so demented she doesn't really know what she wants and she really need one.' No, you can't say that. That's being disloyal to your client. Your client wants to fight it, so you're in that mode, you're in fight mode." (Remarks of Los Angeles Superior Court Judge Maria Stratton at a Los Angeles County Bar Association training program on May 9, 2015)

"*Zealous Advocacy* - In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as practical and legal consequences of those options and the probability of success in pursuing anyone of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client." (Wingspan: The Second National Guardianship Conference - 2001)

"Guardianship proceedings should ensure adequate procedural protections including: mandatory court appointment of counsel at or before notice to act as zealous advocate for the individual. (National Academy of Elder Law Attorneys Public Policy Guidelines on Guardianship)

Guardianship attorneys "must zealously advocate for preserving the substantive and procedural rights of all individuals with I/DD." (2016 Joint Policy Statement of the Arc of the United States and American Association on Intellectual and Developmental Disabilities.)

"The ro1e of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights. . . . "During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are

well represented" (Massachusetts Committee for Public Counsel Services)

"Alaska specifically requires attorneys 'to represent the ward or respondent zealously' and to follow the decisions of the defendant concerning the defendant's interests. The District of Columbia also requires the appointment of an attorney to 'represent zealously the individual's legitimate interests.' The distinction between the role of the attorney and the role of the guardian ad litem is clearest in Washington State. There a defendant has the right to be represented by counsel at any stage in a guardianship proceeding. Counsel is directed to act as an advocate for the client and not to substitute counsel's own judgment for that of the client concerning what may be in the client's best interests. The guardian ad litem, on the other hand, is directed to promote the defendant's best interest, rather than the defendant's expressed preferences." (Excerpt from: "Zealous Advocacy for the Defendant in Adult Guardianship Cases" published in Journal of Poverty Law (1996))

"Role of the attorney. The attorney appointed to represent the ADP [allegedly disabled person] is key to solving the guardianship puzzle. Depending on the role that attorney plays, the ADP may or may not receive substantial due process in the proceeding which deprives her of her rights as an adult citizen. Under the present system, due process is a hit or miss affair. Both of our studies confirm that confusion reigns regarding what role the appointed attorney is to play. The study of case files shows that attorneys generally do not take an advocate's role, though the words of the statute and the legislative history indicate that is what the legislature intended. The survey of judges shows that those who responded are divided about or are unsure of the attorney's proper role. . . . The evolution of the dual role of the attorney in guardianship cases creates significant questions about the adequate representation of the ADP and due process. The legislature clearly intended that the proceeding would be adversarial, by providing for a hearing, an optional jury trial, and court-appointed counsel. In such a setting, the usual role of the attorney, and the one dictated by the Rules of Professional Conduct, would be to see that a defense, if one is available, is raised; that the client's views are advocated in court; and that the petitioner meets the burden of proof. In short, the attorney would insure that the ADP had his or her day in court. But instead, the role of the ADP's attorney has become that of a court investigator, who provides the court with facts and information that normally would be presented and proven by the petitioner. Why the petitioner has been relieved of the duty to prove his case without assistance from opposing counsel is one of the more puzzling questions surrounding guardianship. . . . Clarifying the proper role of the attorney for the ADP is the first and most important step in solving the due process puzzle, because that attorney can effect better, more equitable results in all aspects of the guardianship proceeding." (Excerpts from "The Guardianship Puzzle: What Ever Happened to Due Process," Maryland Journal of Contemporary Legal Issues (1995-96)

Effective Assistance of Counsel

A zealous advocate in a conservatorship proceeding must comply with the requirements of Business and Professions Code 6068. One provision in that statute states that an attorney must support the constitution and the laws of the United States and of California.

Because significant liberty interests are at risk, a conservatee or proposed conservatee is entitled to due process of law in a conservatorship proceeding. *(Conservatorship of Sanderson* (1980) 106 Cal.App.3d 607) The potential deprivation of property, through court-imposed fees from the assets of the conservatee or proposed conservatee, also requires such proceedings to comply with due process.

"The consequences, and concurrent due process requirements, when the ward is a person with mental retardation or developmental disability—rather than an elderly person—are the same. As one federal court noted, 'Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process' (*Heryford v Parker*, 396 F2d 393, 396 [10th Cir 1968])."

SB 724 confers on conservatees and proposed conservatees a statutory right to counsel. The duty of counsel to perform in an effective and professional manner is implicit in the mandatory appointment of counsel. (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037, fn. 6.)

When a litigant has a statutory right to an appointed attorney, due process entitles the litigant to "effective assistance of counsel." This right arises directly from the constitution. It is also "a result of the Legislature's creation of a statutory right to counsel." (*People v. Hill* (2013) 219 Cal.App.4th 646; (*Conservatorship of David L.* (2008) 164 Cal.App.4th 701)

"[T]he purpose of the statutory and due process requirement of the appointment of counsel is to protect the rights and interests of the alleged incompetent. To accomplish this task it is essential that appointed counsel act as an advocate for the individual. . . . The right to counsel becomes a mere formality, and does not meet the constitutional and statutory guarantee absent affirmative efforts to protect the individual's fundamental rights through investigation and submission of all relevant defenses or arguments." (*In re Link* (Mo. 1986) 713 S.W.2d 487.

Due process precludes an attorney from stipulating to a conservatorship order or its terms and that the court must affirmatively determine that the client understands and agrees to such a stipulation prior to entering such an order. If a client lacks capacity to understand contractual terms, then such a stipulation would not have her consent. (*Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022.)

The fact that a conservatee has such a serious developmental disability that she is unable to complain that she is not receiving effective assistance of counsel as constitutionally and statutorily required does not negate the right to seek relief for a violation of that right. Someone else must be given standing to seek relief. (*Michelle K. v. Superior Court* (2013) 221 Cal.App.4th 409.)

The requirement of effective assistance of counsel entitles a client to the reasonably competent assistance of an attorney acting as a diligent and conscientious advocate. *(In Re Scott* (2003) 29 Cal.4th 783, 811.) An attorney's performance is considered ineffective if

it falls below "objective standards of reasonableness under prevailing professional norms." (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.)

Failure to perform basic activities associated with advocacy and defense in litigation has been held to constitute ineffective assistance of counsel. Examples include the failure to properly investigate, failure to interview or call helpful witnesses, and the failure to challenge evidence presented by an opposing party. In other litigation contexts, the following actions or omissions were described as ineffective assistance of counsel.

* Failing to properly investigate the facts (*In re Cordero* (1988) 46 Cal.3d 16, 187)

* Failing to adequately understand the available alternatives, promote their proper application, or pursue the most advantageous disposition for the client (*People v. Scott* (1994) 9 Cal.4th 331, 351.)

* Failing to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*In re Thomas* (2006) 37 Cal.4th 1249, 1258.)

* Before counsel acts or chooses not to act, she "must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Lucas* (2004) 33 Cal.4th 682, 721-722.)

* Failing to present testimony of crucial witnesses. (*United States v. Holder* (10th Cir. 2005) 410 F.3d 651.)

* Failing to use documentary evidence to challenge testimony of an adversary's witness. (*Gonzales-Soberal v. United States* (1st Cir. 2001) 244 F.3d 273.)

* Failing to interview witnesses who could have contradicted evidence of the opposing party. (*Detrich v. Ryan* (9th Cir. 2013) 740 F.3d 1237.)

* Failing to investigate the validity of expert evidence of an opposing party. *(Tice v. Johnson* (4th Cir. 2011) 647 F.3d 87.)

* Failure to consult with an expert on an important issue in the case. (*Showers v. Beard* (3rd Cir. 2011) 635 F.3d 625.)

* Failing to retain an expert to counter the expert of the opposing party. *(Siehl v. Grace* (3rd Cir. 2009) 561 F.3d 189.)

* Failing to interview any witnesses or engage in any meaningful pretrial preparation. (*Stanley v. Bartley* (7th Cir. 2006) 465 F.3d 810.)

Because the underlying test for ineffective assistance of counsel is that an attorney's actions or inactions fall below "objective standards of reasonableness under prevailing professional norms," an inquiry must focus on what are reasonable performance standards for appointed counsel in a probate conservatorship.

Sources of Performance Standards

California has no official performance standards for appointed attorneys in probate conservatorship proceedings. None have been developed by state or local officials or agencies. As a result, details about what such attorneys should or should not be doing in these cases, to comply with constitutional requirements, nondiscrimination laws, ethical obligations, statutory directives, or case law, must be gleaned from other sources.

While the Judicial Council has developed detailed checklists for what appointed attorneys should do in each stage of juvenile dependency proceedings, it has not provided any guidance for probate conservatorship proceedings. Noting that developing performance standards in such proceedings are not within its purview, the Probate and Mental Health Advisory Committee has taken the position that only the Legislature, Supreme Court, State Bar, or the entity that funds such services have the authority to develop performance standards in probate conservatorship cases.

Through Standards of Judicial Administration, the Judicial Council has directed the presiding judges of the juvenile division of superior courts throughout the state to: "Establish minimum standards of practice to which all court-appointed and public office attorneys will be expected to conform. These standards should delineate the responsibilities of attorneys relative to investigation and evaluation of the case, preparation for and conduct of hearings, and advocacy for their respective clients." (Standard 5.40) No similar delegation has been made to presiding judges of the probate division of superior courts to promulgate performance standards for appointed attorneys in conservatorship proceedings. Attorney are left to their own devices as to what they should and should not do in these cases.

The Legislature has not addressed this matter other than stating that appointed attorneys should represent the interests of a conservatee or proposed conservatee and should advocate for a client consistent with the State Bar Act and Rules of Professional Conduct. The State Bar, with approval of the Supreme Court, has adopted Rules of Professional Conduct. By refusing to approve ABA Model Rule 1.4, the Supreme Court has indicated that attorneys for clients with diminished capacity must treat them like any other client. With these exceptions, the Legislature, Judicial Council, Supreme Court, and State Bar have not provided detailed performance standards to which appointed attorneys in conservatorship proceedings must adhere. Some counties, however, have included a few basic standards in agreements with "contract public defenders" but these generally lack much detail.

As a result of the inaction of the legislative and judicial branches to adopt performance standards for appointed attorneys in conservatorship proceedings, reference must be made to other sources to determine what such attorneys should and should not do in these cases.

One source of indirect guidance comes from standards for appointed counsel in child dependency cases. The Judicial Council has provided attorneys for both parents and children detailed checklists for services to be performed during phases of dependency cases. (See attached excerpts from detention hearing checklists from the "Dependency Quick Guide")

Local courts have also adopted performance standards for appointed attorneys in dependency cases. For example, local rule 7.7 of the Los Angeles County Superior Court specifies actions that should be taken by attorneys in those cases. (See attached rule 7.7) In contrast, the court has not promulgated a rule specifying performance standards for appointed attorneys in probate conservatorship proceedings.

Orange County has an administrative order specifying standards for appointed attorneys in juvenile court. Complaints against such attorneys may be filed with the court by the child or a caretaker relative or a social worker. The court has no administrative order with performance standards for appointed attorneys in probate conservatorship cases. The duties of appointed counsel in juvenile cases are quite detailed: (See attached order.)

> "The attorney shall thoroughly and completely investigate the accuracy of the allegations of the petition or other moving papers and the court reports filed in support thereof. This shall include conducting a comprehensive interview with the client, if four years of age or older, to ascertain his or her knowledge of and/or involvement in the matters alleged or reported; contacting social workers and other professionals associated with the case to ascertain if the allegations and/or reports are supported by accurate facts and reliable information; consulting with and, if necessary, seeking the appointment of experts to advise the attorney or the Juvenile Court with respect to matters which are beyond the expertise of the attorney and/or the Juvenile Court; and obtaining such other facts, evidence or information as may be necessary to effectively present the client's position to the Juvenile Court."

<u>County Contracts</u>

Once source of performance standards for attorneys representing conservatees and proposed conservatees is found in contracts between counties and private law firms or bar associations who either provide legal services to indigent clients in these cases or administer programs in which other law firms do.

Spectrum Institute reviewed contracts in many counties. The results, including some which had performance standards, are found in an attachment to this report.

Competent Representation Checklist

Performance standards for lawyers who represent clients in conservatorship or adult guardianship cases have been developed by various government agencies and nonprofit organizations throughout the nation. Spectrum Institute reviewed a variety of documents

containing such standards or guidelines. From this study, we developed a checklist which could be used in California.[1]

The checklist also took into consideration a set of performance standards issued by the Judicial Council for appointed attorneys representing parents or children in juvenile dependency proceedings.[2] In those cases, as in probate conservatorship proceedings, significant liberty interests are placed at risk. The standards for dependency cases were developed pursuant to a legislative directive. (Welfare and Institutions Code, Section 317)

The standards for attorneys in child dependency proceedings require them to perform the following services: (1) establish and maintain an attorney-client relationship; (2) visit child clients at each new placement whenever feasible; (3) conduct thorough, continuing, and independent investigations and interviews at every stage of the proceedings; (4) determine their client's interest and desires and advocate for those interests and desires; (5) contact social workers and other professionals associated with their client's case prior to each hearing; (6) request services (by court order if necessary) to access entitlements and to ensure a comprehensive service plan; (7) monitor compliance with court orders; (8) prepare for and participate in all hearings; (9) file pleadings, motions, responses, or objections as necessary to represent the client; (10) determine if appeals and writs are appropriate and, where necessary file writ and notice of appeal.

Under a program operated by the Judicial Council for 20 superior courts – Dependency, Representation, Administration, Funding and Training Program (DRAFT) – attorney performance evaluations are conducted regularly by judicial officer, peers, and clients. In the 38 non-DRAFT counties, courts are encouraged to develop a system of accountability and supervision to ensure the quality of services by appointed attorneys.

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[1] "Due Process Plus," White Paper to the United States Department of Justice (Spectrum Institute 2015), abbreviated as DPP; "Efficiency vs. Justice," an exhibit to a complaint filed with the United States Department of Justice (Spectrum Institute 2015), abbreviated as EVJ; "Strategic Guide for Court -Appointed Attorneys" (Spectrum Institute 2014), abbreviated as SG; "California Conservatorship Defense: A Guide for Advocates" (California Advocates for Nursing Home Reform 2010), abbreviated as CCD; "Representing the Elderly and Adults with Disabilities Who Are Facing or Under Guardianship," (Legal Aid Center of Southern Nevada 2018), abbreviated as NV; "Maryland Guidelines for Court-Appointed Attorneys in Guardianship Proceedings (Maryland Rules of Procedure), abbreviated as MD; "Performance Standards Governing the Representation of Indigent Adults in Guardianship Proceedings" (Committee for Public Counsel Services), abbreviated as MA; "Guidelines on Indigent Defense Services Delivery Systems" (State Bar of California (2006);.

[2] "Request for Information: Juvenile Dependency Representation Services," (California Judicial Council - 2017).

In San Francisco, for example, the bar association contracts with the superior court to operate a panel of attorneys from which appointments are made to individual dependency cases. Some attorneys are required to have six month mentorships before going solo. All attorneys must take 10 hours of training each year to remain on the panel.

In Los Angeles, a nonprofit lawfirm contracts with the court to represent parents in dependency cases. The firm has a staff of attorneys, social workers, and investigators who work as a team. Attorneys are subject to evaluations by peers, clients, and judges. A similar program operates in a similar manner in Santa Clara County.

Unfortunately, even though the liberty interests of seniors and people with disabilities in conservatorship cases are as significant as those of parents and children in dependency proceedings, the State of California has not yet seen fit to issue performance standards or to periodically monitor the performance of appointed attorneys in conservatorship proceedings.

Although the Judicial Council initially authorized its Probate and Mental Health Advisory Committee to place the issue of performance standards for conservatorship cases on it annual agenda in 2016, that project eventually was dropped on the ground that it was not in the purview of the Judicial Council to develop performance standards without authorizing legislation.

Committee staff concluded that performance standards could be issued by the Legislature or the Supreme Court.[3] The committee also indicated that the State Bar, which is an arm of the Supreme Court, could create standards of professional conduct for attorneys in probate

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[3] "The committee considered whether to specify the standards of professional conduct applicable to attorneys appointed by the court to represent (proposed) wards and conservatees. The committee determined, however, that it is the province of the Legislature (see, e.g., Bus. & Prof. Code, § 6068) and the Supreme Court (see, e.g., Rules of Prof. Conduct, rules 1.2–1.4 (eff. Nov. 1, 2018)) to specify the general role and duties of an attorney and to authorize any exceptions in specific circumstances. When the Judicial Council *has* entered this arena, it has done so at the express direction of the Legislature and, doing so, has echoed the standard specified by the relevant statute. (See, e.g., Fam. Code, §§ 3150–3151; Cal. Rules of Court, rule 5.242(j): court-appointed minor's counsel is to represent "the child's best interest".) Here, Probate Code section 1456 directs the council to adopt a rule that specifies the qualifications and the amount and subject matter of education related to guardianships and conservatorships required for appointed counsel, as well as reporting requirements to ensure compliance with the statute. Nothing in sections 1456, 1470, or 1471, however, specifies—or invites the council to specify—the role and duties of counsel appointed in guardianship or conservatorship proceedings. The committee has therefore declined to specify those duties in the proposed rules. (Invitation to Comment - W19-08, Judicial Council of California - 2019)

conservatorship proceedings.[4] The committee also suggested that an entity which funds such legal services, such as a county government, could include performance standards as a condition of providing such funding to a legal services provider.[5]

To date, neither the Legislature, the Supreme Court, or the State Bar have issued performance standards for appointed attorneys in probate conservatorship cases, although some counties have included them in written agreements with "contract public defenders" who are paid with public funds to represent indigents in these proceedings.

A suggested checklist of services that should be performed by a diligent and conscientious attorney acting as a reasonably competent and zealous advocate is attached to this report.

Caseload Standards

Unreasonably large caseloads can prevent attorneys from adhering to professional standards and deprive clients of effective legal representation. Both the American Bar Association and the California State Bar have issued reports with a variety of standards to ensure that caseloads of publicly-funded legal defense services – whether provided by county departments, contract law firms, or court-appointed counsel programs – do not interfere with an attorney's ethical and professional duties to clients. Excerpts from those reports are attached to this report.

The California Rules of Professional Conduct advise attorneys to resist unreasonably large caseloads that may be imposed on them by supervisors due to inadequate funding or staffing. (Rule 1.8.6; Rule 5.2)

Unfortunately, these bar association reports and these rules are not preventing supervisors in some public defender's offices from requiring staff attorneys from having huge caseloads.

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[4] "The committee determined, however, that standards of professional conduct fall in the first instance within the province of the Legislature and, to the extent that the Legislature has left gaps in the statutory scheme, of the State Bar." (Invitation to Comment - SPR18-33, Judicial Council of California - 2019)

[5] "In addition, the court's authority to impose special standards of attorney conduct seems tied to the existence of a statutory financial relationship. The cost of appointed children's counsel in family law proceedings is an element of court operations. (Gov. Code, § 77003(a)(4).) Courts frequently contract with counsel to represent children. By contrast, no financial relationship exists between the court and appointed counsel in conservatorship or guardianship proceedings. Sections 1470(a) and 1472 impose liability for the cost of appointed counsel in guardianships and conservatorships on the person represented, the person's estate, or the county." (Invitation to Comment - SPR18-33, Judicial Council of California - 2019)

One deputy public defender in Northern California reported that he handled 431 cases in 2020. This caseload included probate conservatorships as well as a variety of other types of legal proceedings. A deputy public defender in Alameda County told county supervisors that he had represented 362 clients in probate conservatorship proceedings in one year. In contrast, staff attorneys in that office who defended misdemeanor cases had caseloads ranging from 80 to 180 cases. No good explanation was given for this disparity.

The issue of caseloads in probate conservatorships has never received the attention of the California Judicial Council. That agency, however, has issued caseload standards for attorneys appointed to represent parents or children in juvenile dependency proceeding. The standards were developed from a statewide workload study in 2002. Those standards call for an attorney handling no more than 188-200 clients per year (assuming the attorney is assisted by a half-time social worker/investigator).

Role of Supreme Court

Whether conservatees and proposed conservatees receive effective legal representation as required by the constitution and contemplated by statutes and rules of court is largely dependent on whether the California Supreme Court will use its authority to address a wide range of deficiencies in the current fragmented system of providing such legal services.

Because the delivery of legal services to indigents in conservatorship proceedings is the responsibility of county governments, and the appointment of counsel for nonindigents is handled by superior courts, the quality of these legal services is left to the unfettered discretion of state and local officials in 58 separate jurisdictions. The Supreme Court, State Bar, Judicial Council, and Legislature have no idea of the extent to which conservatees and proposed conservatees are receiving deficient legal services. Unlike juvenile dependency proceedings where the Legislature and the Judicial Council have taken a pro-active approach to ensure quality services for parents and children, these officials have shown no interest in the legal services situation for seniors and people with disabilities in probate conservatorship proceedings.

Spectrum Institute and a wide range of other organizations have brought this issue to the attention of the California Supreme Court. As the Judicial Council has noted, the Supreme Court has the authority to regulate the ethics and performance of attorneys practicing law in this state. That includes attorneys appointed to represent clients in conservatorship cases.

A request to convene a *Workgroup on Conservatorship Right to Counsel Standards* was filed with the Supreme Court on July 21, 2021. The report and attachments document a legal services delivery system in disarray. It urges the court to convene a blue ribbon panel to identify deficiencies in the legal representation of clients in conservatorship proceedings and to make recommendations on ways to improve these services. Performance standards, caseload limits, and quality assurance monitoring mechanisms are some of the suggestions raised in the request. Whether the court will rise to the occasion remains to be seen.

Excerpts from Reports on Caseloads

Eight Guidelines of Public Defense Related to Excessive Workloads (American Bar Association 2009)

All publicly funded lawyers. These guidelines apply to public defender agencies and to programs that furnish assigned lawyers and contract lawyers. (p. 4)

Connection of workload to competency. If workloads are excessive, neither competent nor quality representation is possible. (p.4)

Workload and conflict of interest. An excessive number of cases create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services. (p. 5)

Performance standards. The responsibilities of defense lawyers are contained in performance standards and in professional responsibility rules governing the conduct of lawyers in all cases. (p. 5)

No exceptions. There are "no exceptions" for lawyers who represent indigent clients, i.e., *all* lawyers have a duty to furnish "competent" and "diligent" service, as required by rules of professional conduct. (p. 1)

Workload oversight. The ABA Ten Principles require that "workload[s]…[be] controlled" and that lawyers be "supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards." "Workload," as explained in the ABA Ten Principles, refers to "caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties."The need for such oversight is just as important in programs that use assigned lawyers and contract lawyers as it is in public defender offices. When lawyers have a private practice in addition to their indigent defense representation, the extent of their private practice also must be considered in determining whether their workload is reasonable. This applies to part-time public defenders, assigned lawyers, and contract lawyers. (p. 6)

Duties of management. Guideline 1 urges the management of public defense programs to assess whether excessive workloads are preventing their lawyers from fulfilling performance obligations; and Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for management to determine if excessive workloads exist. Guidelines 5 through 8 address the range of options that public defense providers and their lawyers should consider when excessive workloads are present. As set forth in Guideline 6,

depending upon the circumstances, it may be necessary for those providing public defense to seek redress in the courts, but other choices may be available, as suggested in Guideline 5, before this step is required. (p. 1)

Guidelines on Indigent Defense Services Delivery Systems
(California State Bar - 2006)

Loyalty to client is paramount. The indigent defense provider's ultimate and overriding obligation is to properly represent each individual client. Hence all other loyalties and concerns are subordinate to the best interests of each client. The decisions of the defense provider must not be effected by political influence and must be unaffected by judicial intervention, except to the same extent that a privately retained counsel may properly be influenced by rulings of the court. (p. 4)

Appearance of undue influence. When a judge appoints the attorney, or it is done on an ad hoc basis, the appearance of undue influence is great, and points to the necessity for basing appointments of counsel on a rotational system. Systematic assignment of counsel through a planned program, in lieu of *ad hoc* assignments by the courts, has been uniformly recommended by national professional organizations and governmental study groups. (p. 5)

Vices of ad hoc appointments. Among the reasons for avoiding the ad hoc or random method of assignments are the following: 1) frequent use of inexperienced counsel and overall lack of quality control; 2) the potential for patronage, discrimination, political control, or undue influence; 3) pressure to obtain waivers because of the unavailability of counsel; 4) inadequate or uneven compensation and lack of fiscal control and responsibility; 5) lack of training and continuing education; and 6) lack of development of a skilled and vigorous criminal defense bar able and willing to seek criminal justice reforms. (p. 5)

Monitoring procedures. Procedures should be established by the administration to monitor attorney conduct in order to enforce reasonable standards of representation. (p. 6)

Institutional public defenders. Should there develop an unavoidable conflict between the duties, responsibility or allegiance of an institutional public defender as a county manager or department of county government, and the role of said Public Defender in representing an indigent client, the duty to properly represent the client supersedes all other loyalties. The institutional public defender must resist any efforts by others to cause such a defender to compromise this core duty even at the risk of financial penalty to an individual defender or to the continued existence of the entire defender office.(p. 7)

Zealous advocacy. Indigent defense providers must act zealously to provide services meeting the mandate of being a "reasonably competent attorney acting as a diligent, conscientious advocate. (p. 8)

Performance standards. Assigned counsel programs and indigent defense contracts should furnish a competent attorney acting as a diligent, conscientious advocate, who undertakes the following responsibilities: (1) careful factual and legal investigation and utilization of needed experts; (2) prompt action to protect a client's legal rights; (3) informing the client of case developments; (4) a demonstrated willingness to try appropriate cases; (5) (for cases to be tried) preparing for jury selection, examination of witnesses, and preparation of arguments; (6) knowing and exploring disposition and sentencing alternatives available in the relevant jurisdiction; (7) advising clients concerning their rights of appeal; (8) refusing to accept more cases than the attorney can competently handle; (9) declining matters which the attorney knows or should know he or she is not competent to handle; and (10) maintaining client confidences and secrets. (p. 9)

Quality controls. There should exist a mechanism whereby the quality of the representation provided by indigent defense providers is monitored and accurately assessed, employing uniform standards. (p. 14)

Assigned counsel and contract system caseloads. Each jurisdiction and individual attorney should set approximate case load limits to assure that the individual attorney is not so over worked that the quality of representation is diminished. (p. 16) The number and types of cases for which an attorney is responsible may impact the quality of representation individual clients receive. Administrators of assigned counsel and contract indigent defense systems should establish reasonable maximum caseload goals. (p. 24) No attorney should be assigned more cases than he or she can effectively handle. Appropriate records should be kept by the administrator to avoid assigning an excessive number of cases to an attorney. (p. 25)

Complaint system. Each jurisdiction should maintain a written complaint procedure for complaints made against an attorney who is providing indigent legal representation. (p. 16)

Monitoring performance. To assure consistent quality representation, each jurisdiction shall establish written procedures, using uniform standards, to periodically monitor and accurately assess the performance of its attorneys. (p. 16)

Institutional defender quality controls. An institutional defender should provide a continuous, interactive system whereby mentors, supervisors and managers provide assessment, feedback, documentation, remediation and other functions to ensure that the quality of service being provided is assured. (p. 17) Chief Defenders bear the ultimate responsibility for assuring that workloads are not excessive in volume for any individual institutional public defender employee. (p. 28) Great care should be exercised by Chief Defenders to cause continuous monitoring of workload and to arrange for workload adjustments where necessary. (p. 29) Failure of a Chief Defender to effectively address workloads may result in personal liability for an adverse civil judgment and jeopardize the right of the Chief Defender to practice law in any capacity. (p. 30)

County Contracts with Law Firms:
Terms, Conditions, and Standards

Providers of legal services to indigent conservatees and proposed conservatees vary among the 58 counties in California. In some counties the legal services are provide by a county department known as the office of public defender. In others, the county enters into an agreement with a private law firm or bar association to provide these services or to administer a program where other law firms provide the services. A third method is through a court-appointed panel program administered by the superior court.

Spectrum Institute reviewed the written agreements for the "contract public defender" programs in most of the counties that delegated these services to private law firms. Summaries appear below. We specifically noted whether the terms of the agreements included performance standards, monitoring mechanisms for quality control, and nondiscrimination provisions.

While the conservatees and proposed conservatees in probate conservatorship proceedings are not parties to such a contract, they are third-party beneficiaries. As such, they would be entitled to complain about a breach of terms that adversely affects them. (Civil Code 1559) One remedy would be to bring an action for breach of contract against the law firm for providing deficient services. (*Brinton v. Bankers Pension Services, Inc*. (1999) 76 Cal.App.4th 550, 558.)

Amador County

The following provisions were contained in a sample contract between the county and the contracting law firm for legal services that included probate conservatorship proceedings.

Nondiscrimination. The law firm shall comply with all federal, state, and city laws and shall be compliant with the American Disabilities Act and its California counterpart.

Legal Services. Specific tasks to be performed by attorneys are similar to those described in the Butte County contract.

Ancillary Services. The contract recognizes that: "Ancillary Services may be needed from time to time. These services may include social work services, evidence testing, special court-appointed expert witness, psychological testing." The law firm shall provide investigation services, expert witnesses, forensic services, medical or other technical experts, interpreters, and other ancillary services of similar nature. The law firm must use or employ only licensed investigators with investigation training and experience in compliance with the Private Investigator Act (Div. 3 Business and Professional Code of California, Chapter 11.3).

Monitoring. The contract calls for periodic evaluation by a panel to verify that the law firm is complying with the terms of the contract. Panel members may include the County Administrative Officer, General Services Director, Presiding Judge of the Superior Court, and the supervising attorney of the law firm. The panel is supposed to meet twice a year.

Duties of the compliance panel include: a. Monitoring the quality, accountability, contract compliance of the attorneys providing indigent defense; b. Development and monitoring of the implementation of policies and guidelines for assignments, review of attorney performance requirements, etc. c. Development and monitoring of the implementation of a complaint procedure and process on behalf of clients of indigent defense services provided by Contractor and his staff attorneys under this contract.

Workload. The contract also specifies: "Pursuant to the California State Bar workload standards, indigent defense providers shall not maintain excessive workloads that compromise the ability of the provider to appropriately and competently represent a client. Contractor must have a plan or place in plan to track and monitor case assignments per attorney to ensure workload standards are met."

Butte County

In Butte County, the contract has a section titled "Duties and Obligations of the Attorney." It requires the contract attorneys to provide legal representation to clients in new petitions and other matters in pending probate conservatorship proceedings. Cases are assigned to individual attorneys on a rotational basis.

Attorneys must provide services necessary to provide adequate representation. In addition, attorneys must supply competent ancillary personnel, such as investigators or experts, necessary to meet all constitutional requirements relating to legal services.

The following specific duties are outlined in the Butte County contract: (1) duty of careful factual and legal investigation (such as research the law and raise objections; investigating medical reports and conducting psychiatric examinations); (2) duty to take prompt action to protect a client's rights; (3) duty to keep client informed; (3) duty to prepare for examination of witnesses and present argument at trial; (4) duty to maintain confidences and secrets; duty to advise client concerning appeals; (5) filing all necessary motions; and (6) preparation of documents, letters, research, and referrals to appropriate agencies.

The law firm also agrees that all legal services will be performed in accord with all applicable professional standards and in compliance with applicable federal, state, and local laws. Compliance with federal and state nondiscrimination laws and regulations is require by the contract. The ADA is specifically mentioned as one of those laws. Implicitly included would be the state Unruh Civil Rights Act for clients with disabilities and the state Lanterman Developmental Disabilities Services Act for clients with developmental disabilities.

Calaveras County

The county has a contract with a private law firm. Services to be performed include legal representation of indigents in probate conservatorship proceedings.

The contract requires the firm to provide competent legal services. Otherwise, there are no performance standards contained in the contract. The contract does not contain a nondiscrimination clause.

Colusa County

The county has a contract with a solo proprietor. Services to be performed include legal representation of indigents in probate conservatorship proceedings.

The contract does contain some performance standards although they are rather vague. The contract states: "Contractor shall be available to meet and confer with clients assigned under this contract. Contractor shall, in addition to any other applicable federal, state and local laws and rules, comply with the California Rules of Professional Conduct in providing services to clients subject to this Contract, and maintaining communication with said clients." It also states: "Contractor shall use the standard of care in its profession and comply with all applicable federal, state and local laws, codes, ordinances and regulations."

With the following clause, the county seems to distance itself from any responsibility for the quality of services: "Services shall be provided by Contractor without the advice, control or supervision of County. Contractor shall have sole discretion and control of Contractor' s services and the manner in which they are performed."

The contact agrees to pay for ancillary services as approved by the court and the county as follows: "Appropriate ancillary services necessary to provide the client with effective representation."

Contra Costa County

The county has a contract with a nonprofit organization. Services to be performed include legal representation of indigents in probate conservatorship proceedings. The nonprofit operates a panel of private attorneys who are assigned to cases.

Upon notification that an attorney is needed for a case, the program director assigns an eligible independent attorney from the panel to provide the required services. Before an attorney can be eligible for case assignment, a written agreement must be executed between the nonprofit and the attorney, in which the attorney agrees to render all professional services reasonably required to represent the client.

Assigned attorneys agree to comply with all terms of the master contract with the nonprofit.

One of those provisions requires compliance with all applicable federal, state, and local laws and regulations with respect to its performance under this contract, including but not limited to, licensing, employment, and purchasing practices; and wages, hours, and conditions of employment, including nondiscrimination. This includes nondiscrimination on the basis of disability in the delivery of services.

The contract contains an unusual provision specifying that there are no third-party beneficiaries to the contract.

Attorneys assigned to conservatorship cases must agree to work at the rate between $112 and $122 per hour with a travel rate of $29 per hour (travel to and from court is not billable) and an investigation rate of $73 per hour.

Appointment to individual cases is based upon a rotational system, providing as far as practicable equal access to appointments by all attorney participating attorneys. In each case in which an attorney is appointed, the attorney shall provide skilled and effective legal representation, consistent with the attorney's qualifications and fiscal prudence. The attorneys are required to provide all legal representation necessary for effective representation of conservatees in conservatorship cases. There are no specific performance standards like there are for attorneys in criminal cases.

The panel is overseen by a review committee. Cases are classified by type and complexity, with appointments to cases matching the experience of attorneys with the classification type.

Del Norte County

The county has a contract with four law firms, each of which receives cases on a rotational basis. The contract includes probate conservatorships. One law firm is designated as lead attorney for purposes of interactions with the county. The contract does not contain a nondiscrimination provision.

A clause pertaining to performance states: “Attorneys will provide competent legal representation of indigent defendants consistent with constitutional and professional standards. All Attorneys shall meet the legal training, education and work experience standards required for providing competent representation under both California and Federal law as each may apply. Attorneys shall also meet the standards of representation established in the legal community within Del Norte County.” More detailed performance standards are listed for criminal cases but not for conservatorships.

The contract agrees to reimburse attorneys for: (1) investigative services at the rate of $45 per hour; (2) professional consultations at a rate of $150 per hour; and (3) expert witness fees as authorized by the court.

Glenn County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract requires the law firm to complete in a professional and diligent manner all legal representation of indigent persons who are represented pursuant to court appointment. The law firm is required to perform the services hereunder with the care, skill and diligence associated with professional attorneys and in accordance with the applicable professional standards currently recognized by such profession.

The contract also requires the firm to comply with all applicable Federal, State, and Local laws, ordinances, codes, and regulations in performing these services. Although not specifically mentioned, this requirement presumably includes state and federal disability nondiscrimination laws and regulations.

The law firm is required to provide such ancillary and supportive services as may be necessary to provide adequate representation, including, but not limited to, investigative services, expert witnesses, and forensic experts.

The contract requires the law firm to retain a sufficient number of investigators on staff or under contract at all times to provide investigative services adequate to service the projected caseload.

The law firm is required to generate written practices and procedures to govern all attorneys providing services under the contract.

The law firm is also required to maintain ongoing communications with the local Bar Association and other interested professional groups to assure that the firm's operations meet the established professional standards for adequate representation.

According to the contract, the legal representation provided by the law firm and all attorneys performing legal services under this Agreement shall be of such high quality as will meet all constitutional, statutory, case law, and professional standards and requirements. This includes: the duty of careful, factual and legal investigation; the duty to take prompt action to protect a client's legal rights; the duty to keep a client informed; the duty to prepare for jury selection, examination of witnesses, submission of instructions and presentation of argument at trial; The duty not to accept more cases than can be competently handled; The duty not to handle a legal matter which the attorney knows or should know that he or she is not competent to handle; the duty to maintain confidences and secrets; and the duty to administer an attorney's office in full compliance with any and all constitutional, legal, ethical, professional obligations, duties and responsibilities.

The contract call for the following duties of the firm for training of attorneys and other staff: to ensure that each attorney providing services under this agreement shall be provided professional training.

The contract contains a provision requiring compliance with disability nondiscrimination laws as follows: compliance with all applicable federal, state, and local antidiscrimination laws, regulations, and ordinances; do not discriminate against any recipient of services contemplated to be provided or provided under this agreement, because of physical or mental disability. The law firm is required to ensure that the evaluation and treatment of recipients of services are free from such discrimination and harassment. Compliance with the Americans with Disabilities Act is specifically mentioned in the contract.

Inyo County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract states that it's purpose "is to provide competent and effective legal representation to qualified indigent persons appearing before the various courts." The contract adds that: work provided by the Contractor at the County's request under this Agreement will be performed in a manner consistent with the requirements and professional standards established by federal, state, and County laws, ordinances, regulations, and resolutions."

Lake County

The county has a contract with Lake Indigent Services LLP to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract obligates the firm to complete in a professional and diligent manner all legal representation of indigent persons. This requires the firm to perform the services with the care, skill and diligence associated with professional attorneys and in accordance with the applicable professional standards currently recognized by such profession. The firm is responsible for the professional quality, technical accuracy, completeness and coordination of all reports, information, and other items and services furnished under the contract. The firm must comply with all applicable Federal, State, and Local laws, ordinances, codes, and regulations in performing these services.

The legal representation provided by the firm and all attorneys performing legal services under the contract shall be of such high quality as will meet all constitutional, statutory, case law, and professional standards and requirements.

The firm is also required to ensure that the ongoing legal education of its staff attorneys and/or Contract Attorneys includes formal training likely to assist the individual attorney's professional development in providing indigent defense services.

The contract has a strong nondiscrimination clause that includes a prohibition on disability discrimination in the delivery of services and requires compliance with state and federal disability nondiscrimination laws and regulations.

Madera County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract calls for "competent legal representation" to persons unable to employ legal counsel. The law firm agrees to provide legal services on a flat-fee basis. The contract does not contain any performance standards nor does it contain a requirement that the services be performed in a manner that complies with state and federal disability nondiscrimination laws.

Mariposa County

The county has a contract with a private law firm. Services to be performed include legal representation of indigents in probate conservatorship proceedings.

The contract requires good faith performance in conformity with the Rules of Professional Conduct. The law firm agrees to comply with all federal, state, and local laws pertaining to the services contemplated by this contract.

The contract mentions several specific performance standards applicable to the representation of indigent defendants but it is unclear whether these standards are intended by the contract to apply to legal services in probate conservatorship proceedings.

The contract does not contain any requirements regarding compliance with state and federal disability nondiscrimination laws or regulations.

Mono County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The law firm agrees to provide quality representational services to all eligible clients to whom the it is appointed by the Court, consistent with any applicable rules of professional conduct and standards of care. Specifically, the following duties and responsibilities of the

la firm as appointed by the Court shall be observed: 1. Provide careful, factual and legal investigation. 2. Take prompt action to protect client's legal rights. 3. Make all necessary court appearances for motions, trials, adjudications, hearings, dispositions, and sentencing. 4. Prepare for jury selections, examination of witnesses, submission of instructions, and presentation of argument at trial. 5. Know and explore sentencing alternatives. 6. Advise the client concerning appeals. 7. Not accept more cases than can be competently handled. 8. Not handle a legal matter which the law firm knows or should know that it is not competent to handle. 9. Maintain client confidences. 10. Keep the client informed. 11. Comply with all standards of performance set by the Courts and rules in juvenile cases. 12. Not accept a matter in which a conflict of interest exists of which he would be otherwise prohibited from accepting under the Rules of Professional Conduct of the State Bar.

In June of each year during the term of this Contract, and any extension thereof, commencing June 2021, the County Counsel, County Finance Director and County Administrative Officer shall meet with the law firm and the Judges of the court to ensure that the performance standards set forth herein are being met. If upon said evaluations, the county determines that the law firm is failing to provide competent legal services based upon the above standards the county may terminate this Contract upon 15 days' written notice to the law firm and fees due shall be prorated as of the date of termination.

During the performance of this Contract, neither the law firm nor any party subcontracting with the law firm under the authority of this Contract shall discriminate on the basis of race, color, sex, religion, national origin, creed, marital status, age, sexual orientation, or the presence of any sensory, mental, or physical handicap in the delivery of services or any other benefit under this Contract, nor on any other basis prohibited by state or federal law in effect during this Contract. The law firm shall comply fully with all applicable federal, state, and local laws, ordinances, executive orders, and regulations which prohibit such discrimination.

The law firm shall immediately notify the county in writing if the law firm becomes aware that a complaint lodged with the State Bar Association has resulted in the public or private reproval, suspension, or disbarment of any attorney providing services under this Contract.

Placer County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract contemplates competent and effective services by the law firm. The contract specifically requires the la firm to "follow applicable public defender standards of representation published by the American and California Bar Associations, including the California Bar Association's Rules of Professional Conduct; prevailing local court rules; and applicable provisions of California law."

The county agrees to pay, pursuant to court order, for costs for expert witnesses, special investigations, tests, interpreters and reports from third parties, medical and psychiatric expenses and ancillary services.

The county, through a representative of the County Executive Office and a representative of the Superior Court Executive Committee shall confer on at least a quarterly basis to maintain oversight and evaluation of public defender services. Such oversight shall include recommendations and related implementation review applicable to maintaining services in conformance with standards as set forth in the agreement.

The contract requires the law firm to maintain a procedure for internal systematic supervision and evaluation of staff performance. Performance evaluations are to be based upon personal monitoring by the law firm's director or lead attorney and shall be augmented by regular, formalized comments by judges, other defense lawyers and clients.

The contract requires the law firm to provide funds and sufficient staff-time to permit systematic and comprehensive training to attorneys and professional staff at least in accordance with the State Bar's Minimum Continuing Legal Education (MCLE) requirements. Resources shall include continuing legal education programs, attendance at local training programs, and the opportunity to review training and professional publications and tapes. It also requires the law firm to provide at the beginning of each fiscal year a written training plan that includes specific goals and objectives for all employees.

The contract also requires the law firm to maintain a process by which the most skilled attorneys are available to assist in the development of new attorneys and to those ready to begin handling more difficult cases.

Plumas County

The following provisions were contained in a contract between the county and the contracting law firm for legal services that included probate conservatorship proceedings.

The contract states: (a) The attorney shall represent conservatees as appointed by the Court through all trial court proceedings in . . . Probate Code Sections 1470, 1471; (b) the attorney shall appear at all hearings, upon notice by the Public Guardian or County Counsel of such hearings; © when a probate conservatorship is set for a hearing or reappointment, the attorney shall meet with each conservatee living in Plumas County, at least thirty (30) days prior to the court date to explain to the client his or her options and explain the court procedure; (d) the attorney shall notify Public Guardian and/or Mental Health staff at least two weeks in advance of the hearing as to the conservatee's wishes with regard to his/her court hearing so that staff can arrange transportation and be ready to accompany conservatee to court, if so requested; (e) the attorney shall make phone calls or have face-to-face meetings with each appointed conservatee, at approximately six month intervals to answer any questions, concerns or complaints the conservatee has with the present placement. (It is

important that Attorney and conservatees have regular contact so they become familiar with one another and conservatees are aware they have legal representation when hearings occur.); (f) the attorney shall be available for phone contact from conservatees or staff from Mental Health and Public Guardian as well as family when a new conservatorship is being established, should problems or questions arise in regards to the conservatorship.

Riverside County

The county has a contract for legal services with a private law firm. The law firm agrees to provide legal defense for indigent adults in probate conservatorship cases. There are seven attorneys who work on such cases.

We reviewed the most recent contract which runs from July 2020 to June 2023. .

The contract has no specific performance standards other than a requirement that attorneys shall provide clients with effective assistance of counsel as required by the state and federal constitutions. The law firm agrees to provide services reasonably and legally required from the time of appointment and continuing throughout the life of the case. Compliance with Rule 3-700 of the Rules of Professional Conduct is specified in the contract. Failure to obey the Rules of Professional Conduct is considered a material breach of contract.

The contract does not contain any requirement that the law firm obey state and federal disability nondiscrimination laws and regulations.

San Benito County

The county has a contract for legal services with a private law firm. The law firm agrees to provide public defender services for litigants when appointed to do so by the court in probate conservatorship cases. The law firm agrees to pay for necessary investigation services. Under the contract, the county "agrees to pay, subject to court order, all witness fees, including expert witnesses, and for the services of court - appointed laboratories, forensic services, medical or other technical experts, interpreters, and stenographic transcriptions and other ancillary services of similar nature."

In performing these services, the law firm agrees to comply with all federal, state and local laws and regulations in performing the work and providing the services specified in this Contract. This includes abiding by "the American Disabilities Act and its California counterpart." The contract also specifies that: "Attorneys shall be available on a reasonable basis to meet and confer with clients."

Performance standards include: (1) Providing for the maintenance of quality representation of indigent defendants consistent with constitutional and professional standards; (2) Meeting the legal standards required for providing competent representation in California pursuant to California and Federal law; (3) Filing all necessary motions, including pre- and post

judgment motions; (4) Avoiding any actions of unprofessionalism or dereliction in duties or ethics; (5) Avoiding being unprepared to go forward with a motion, hearing or trial.

The following specific duties are required of the law firm: (1) Duty of careful factual and legal investigation, including the duty to research the law and raise settled objections and the duty to investigate medical reports and conduct psychiatric examinations; (2) Duty to take prompt action to protect a client' s legal rights; (3) Duty to keep the client informed; (4) Duty to maintain client confidences and secrets.

The contract calls for a commission to meet at least semi-annually to review the quality of services, accountability, and contract compliance. The commission consists of two county administrators and a representative of the law firm. The commission can develop and monitor the implementation of policies and guidelines for assignments, review of attorney performance requirements as well as complaint procedures for clients. It can also review any specific complaints by clients or others about the performance by attorneys.

The contract requires that, pursuant to State Bar workload standards, the law firm shall not maintain excessive workloads that compromise the ability of the provider to appropriately and competently represent a client. Contractor must have a plan or place in plan to track and monitor case assignments per attorney to ensure workload standards are met.

As for investigation services, the contract requires that licensed investigators with investigation training and experience in compliance with the Private Investigator Act (Div. 3 Business and Professional Code of California, Chapter 11. 3) should be used.

The contract contemplates that ancillary Services may be needed from time to time. These services may include social work services, evidence testing, special court -appointed expert witness, and psychological testing, as appointed by the Court. Costs for Ancillary Services are subject to prior Court Order for good cause and shall be paid pursuant to an attachment to the contract.

The law firm must participate in providing satisfaction surveys to represented clients, attending reasonable meetings with the Citizen' s oversight committee, and shall provide such statistics as reasonably may be requested by County.

The law firm must keep records regarding the total number of case appointments, broken down between misdemeanors, felony, juvenile delinquency, conservatorships, dependency matters and other cases.

San Luis Obispo County

This county has an agreement with San Luis Obispo Defenders to provide legal services for indigents in probate conservatorship cases. The contract has no performance standards or requirement that the firm obey federal and state nondiscrimination laws. There is no

procedure for monitoring by the county of the quality of legal services that are provided. There is a requirement, however, that if the firm discovers that the client has assets it must take steps to reimburse the county for the cost of legal services that have been provided.

San Mateo County

This county has an agreement with the San Mateo County Bar Association to provide legal services in probate conservatorship and other proceedings through the association's Private Defender Program.

The agreement has provisions to ensure competent representation of clients: (1) evaluation of attorney performance by the chief defender in the program; (2) procedures for clients to complain about attorney performance and for the program to evaluate and resolve such complaints; (3) a procedure for complaining clients to be informed of their right to file a complaint with the State Bar and/or to seek a *Marsden* hearing with the judge in the case; (4) an annual report to the county in which the number and disposition of complaints in included; (5) an annual report to the county of the caseloads of each attorney and average caseload of all attorneys in the program; (6) a requirement for attorneys to conduct a client interview as soon as possible after appointment; (7) a survey of clients regarding the client's views on the quality of representation they received; and (8) compliance with federal and state nondiscrimination laws.

Attorneys are paid $95 per hour with up to 15 hours on a probate conservatorship case without the need to seek prior approval for hours.

Santa Cruz County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract contains an outdated nondiscrimination clause which, in terms of disabilities, only mentions physical handicap. Mental disabilities are not mentioned.

The contract does not contain any performance standards.

Sierra County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract looks more like one for a vendor who is going to build a building or repair machinery. The terms are for the benefit of the county and not for third-party beneficiaries

such as recipients of legal service.

The contract requires the contractor to perform all services required pursuant to the agreement in the manner and according to the standards observed by a competent practitioner of the profession in which contractor is engaged. All products of whatsoever nature which contractor delivers to county pursuant to this agreement shall be prepared in a first class and workmanlike manner and shall conform to the standards or quality normally observed by a person practicing in contractor's profession. There are no standards specifically relevant to the delivery of legal services to clients in legal proceedings.

The nondiscrimination clause refers to a 1972 statute predating the Americans with Disabilities Act and state laws prohibiting disability discrimination in services.

Tehama County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract does not contain any performance standards or monitoring mechanisms. It does not does not contain any disability nondiscrimination provisions or requirement for the firm to comply with state and federal nondiscrimination statutes and regulations.

Trinity County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

Attached to the contract is a request for proposal specifying the services that the law firm would provide. It includes a set of performance standards, including a requirement that the firm provide services in a manner consistent with constitutional professional standards. The firm must: conduct a thorough and timely legal investigation, preparation and consultation; initiate timely action to protect the client's legal rights; be present at all required court hearings; prepare for jury selection, examination of witnesses, submission of instructions, and presentation of argument at trial; and advise client concerning appeals.

Additional requirements for the attorney-client relationship include: make all reasonable attempts to meet with and communicate with the client prior to each court hearings; make all reasonable attempts to ensure the client knows their rights under the law; make all reasonable attempts to make sure the client knows their options; provide competent and adequate advice and guidance regarding the client's rights; and present valid, relevant and legal arguments and evidence to the court in support of the client's position.

The law firm is also required to comply with rules of professional conduct and all applicable ethical rules, as well as managing caseloads so that all specified duties and responsibilities set forth in the contract can be accomplished.

The contract does not require the law firm to obey state and federal disability nondiscrimination laws and regulations.

Yuba County

The county has a contract with a private law firm to perform public defender services, including the representation of persons not financial able to employ counsel in probate conservatorship proceedings.

The contract requires the law firm to provide "competent and adequate legal representation" for such persons. The contract specified that the "county shall review Attorney's compliance and performance under the contract and, at County's option, may at any time require Attorney to attend any meetings, interviews with County personnel or Judges to discuss such compliance and performance."

The contract includes specific performance standards for representation of criminal defendants but not for clients in probate conservatorship proceedings.

The contract does not contain any requirement that the law firm shall comply with state and federal disability nondiscrimination laws and regulations.

The law firm is obligated to comply with state and federal disability nondiscrimination laws.

Mental Health Project
Disability and Guardianship Project

1717 E. Vista Chino A7-384 • Palm Springs, CA 92262
(818) 230-5156 • https://spectruminstitute.org/

July 21, 2021

California Supreme Court
350 McAllister St, Room 1295
San Francisco, CA 94102

ADMINISTRATIVE DOCKET

Re: Convening a Workgroup on Conservatorship Right to Counsel Standards

To the Court:

Public confidence in the fairness of the conservatorship system in California has been steadily eroding. This is occurring due to increased media scrutiny of the manner in which judges and probate attorneys process these cases.

All too often vulnerable adults are placed into conservatorships without regard to the availability of less restrictive protective measures. Quite frequently conservatorship proceedings result in a huge depletion of assets to pay for the fees of attorneys for petitioners, conservators, and attorneys appointed to represent these adults.

Judges and attorneys who operate these protective proceedings have been getting bad press for many years. Then Chief Justice Ronald George was able to diminish public outrage when he convened a Probate Conservatorship Task Force in 2007. Unfortunately, this well-meaning gesture changed very little in the systemically flawed conservatorship process due to the failure of the Legislature to fund most of the reforms suggested by the Task Force.

This Court was recently advised that systemic problems with the conservatorship system are as great today as they were in 2007. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989 - Amicus Curiae Brief of Spectrum Institute, pp. 64-74) Virtually every moving part of the system is not functioning as the Legislature intended. Instead of each case being assessed carefully by judges, and proposed conservatees receiving a proper legal defense of their liberty and property, the cases are processed with assembly-line efficiency. As explained in the Amicus Curiae Brief, the pattern and practice of errors, omissions, and abuses by judges is the result of a lack of accountability due to complacency by court-appointed attorneys who go along to get along rather than providing clients with effective advocacy.

Spectrum Institute has been studying the operations of the conservatorship system in California for more than seven years. Auditing dozens of case files. Interviewing proposed conservatees and their families. Meeting with judges. Attending training programs for court-appointed attorneys. Consulting with public defenders. Comparing the procedures contemplated by relevant statutes and mandated by due process with what is actually occurring in practice. The result of this research shows a well-intentioned system in theory

that in reality is an efficiently run process that moves only in one direction – toward an order of conservatorship. The reason for such a "cookie cutter" approach to conservatorship proceedings is a lack of transparency and accountability for judges and appointed attorneys.

Research suggests that fewer than 10% of probate conservatorship petitions in California are denied and that petitions to terminate conservatorships are filed infrequently. Contrast this with outcomes in Nevada where robust advocacy by the Legal Aid Center of Southern Nevada resulted in 25% of initial petitions being denied last year, either as unwarranted or because less restrictive protective measures were available. Some 25% of the Center's caseload in 2020 involved successful termination petitions. All because of zealous advocacy.

This Court was recently informed that the lack of concern for less restrictive alternatives in California is so obvious that a finding on this issue is pre-printed on the Judicial Council form for the conservatorship order. A judge does not even have to check a box on the form. (*Conservatorship of O.B.*, 2d Civil No. B290805, Request for Depublication)

The purpose of this communication is not to educate this Court of the wide range of problems with the probate conservatorship system, the ongoing violation of due process rights of conservatees and proposed conservatees, and the failure of judicial branch leaders to address these problems. The justices of this Court, members of the Judicial Council, and management of the State Bar have been repeatedly advised of these problems through a steady stream of letters and reports for several years. (Communications to California Judicial Branch About Systemic Problems in Conservatorships: 2014 - 2020) Members of the bench and bar have also learned about flaws in the probate conservatorship system through dozens of commentaries published by the Daily Journal legal newspaper from 2015 to the present. (Disability and the Law: A Compendium of Commentaries - June 1, 2021)

Despite such warnings to leaders in the judicial branch, not much has been done to address these problems. Action should be taken now – before public confidence in the ability of the judiciary to administer the conservatorship system with fairness drops any further.

Although all parts of the conservatorship system are in disarray, the underlying source of this dysfunctional situation is the systematic violation of the right to counsel. As the body overseeing the State Bar and the entity that promulgates the Rules of Professional Conduct, this Court has authority to investigate and remedy violations of the due process right of conservatees and proposed conservatees to effective assistance of counsel.

If each individual with funds has an attorney of choice or those without assets have a competent and loyal appointed attorney, the flaws in the conservatorship system will be corrected in due course. When judges or other parties in these proceedings are not following the law, attorneys will raise objections, file motions, demand evidentiary hearings, cross-examine witnesses, produce favorable evidence, and even insist on jury trials. There would be an appropriate number of appeals which would give appellate courts an opportunity to publish opinions instructing trial courts and attorneys on what is permissible and what is not. As things now stand, contested hearings are unusual, court trials are few and far between, jury trials are virtually nonexistent, and appeals are rare. All because attorneys are not appointed at all or those who are appointed – whether public defenders or court-appointed

private attorneys – routinely are surrendering the rights of their clients and settling cases due to high case loads, financial considerations, or as a result of direct or implicit judicial pressure to clear overloaded court dockets. Contested proceedings are strongly discouraged.

This Court should convene a Workgroup on Conservatorship Right to Counsel Standards to address the pervasive violations of the right to counsel that occur on a regular basis throughout the state. Members of the workgroup should not be probate court "insiders" who would not be able to objectively evaluate the status quo. These insiders can be interviewed or submit written testimony to ensure that their views are considered. Objective and neutral members of the workgroup could include appellate justices, retired superior court judges who are not serving as mediators or otherwise in litigation, professors of judicial and legal ethics, a public defender from a county where the public defender's office does not handle probate conservatorships, researchers who have published articles or reports on the conservatorship system, a member of the Commission on Aging and the State Council on Developmental Disabilities, a member of the State Bar's Council on Access and Fairness, the chairperson of the Fair Employment and Housing Council, and others with a commitment to justice.

The mandate of the workgroup would be to investigate violations of all aspects of the right to counsel with the goal of making recommendations for improvement in actual practice. Areas of inquiry should include issues such as: the right to an attorney of choice; mandatory appointment of counsel for those without one; the role of counsel as a loyal advocate; the lack of performance standards for appointed counsel; the caseloads of public defenders; the adequacy of county funding for conservatorship legal defense services; the role of the public defender for adjudicated conservatees in "life of the case" representation; local court rules that give counsel a dual role; the ethics of judges operating legal services programs; the adequacy of training programs; the lack of quality assurance controls; the adequacy of funding for legal services for indigents; the lack of accessibility of conservatees and proposed conservatees to the State Bar's complaint system; the failure to appoint attorneys on appeal for conservatees; and the adequacy of training of appellate counsel.

This time-limited workgroup would issue a report to the Supreme Court with recommendations for the establishment of standards to protect the right to effective assistance of counsel for conservatees and proposed conservatees through: (1) amendments to the Rules of Professional Conduct to clarify the role of appointed counsel for litigants in such cases; (2) the establishment of performance standards such as has been done in Massachusetts and Maryland for adult guardianships and has been done in California for counsel for parents and children in dependency cases; (3) clarification of the Rules of Judicial Ethics to address ethical concerns with judges operating legal services programs for court-appointed attorneys; (4) modifications to the complaint system of the State Bar to make it more accessible, directly or indirectly, to litigants with cognitive disabilities; (5) amendments to the California Rules of Court to prohibit local court rules that give appointed counsel a dual role or that interfere with litigants exercising their right to retain an attorney; (6) amendments to the Standards of Judicial Administration to advise judges that appointment of counsel may be a necessary modification or accommodation for litigants with cognitive disabilities, even without request, in order to fulfill the court's duties as a public entity under state and federal disability nondiscrimination laws; and (7) new legislation to protect these and other elements of the right to counsel for litigants with disabilities.

This Court's attention is drawn to some excerpts from a recent article published by the Trusts and Estates Section of the California Lawyer's Association. ("A Lawyer is a Lawyer is a Lawyer," *Trusts and Estates Quarterly*, Vol 25, Issue 1 (2019))

> "Although attorneys have a general obligation to be zealous advocates for their clients, attorneys appointed to represent proposed conservatees in probate courts are routinely encouraged, and even required, to provide the courts with reports regarding their clients. The contents of those reports often violate the attorneys' duty to be a zealous advocate."
>
> "[T]he practice of requiring or encouraging appointed attorneys to report to the court about what the attorney believes is in the best interests of the proposed conservatee should be ended, and California should instead follow state-wide, uniform procedures that encourage appointed attorneys to fulfill their duty to act solely and only as zealous advocates for their clients."
>
> "The attorney who files a report with the court regarding his or her interactions with a client, describing his or her conclusions about the case which might differ from the client's, or describing communications with the client, violates both the duty of confidentiality and the duty of loyalty."

This Court and the Chief Justice sometimes convene workgroups to study pressing issues. For example, this Court convened a Jury Selection Workgroup last year. Three years ago, it convened a California Attorney Practice Analysis Working Group. The Chief Justice has convened four workgroups since 2016: Bias in Court Proceedings; Homelessness, Prevention of Discrimination and Harassment; and Pretrial Detention Reform.

California has about 70,000 adults currently living under an order of probate conservatorship, with approximately 7,000 new petitions being filed annually. Evidence indicates that for many, if not most of them, the right to counsel has been violated or seriously compromised.

Convening a Workgroup on Conservatorship Right to Counsel Standards will not only help identify ways to strengthen the right to counsel for this vulnerable population, it will also send a signal to the public that leaders in the judicial branch are committed to improving the administration of justice in probate conservatorship proceedings.

Respectfully submitted:

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cc: Jorge E. Navarrete, Supreme Court Administrator
Sean M. SeLegue, Chair, State Bar Board of Trustees

Endorsements

The following organizations join this request to the California Supreme Court to convene a Workgroup on Conservatorship Right to Counsel Standards.

The National Coalition for a Civil Right to Counsel is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, its mission is to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs. NCCRC has over 300 participants and 200 partners in 40 states. http://civilrighttocounsel.org/

Founded by former Democratic congressman and disability rights icon Tony Coelho, The Coelho Center for Disability Law, Policy & Innovation brings together all of the schools and colleges within Loyola Marymount University. It collaborates with the disability community to cultivate leadership and advocate innovative approaches to advance the lives of people with disabilities. https://www.lls.edu/coelhocenter/

Since 1983, California Advocates for Nursing Home Reform (CANHR), a statewide nonprofit 501(c)(3) advocacy organization, has been dedicated to improving the choices, care and quality of life for California's long term care consumers. Through direct advocacy, community education, legislation and litigation it has been CANHR's goal to educate and support long term care consumers and advocates regarding the rights and remedies under the law, and to create a united voice for long term care reform and humane alternatives to institutionalization. http://canhr.org/

Mental Health Advocacy Services (MHAS) advances the legal rights of low-income individuals with mental health disabilities and empowers them to maximize their autonomy, achieve equity, and secure the resources they need to thrive. MHAS provides free legal services for low-income people, offers training for consumers, families, and advocates, and engages in impact litigation to end discrimination and to promote civil rights. https://www.mhas-la.org/

The Autistic Self Advocacy Network is a 501(c)(3) nonprofit organization run by and for autistic people. ASAN was created to serve as a national grassroots disability rights organization for the autistic community, advocating for systems change and ensuring that the voices of autistic people are heard in policy debates and the halls of power. Its staff works to advance civil rights, support self-advocacy in all its forms, and improve public perceptions of autism. https://autisticadvocacy.org/

Different Brains® strives to encourage understanding & acceptance of individuals who have variations in brain function and social behaviors known as neurodiversity. Its mission has 3 pillars: to mentor neurodiverse adults in maximizing their potential for employment and independence; to increase awareness of neurodiversity by producing interactive media; and to foster the next generation of neurodivergent self-advocates

Sage Eldercare Solutions helps Bay Area families care for their loved ones with expert services that provide for the highest level of individualized care. It also helps families find solutions and care for loved ones living with dementia—and adapting those solutions over time to meet the changing physical and cognitive abilities of its clients. https://www.sageeldercare.com/

LGBTQ Attorneys and Allies is a section of the Long Beach Bar Association. It was created to work with other legal professionals and non-LGBTQ attorneys and focuses on networking, education, and community events to promote and foster diversity. The section has co-sponsored webinars for attorneys on a variety of issues involving probate conservatorship proceedings. The most recent webinar, *Flaws & Fixes*, included proposed reforms to strengthen the right to counsel for conservatees and proposed conservatees.

TASH Founded in 1975, TASH is an international leader in disability advocacy. TASH's mission is to advance equity, opportunity and inclusion for people with disabilities, including those with the most significant support needs, in the areas of education, employment, and community living through advocacy, research, and practice. TASH supports the right of people with disabilities to receive the effective assistance of counsel which will help ensure access to justice in probate conservatorship proceedings. https://tash.org/

Kasem Cares is a nonprofit foundation with a mission to raise awareness about elder abuse with a specific focus, through its affiliates, to promote the passage of legislation to prevent isolation of elders by guardians, conservators, and others who have control over the lives of vulnerable seniors. The Kasem Cares visitation bill has been adopted in 12 states with another 9 states passing a version of it. https://www.kasemcares.org/

Performance Standards Outline

1) Qualification and Training

a. Qualification Standards (ADA B, B-1) (MD 3)

b. Training Standards (ADA B, B-2) (MD 2)

2) Advocacy and Defense

a. Introduction

i. Defining a Guardianship (NV 1-1)

ii. Types of Guardianships (NV 1-2 – NV 1-3)

iii. Attributes of a Guardianship (Attributes Doc)

iv. Ethical Conduct and Procedure (CA Pg. 8-9) (NV 2-4) (Business Code 6088)
1. Discrimination (Rule 8.4.1)

v. ADA Appointment Standards (ADA PG 73)

b. Appointment of Attorney

i. Order Appointing Attorney (NV 2-1)
1. Add powers to appointment order (Debra Expanded Order)

c. Investigation

i. Records (ADA A-1-A)

1. Petition and supporting documents
2. Other Medical and Phycological Records (NV 3-14)
3. Medical Capacity Declaration (CA PG 14)
4. Regional Center Report (Strategic Guide PG 19)
5. IPP Reports from Regional Center (Strategic Guide PG 20)
6. IEP Reports from schools
7. Court Investigator's Report (Efficiency v Justice PG 4) (CA 16)
8. Service Provider Records (NV 3-15)

9. Bank and Other Records (NV 3-15)
10. Powers of Attorney, Trust, Will, Medical Directives

ii. Client Interviews (ADA A-1-C)

1. ADA needs assessment for interviews and other client communications (interpreter, communication device, support person, etc.)
2. Selecting a confidential and comfortable venue for interviews
3. Choose best timing for interview(s)
4. Preparation of questions with correlation to findings in records (Strategic Guide 20)
5. Explanation to Client (NV 3-7- 3-10)
6. Discussion of Case Proceedings (NV 3-10- 3-11)
7. Keeping the Client Informed (MA PG 9)
8. Client's Goals (NV 3-10)

iii. Interview Relatives, Friends, Neighbors (ADA A-1) (Strategic Guide 20)

1. Letter of introduction (NV)
2. Follow up Interview (zoom, phone, or in person)

iv. Witnesses (ADA A-1-B)

1. Interview Personal Sources, Professional Sources, Petitioner and the Proposed Conservator (NV 3-16)

v. Appointment of Experts (ADA A-3-B)

1. To assess capacities and incapacities (Psychologist)
2. To assess less restrictive alternatives (Social Worker
3. Convene IPP review for regional center clients

vi. Motion to Join Indispensable Parties

1. Seek to add Regional Center if necessary
2. Seek to Add County APS if necessary

vii. Vetting the proposed conservator(s) (suggesting alternative conservator)

d. Petition for Temporary Conservator

i. Evaluate and/or challenge need
ii. Demand evidentiary hearing if appropriate

iii. Oppose change of current residence

e. Petition for Appointment of Guardian ad Litem

i. Evaluate and/or challenge need
ii. Demand evidentiary hearing if appropriate

f. Petition for Writ

i. File in Court of Appeal if appropriate
ii. Challenge to GAL, Temp. Conservator, Change of Residence

g. Evaluation of Evidence

i. Evaluation will lead the attorney to rule whether there is "clear and convincing evidence" (ADA A-3-A) (NV 3-14)

ii. Less Restrictive Alternatives (Probate Code 1821(a)(3))
    1. Options include in-home care, payee programs, power of attorney etc.

iii. Interviews of people associated with the records that were reviewed (PCP, Regional Center Case Manager)

iv. Request a complete physical and medication assessment if a physical has not been done in the past year

h. Determination of Procedural Options

i. Discovery (if not going to settle)

    1. Requests for admissions
    2. Interrogatories
    3. Document Demands
    4. Depositions

ii. Motion to Dismiss

    1. Attorney should first argue for a dismissal if client is not incapacitated or of less restrictive alternatives would suffice. (NV 1-10)

iii. Propose Settlement Options (consistent with clients wishes)

iv. Demand Trial

1. If dismissal is not ordered and a settlement is not reached, a trial must be ordered. § 1827 provides that conservatees have a right to a jury trial to determine whether conservatorship is warranted.

2. Defend Existing Personal and Financial Documents

    a. Defend presumed validity of existing documents as less restrictive alternative to conservatorship of person or estate (durable financial power of attorney, medical directives, durable medical power of attorney, trust, etc.

3. Defend presumed capacity in all areas

4. Require petitioner to prove all elements of the case by clear and convincing evidence

5. Jury Trial

    a. Develop Case Theory and Strategy (NV 3-17)
    b. Motion in Limine to include/exclude evidence
    c. Presentation of Evidence (ADA A-1-B) (MA PG 9)
    d. Cross Examination of Witnesses (MA 6)
    e. Submit Proposed Jury Instructions
    f. Closing Argument

6. Bench Trial

i. Drafting the Order of Conservatorship

    i. Terms according to the settlement or the findings at trial

j. Fees
    i. Submit fee claim for appointed counsel
    ii. Oppose unreasonable fee claims of temporary conservator, guardian ad litem, attorney for petitioner, attorneys for other parties

k. Post Judgment

    i. Appeal
        1. After judgement is entered the conservatee may file a notice of appeal. (Efficiency v Justice p. 5) (NV 3-17)

ii. Continuing Care Plan

iii. Ongoing Representation (NV) (Solano)
    1. Periodic checking on client. Possibly once every six months
    2. Probate investigator biennial reports

iv. Termination

    1. Conservatorship is no Longer Necessary (Probate Code Sections 1860-1865)
    2. Conservatorship no longer exists (Probate Code Sections 1860-1865)
        a. Death of conservatee

v. Change of Venue

vi. Review periodic financial reports of the conservator (NV)

vii. Oppose unreasonable fee claims of conservator and attorney

l. Performance Evaluation by Supervisor

Funding & Fees Review Project

Internship Activities - Summer 2021

Benjamin Dishchyan

Overview

I was accepted for a summer work-study internship with Spectrum Institute and was assigned to the Funding and Fees Review Project. The project is coordinated by Thomas F. Coleman, legal director of Spectrum Institute, with the assistance of attorney John DiPietro as a research associate. I became part of a three-member research team.

The project has two phases. Phase One is reviewing the use of public funds to provide legal services for indigent adults who become involuntary participants in probate conservatorship proceedings in California. Our task was to determine who is providing such services in each county – whether a public defender county department, a private law firm or bar association acting as a "contract" public defender, or private attorneys assigned to cases through a panel operated by a superior court. Once we identified the provider, our task was to learn as much as possible about their methods of representation.

For those counties that contract out these legal services to a private firm, we obtained the contracts and reviewed and summarized their terms and conditions. For those counties that used a public defender department, we sought information about their caseloads and methods of representation. We did not gather much information about the court-operated panels, mostly due to the lack of time.

We also reviewed reports from the American Bar Association and the California Bar Association about caseload standards for public indigent defense programs. Finally, from a variety of reputable sources, we developed a checklist of activities or performance standards that should be done or seriously considered by attorneys who purport to provide these clients with effective assistance of counsel consistent with constitutional requirements, rules of professional conduct, and state and federal nondiscrimination laws and regulations.

What follows is a description of my activities in each of these categories.

Interview of Debra Bookout

Before I became an intern with this project, Tom had already interviewed Barbara Buckley, founder and executive director of the Legal Aid Center of Southern Nevada located in Las Vegas. He had learned that the center had a Guardianship Advocacy Project that was providing excellent legal representation to adults involved in guardianship proceedings in Nevada. During his interview, he learned details of how the program operates. Because it appeared to be such a good model, Tom scheduled a follow-up interview with Debra Bookout, the lead attorney for the Guardianship Advocacy Program to learn more details.

During the interview which I observed, Debra had an enthusiastic attitude and was truly passionate about her work. Our interview with her mainly focused on the post adjudication procedures her office has for probate conservatorships. The procedures her office uses are very extensive to ensure proper care of the conservatee. One of the procedures that stuck with me was periodically checking in on the client to assure their proper needs are being taken care of.

Interview of Public Defender of Alameda County

Tom had scheduled an interview with John Plaine, the deputy public defender in who provides legal representation to adults who are indigent and all adults with developmental disabilities, indigent or not, who are involved in probate conservatorship proceedings. The intent was to learn about his caseload, training, performance standards, monitoring, and how he provides these legal services.

A few days before the interview with John, Tom learned that also attending the zoom interview would be Brendon Woods, the head public defender and Youseef Elias the chief assistant public defender. Brendon would not allow the interview to be recorded. In fact, he would not allow John to answer any questions. John sat mute.

Brendon began interviewing us. He questioned our goals and mission at Spectrum Institute and moved onto our plan with our report. At one point Brendon made an underhanded joke towards me by suggesting a career path of mine could be a prosecutor, and if I were to go on that path, he would not assist us in our research.

During the conversation, Tom mentioned that Spectrum Institute respects what Alameda County is doing, and we would like to make Alameda a "model county" for legal representation of conservatees and proposed conservatees. He hoped that Brendon would allow John to open up with information and that eventually Brendon's team could work with us to develop performance standards that could be emulated by other public defenders throughout the state. Brendon said he would think about it and get back to us. Weeks have since passed and we have not heard a word from Brendon.

In conclusion, this meeting was rather uneventful for us as we had very high hopes and anticipation for what we would learn in this meeting. Since Brendon is an advisor to the Funding & Fees Review Project, we hope that he will eventually see the benefit of making the Alameda County Public Defender a model for conservatorship representation. At this point, we have had more cooperation from public defender offices that are not associated with the project.

Promotional Interview with Sarah Barlow

Sarah Barlow is the social media coordinator intern for Spectrum Institute. She had contacted me for an interview for Spectrum institute to use internally going forward. She asked me questions regarding my background and how I ended up at Spectrum Institute this summer. Then she asked questions about my position, tasks, and overall enjoyment of the workplace. I felt that the questions Sarah had asked will give great insight to future interns of what to expect of the position.

Reviewing ADA Statements on Public Defenders' Websites

Another one of my tasks was to analyze the public defender websites for any sort of non-discrimination statement or ADA statement. Along with this I was searching for anything mentioning conservatorships on their website.

As I began my search, I quickly noticed that most of the websites did not contain anything accessible regarding ADA or non-discrimination. In an attempt find something, I started digging deeper on their websites. I often got rerouted to the main county website where it would have a segment regarding the ADA/non-discrimination. For many of the

websites I would have to be rerouted twice just to find something that does not pertain directly to the public defender's office.

Merced County has a dedicated tab to conservatorships, but it is only one sentence explaining that they represent people who are under conservatorship. Other counties such as Kern, Sonoma, and Solana County did have any statements on their website nor did it reroute to the county site, so their websites were completely inaccessible. The Nevada County public defender's website had the most accessible ADA statement, as there is an icon in the top right of their website that clearly says ADA.

In conclusion, almost all the public defender's websites are lacking an accessible ADA or non-discrimination statement. To proceed with this, we may request the public defender's offices to change their website to clearly include these statements.

Ascertaining Method of Delivery of Legal Services in Each County

Tom had given me a previously developed directory of public defender departments and contract public defender for legal services in probate conservatorships. I began working off this list by confirming the contractors. My first attempt was to call them with a simple introduction of who I was and explain the reason behind my call. Some of the attorneys were unresponsive too all my methods of contact, so I had to contact the board of supervisors to confirm that they were still contractors. One of my most interesting finds was in Sutter County. The original list I was working off stated that it was a contract public defender county. I then found that the attorney was originally a contractor providing legal services including probate conservatorships beginning in the 1990's. Now he is the head public defender of Sutter County, and has an agreement with

the county that permits him to contract third parties at his discretion. For the contractors it turned out that most of this list was up to date besides a few exceptions.

Moving onto the public defender departments I had the same approach as the contractors, and I had similar results. Most of the list had it correct with a few exceptions. Some of the staff members informed me that a contractor handled these cases, so I had to arrange the list accordingly. One intriguing find I had was in Contra Costa County. To my surprise a public defender from the county informed me that probate conservatorships are handled by the criminal conflicts panel. The criminal conflicts panel is contracted by the county administration. At this point the directories are up to date and are edited on a rolling basis as new information comes in. The contract between the criminal conflicts panel and Contra Costa County and a sample agreement between the public defender and third parties in Sutter County has been requested.

Identifying Public Defender Who Handles Probate Conservatorship Proceedings

After determining which public defender offices handle probate conservatorship proceedings, it was necessary to identify the attorney who handles these cases. My first attempt was by emailing the head public defender to get this information. I found often in the smaller counties the head public defender handled probate conservatorships themselves. But, after a few emails and follow ups to the public defenders' offices, I had many counties that did not respond to any of my contacts. I began calling the offices to get faster results. When I would first ask the question of, "Who within your office handle probate conservatorship proceedings," I noticed a tendency of hesitance and defensiveness to respond to the question. Then when I explained my role at Spectrum and our goals, they would reveal the information about the attorney. This task has been

completed as I have received definitive responses from all of the public defenders' offices on the list.

Obtaining Written Agreements for "Contract Public Defender" Offices

After determining who the contractors were came the task of obtaining and analyzing their agreements with the county. My first attempt of obtaining the contract was contacting the attorney via email. I received some feedback by doing this, but it was primarily by directing me towards the entity in the county that would be able to provide the contract. There were also many responses such as from Yuba County that would not give up their contract.

After a week had passed on the email assignment the time had come to do record requests through each of the counties we had not received. The counties do not have a uniform system of processing these type of requests so there was a fair amount of research and phone calls done before sending off the request. There were three major categories of how to request the contract: 1) Public record request portal, 2) administrative office, and 3) board of supervisors. There were a few smaller counties that had a designated person in the county that can handle this request, but most requests were in one of the three categories outlined above.

In the smaller counties, some of the administrative officers knew the contractors by name and were able to provide the contracts the day I had requested them. Another issue that arose with requesting these contracts, is when I would specify "the most recent contract", the county official would just send me the most recent amendment. This would cause a delay as then I would have to clarify that I need the original contract as well.

Overall, this was a great learning experience to how counties differ in handling the same request. At this point in time, we are only waiting for the Kings County contract to be clarified and to receive the Riverside County contract.

Record Requests to Public Defender for Statistics and Materials

Tom, John, and I devised a list of 12 items that we needed to request for our report. We decided it to be best to split the list into two separate requests. The first request which had been sent out in early July had four items with subsections within it. After doing research on how to complete the PRA request to the public defender's office I confidently sent them out, expecting fast responses and responsive records. This did not turn out to be the case.

After about a week of sending out the requests I did not have any responses, but I had a phone call with an attorney within the Sonoma County public defender's office. We had a very long conversation about their office and how it operates. They also asked extensive questions about our purpose with the records we had requested. The attorney was glad to speak with me and to provide the records but described that our requests had cause a great deal of "uproar" within other counties. As time went on, I began receiving responses to the requests which had been sent. The most common response was "XXX county does have documents to records you have requested." I also had a phone conversation with the assistant public defender of Santa Clara, and he stated that although they don't maintain those records on hand, their software system should have responsive records. He said he was glad to assist us because of our mission and went out of his way to contact the IT department to assist our cause.

Follow ups have been sent to the counties that have not responded to our first request. The second request has also been sent out, so we are waiting for responses to our requests. The excel sheets must be updated to organize the responses and keep track of them.

Summary of Caseload Studies

Tom had provided me with seven caseload studies and assigned me the task of extracting any relevant quotes, excerpts, and segments we could use in our discussion of caseload standards in the report. Out of eight studies, there were two that were truly useful. The first being Eight Guidelines of Public Defense Related to Excessive Workloads (American Bar Association 2009) and the second, Guidelines on Indigent Defense Services Delivery Systems (California State Bar - 2006).

The Eight Guidelines from the ABA turned out to be very helpful as the study was directly aimed toward excessive workloads and how caseloads should be managed in each work force. “There are “no exceptions” for lawyers who represent indigent clients, i.e., all lawyers have a duty to furnish “competent” and “diligent” service, as required by rules of professional conduct,” was the quote that summarized the goal of this study made by the ABA and really resonated with me. The eight guidelines that were mentioned also had subpoints that explained how the guideline can be followed and accomplished.

The other studies, although long and in depth, were not very useful for this task. There were not any useful portions that would be applicable for our purpose. At this point in time this task is complete and requires no further research.

Performance Standards Outline

One of the best learning experiences this summer was creating the performance standards outline. After gaining some knowledge through interviews and research by materials Tom provided, I had a general understanding of how probate conservatorships worked. Then I was given extra materials such as the Nevada and ADA guidelines to model our ideal outline of performance standards.

The order of both the ADA and the Nevada guidelines was twisted and some of the steps in were not as detailed as need be. For example, the Nevada guideline only had four records to obtain to satisfy that step in the process, meanwhile we outline ten records the attorney must go through. The main points of the outline include qualification and training, investigation, evaluation of evidence, post-trial, etc. The studies and documents we analyzed did not include a section for procedural options. By piecing together, the materials we created four subsections in the procedural part of our outline: 1) Discovery, 2) Motion to dismiss, 3) Propose Settlement Options, and 4) Demand Trial.

This task is tentatively completed, but if there are new findings the outline should be modified.

About Benjamin

Ben Dishchyan earned a B.B.A. in finance from Loyola Marymount University. He just finished his first year of law school and should graduate in May 2023 from Loyola Law School in Los Angeles. Prior to law school, Ben worked in the elder care industry, placing elders in affordable board and care facilities that met their medical and personal needs. Being a licensed insurance broker, he also has knowledge in the sales and consulting aspects of the insurance market. After law school, Ben's goal is to serve the public need and be a successful public interest attorney.

Directory of Public Defender Offices Providing Legal Representation in Probate Conservatorship Cases

County Departments = 22 / Contract Defenders = 24

Alameda County Public Defender
Brendon Woods
1401 Lakeside Drive #400
Oakland 94612-4305
Phone No. 510-272-6622
Fax No. 510-272-6609
E-Mail Address: brendon.woods@acgov.org

Amador County Public Defenders (Contract)
Randall Shrout, Supervising Atty,
Richard A. Ciummo & Associates
201 Clinton Rd Ste 202 Jackson 95642-2678
Phone No. 209-223-0877
Fax No. 209-223-0831
E-Mail Address: rshrout@ciummolaw.com

Butte County Public Defender Services (Contract)
Philip Heithecker, Esq.
1560 Humboldt Rd Ste 1
Chico 95928-9101
Phone No. 530-345-1647
Fax No. 530-894-2103
E-Mail Address: ph@pheithecker.com

Calaveras County Public Defender (Contract)
Richard Esquivel
692 Marshall Ave #B
San Andreas 95249
Phone No. 209-754-4321
Fax No. 209-754-4143
E-Mail Address: reeesqlaw@yahoo.com

Contra Costa Conflict Panel (Contract)
Independent Counsel, Inc.
William Green, Director
820 Main St Ste 1
Martinez, CA 94553-1226
Phone: 925-384-2124
Email: greenbill@pacbell.net

Colusa County Public Defender (Contract)
Albert Smith
229 5th St
Colusa 95932
Phone No. 530-458-8801
Fax No. 530-458-8506
E-Mail Address: albertsmithlaw@yahoo.com

Del Norte County Public Defender (Contract)
Karen Olson
431 H St Ste A
Crescent City 95531-4019
Phone No. 707-464-2350
Fax No. 707-464-2354
E-Mail Address: ko.lawyer@earthlink.net

El Dorado County Public Defender
Teri Monterosso
3976 Durock Road, Suite 104
Shingle Springs, CA 95682
Phone: (530) 621-6440
Fax: (530) 387-2180

Glenn County Public Defender (Contract)
Geoff Alan Dulebohn
332 W Sycamore St
Willows, CA 95988-2830
Phone: 530-518-3688
Fax: 530-330-7086
geoffesquire@gmail.com

Humboldt County Public Defender
Reavis Marek
1001 4th St.
Eureka, CA 95501
Phone: 707-445-7634

Fax: 707-445-7320
E-Mail Address: mreavis@co.humboldt.ca.us

Imperial County Public Defender
Benjamin Salorio
895 Broadway
El Centro, 92243
Phone No. 760/482-4510
Fax No. 760/352-2587
E-Mail Address: bensalorio@co.imperial.ca.us

Inyo County Public Defender (Contract)
Bishop 93514
Phone No. 760-9206120
Fax No.
E-Mail Address: sophiecbidet@gmail.com

Kern County Public Defender
Pam Singh
1315 Truxtun Ave.
Bakersfield, 93301
Phone No. 661/868-4799
Fax No. 661/868-4811
E-Mail Address: singhp@kerncounty.com

Lake Indigent Defense (Contact)
Mary Heare Amodio
PO Box 1606
Lakeport, CA 95453-1606
Phone: 707-263-5759
Fax: 707-263-3126
lakeindigentdefense@gmail.com

Madera Alternate Public Defender(Contract)
Bonnie Bitter, Supervising Atty.
512 E Yosemite Avenue
Madera 93638
Phone No. 559-661-8673
Fax No. 559-661-1820
E-Mail Address: bbitter@ciummolaw.com

Marin County Public Defender
Jose Varela
3501 Civic Center Drive, #139

San Rafael, 94903
Phone No. 415/473-6321
Fax No. 415/473-6898
E-Mail Address: jvarela@marincounty.org

Mariposa County Public Defender (Contract)
Eugene Action
PO Box 696
Ahwahnee 93601
Phone No. 559-283-9772
Fax No.
E-Mail Address: eugeneaction@hotmail.com

Mendocino County Public Defender
Jeffrey A. Aaron
175 South School Street
Ukiah, CA 95482
Tel. 707-234-6960
Email address: aaronj@mendocinocounty.org

Merced County Interim Public Defender
Vincent Andrade
1944 M Street
Merced, 95340
Phone No. 209/385-7694
Fax No. 209/725-8873
E-Mail Address: Vincent.Andrade@countyofmerced.com

Mono County Public Defender (Contract)
Brad Braaten
587 Old Mammoth Rd # 9H
Mammoth Lakes, CA 93546
Phone: 760-969-2144
e-Mail Address: braatenbrad@outlook.com

Monterey County Public Defender
Susan Chapman
168 W. Alisal Street 2nd Flr
Salinas, 93901
Phone No. 831/755-5058
E-Mail Address: chapmanse@co.monterey.ca.us

Napa County Public Defender
Ronald Abernethy

1127 First Street, Ste 265
Napa, 94559
Phone No. 707-253-4442
Fax No. 707-253-4407
E-Mail Address: ronald.abernethy@countyofnapa.org

Nevada County Public Defender
Keri Klein
109 N Pine Street
Nevada City, 95959
Phone No. 530-265-1400
Fax No. 530-478-5626
E-Mail Address: keri.klein@co.nevada.ca.us

Orange County Public Defender
Sharon Petrosino
801 Civic Center Dr W Ste 400
Santa Ana 92701-4033
Phone No. 657-251-6090
Fax No. 714-479-0825
E-Mail Address: sharon.petrosino@pubdef.ocgov.com

Placer County Public Defender (Contract)
Dan Koukol
11930 Heritage Oaks Place #6
Auburn 95603
Phone No. 530-823-5400
Fax No. 530-852-0150
E-Mail Address: dkoukol@placergroup.com

Plumas County Public Defender (Contract)
Robert David McIlroy
550 Orion Way,
PO Box 3136, Quincy, 95971
Phone: 530-283-5155

Riverside County Indigent Defense (Contract)
Brown, White and Oborne
Mark Flory
300 E. State Street Suite 300
Redlands, California 92373
Tel: 909-798-6179
Fax: 909-798-6189
mflory@brownwhitelaw.com

San Benito County Public Defender (Contract)
Gregory LaForge
339 Seventh Street Suite G
Hollister 95023
Phone No. 831-636-9199
Fax No. 831-636-9499
E-Mail Address: lawforge@pacbell.net

San Joaquin County Public Defender
Miriam T. Lyell
102 S. San Joaquin, Room1
Stockton 95202
Phone No. 209/468-2756
Fax No. 209/468-2267
E-Mail Address: mlyell@sjgov.org

San Luis Obispo County Public Defender (Contract)
San Luis Obispo Defenders
991 Osos Street, Suite A
San Luis Obispo, 93401
Phone No. 805/541-5715
Fax No. 805/541-3064
E-Mail Address: pashbaugh@slodefend.com

San Mateo County Private Defender (Contract)
Lisa Maguire, Chief Defender
333 Bradford, Suite 200
Redwood City 94063
Phone No. 650/298-4047
Fax No. 650/369-8083
E-Mail Address: lisam@smcba.org

Santa Barbara County Public Defender
Tracy Macuga
1100 Anacapa Street, 3rd Floor
Santa Barbara, 93101
Phone No. 805-568-3494
Fax No. 805-568-3538
E-Mail Address: tmacuga@publicdefendersb.org

Santa Clara County Public Defender
Molly O'Neal
120 West Mission Street
San Jose 95110

Phone No. 408/299-7701
Fax No. 408/293-6457
E-Mail Address: molly.oneal@pdo.sccgov.org

Santa Cruz County Public Defender (Contract)
Lawrence P. Biggam
2103 N. Pacific Avenue
Santa Cruz, 95060
Phone No. 831/429-1311
Fax No. 831/429-5664
E-Mail Address: lbiggam@scdefenders.com

Shasta County Public Defender
William S. Bateman
1815 Yuba St,
Redding, 96001
Phone: 530-245-7598
Fax: 530-245-7560
Public_defender@co.shasta.ca.us

Sierra County Public Defender (Contract)
J. Lon Cooper
P.O. Box 682
Nevada City, 95959
Phone No. 530-265-4565
Fax No. Not Available
E-Mail Address: jloncooper@gmail.com

Siskiyou County Public Defender
Lael Kayfetz
322 ½ West Center Street
Yreka 96097
Phone No. 530-842-8105
Fax No. 530-842-0135
E-Mail Address: lkayfetz@co.siskiyou.ca.us

Solano County Interim Public Defender
Elena D'Agustino
675 Texas Street, Suite 3500
Fairfield 94533
Phone No. 707/784-6700
Fax No. 707/784-6899
E-Mail Address: EDagustino@SolanoCounty.com

Sonoma County Public Defender
Kathleen Pozzi
600 Administration Drive, #111-J
Santa Rosa 95403
Phone No. 707/565-2791
Fax No. 707/565-3357
E-Mail Address: kpozzi@sonoma-county.org

Stanislaus County Public Defender
Laura Arnold
1021 I Street, Ste 201
Modesto, 95354
Phone No. 209/525-4200
Fax No. 209/525-4244
E-Mail Address: arnoldl@stancounty.com

Sutter County Public Defender (Contract)
Mark Van Den Heuvel
604 B Street, Suite One
Yuba City, 95991
Phone No. 530/822-7355
Fax No. 530/673-7967
E-Mail Address: mvandenheuvel@co.sutter.ca.us
Douglas Tibbitts: tibbitts@pacbell.net
Cases are contracted out to private firms.

Tehama County Public Defender (Contract)
Anu Chopra
PO Box 2194
Chico, CA 95927-2194
Phone: 530-809-9030
Fax: 530-231-2134
anuc3@outlook.com

Trinity County Public Defender (Contract)
Larry Olsen
1720 Walnut St, PO Box 735,
Red Bluff, 96080
Phone: 530-529-1794

Ventura County Public Defender
Todd Howeth
800 S. Victoria Ave., HOJ #207
Ventura, 93009
Phone No. 805/654-2201

Fax No. 805/477-1587
E-Mail Address: todd.howeth@ventura.org

Yolo County Public Defender
Tracie Olson
814 North Street
Woodland, 95695-3538
Phone No. 530/666-8165
Fax No. 530/666-8405
E-Mail Address: tracie.olson@yolocounty.org

Yuba County Public Defender (Contract)
Brian J. Davis
303 Sixth Street
Marysville 95901
Phone No. 530/741-2331
Fax No. 530/741-2254
E-Mail Address: yubapd@gmail.com

Directory of Appointed Counsel Panels Operated by Superior Courts for Indigents in Probate Conservatorship Proceedings

Alpine

Fresno County Superior Court
Mari Henson
Probate Department Manager
1130 O Street
Fresno, CA 93721-2220
11 attorneys on panel / paid $80 per hour

Kings

Lassen

Los Angeles

Modoc

Mono

Sacramento

San Bernardino
Marcela Pena
Probate Managing Attorney
MPena@sb-court.org

San Francisco
Assistant Director of Probate
400 McAllister Street
Department 202
San Francisco, CA 94102
28 attorneys on panel

Tulare

Toulumne

Portions of SB724 Relevant to Zealous Advocacy

AMENDED IN SENATE MAY 20, 2021

AMENDED IN SENATE APRIL 15, 2021

AMENDED IN SENATE APRIL 5, 2021

SENATE BILL **No. 724**

Introduced by Senator Allen

February 19, 2021

An act to amend Sections ~~1051,~~ 1470, 1471, 1826, ~~1850, 1850.5, 1851,~~ 1851.1, ~~2250, 2250.4, 2250.6, 2253, and 2620~~ *and 2253* of the Probate Code, relating to guardians and conservators.

LEGISLATIVE COUNSEL'S DIGEST

SB 724, as amended, Allen. Guardianships and conservatorships.

who is not represented by legal counsel. The bill would specify that the role of legal counsel for a conservatee, proposed conservatee, or person alleged to lack legal capacity is that of a zealous advocate, observing specified legal requirements.

The people of the State of California do enact as follows:

SEC. 2. Section 1471 of the Probate Code is amended to read:

(e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous advocate, consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.

BUSINESS AND PROFESSIONS CODE
Section 6068
Excerpts Relevant to SB724

SB724 states that:

SEC. 2. Section 1471 of the Probate Code is amended to read:

1471. . . . (e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous advocate, **consistent with the duties set forth in Section 6068 of the Business and Professions** Code and the California Rules of Professional Conduct.

Section 6068 states that:

It is the duty of an attorney to do all of the following:

(a) To **support the Constitution** and laws of the United States and of this state. [*Comment*: The Due Process Clause requires that a conservatee or proposed conservatee receive effective assistance of counsel in the proceeding.]

(e) (1) To maintain inviolate the **confidence**, and at every peril to himself or herself to preserve the secrets, of his or her client. [*Comment*: The comments to the Rules of Professional Conduct explain that the requirement of confidentiality applies to information the attorney acquires during and as a result of representing the client in the matter.]

(m) To respond promptly to reasonable status inquiries of clients and to **keep clients reasonably informed** of significant developments in matters with regard to which the attorney has agreed to provide legal services. [*Comment*: Keeping a client with cognitive or communication disabilities reasonably informed requires a professional assessment of the level of the client's understanding and the best methods of ensuring meaningful communication with the client, consistent with the duty to provide reasonable accommodations, including ancillary supports and services, pursuant to the ADA and state disability nondiscrimination statutes.]

Rules of Professional Conduct Relevant to Conservatorship Legal Services

SB724 states that:

SEC. 2. Section 1471 of the Probate Code is amended to read:

1471. . . . (e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous advocate, **consistent with the duties set forth in** Section 6068 of the Business and Professions Code and **the California Rules of Professional Conduct.**

The following are rules relevant to legal representation in a conservatorship proceeding.

Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer

Rule 1.4 Communication with Clients

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;
(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;
(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and
(4) advise the client about any relevant limitation on the lawyer's conduct when

the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.(b)A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidential Information of a Client

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,*or the disclosure is permitted by paragraph (b) of this rule.

Comment

Duty of confidentiality

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].)

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, **whatever its source**, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr.253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these rules, or other law.

Rule 1.8.6 Compensation from One Other than Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:
(a) there is **no interference with the lawyer's independent professional judgment or with the lawyer-client relationship**;
(b) information is protected as required by Business and Professions Code

section 6068, subdivision (e)(1) and rule 1.6.
(c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that **no disclosure or consent is required if**: (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or(2) the lawyer is rendering legal services on behalf of any **public agency or nonprofit organization that provides legal services to other public agencies or the public**.

Comment

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

CHAPTER 2. COUNSELOR

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

CHAPTER 3. ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

(a) A lawyer shall not:
(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;* or
(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
(1) the lawyer's testimony relates to an uncontested issue or matter;
(2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
(3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act.
(b) A lawyer having direct supervisory authority over another lawyer, whether or nota member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

Comment

Paragraph (a)–Duties Of Managerial Lawyers To Reasonably* Assure Compliance with the Rules[1]Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.*
(b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:
(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
. . .
(d) engage in conduct that is prejudicial to the administration of justice;

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.*
(b) In relation to a law firm's operations, a lawyer shall not: (1) On the basis of any protected characteristic, (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
(c) For purposes of this rule:
(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, **mental disability**, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harass mnt prohibited by paragraph (b);
(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making **unlawful discrimination** or harassment in employment and in offering goods and **services** to the public;

Comment

[1] Conduct that violates this rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. (See rule 8.4(a).) In relation to a lawfirm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or non lawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.
[**2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer.**

SB 724 - Right to Counsel

Senate Judiciary Committee Analysis

Excerpts Regarding "Zealous Advocacy"

Page 3
This bill:

5) Provides that the role of legal counsel of a conservatee or proposed conservatee is that of a **zealous advocate**.

1. Author's statement

The author writes:
SB 724 advances the due process rights of conservatees and proposed conservatees by providing them with the guarantee of legal counsel, the clear right to choose an attorney of their preference, and requiring that their attorney be a **zealous advocate** on their behalf.
. . . .

Page 4

While it may be expedient, there is cost to liberty if a conservatee appears before the court without legal representation. There is a cost—and arguable unconstitutionality—to restricting a conservatee's right to be represented by counsel of their choosing. And there is a cost to permitting attorneys for conservatees to ignore their clients' wishes and instead advocate for what they perceive as their clients' best interests.

Page 12

6. Seeks to enhance legal representation in conservatorship proceedings

*a. Mandates legal representation, choice of attorney, and **zealous representation***

This bill, with respect to the role of counsel in those conservatorship proceedings, would:
– Make appointment of counsel mandatory.
– Provide that an attorney must be appointed for the person in an appeal or writ proceeding, in order to advocate for their rights, interests, and stated wishes before the court.
– Provide that a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses any preference for a particular attorney to represent them, the court must allow representation by the preferred attorney, even if the attorney is not on the

court's list of appointed attorneys.26
– Provide that the role of legal counsel of a conservatee or proposed conservatee is that of a **zealous advocate**.

Arguably, at the heart each of these changes with respect to the quantity and quality of legal representation for the conservatee is the issue of the proper role of the probate conservatorship attorney. As described below, conservatorship attorneys, especially those who are court-appointed, are often instructed by courts to serve a role that is more paternalistic than adversarial.

b. The duties of court-appointed counsel

"'The duty of a lawyer both to his client and to the legal system, is to represent his client **zealously** within the bounds of the law.' [Citations.] More particularly, the role of . . . attorney requires that counsel 'serve as . . . counselor and advocate with courage, devotion and to the utmost of his or her learning and ability . . . .' [Citation.]" (*People v. McKenzie* (1983) 34 Cal.3d 616, 631; italics omitted.) Lawyers owe clients duties of competence, diligence, and loyalty, including the obligation to avoid conflicts of interest and maintain confidentiality. (*See* Bus. & Prof. Code § 6808.)27

While an attorney generally may only represent clients who have legal capacity, probate conservatorship attorneys, particularly those appointed by the court, are in a different position because many clients have diminished capacity.28 Existing law is unclear with respect to the attorney's role in such cases. Sections 1470 and 1471 provide for the appointment of an attorney to protect the client's "interests."29 This can be construed to mean that the attorney may substitute their own judgement for the client's.

Page 14

Some courts routinely encourage or require attorneys to provide courts with reports regarding their clients that include the attorney's belief about the client's best interest.34 According to the Guide, "[o]ne school of thought considers the attorney—even one appointed by the court—to be a **zealous advocate** for the client's wishes."35 The other school of thought "gives the court-appointed attorney the professional discretion to conclude that the course of action selected by the partially impaired client is not appropriate," meaning that "the attorney is free to make recommendations contrary to the client's stated wishes."36

Page 15

c. Arguments that court-appointed counsel should be zealous advocates

A 2009 report showed that the likelihood of a conservatorship being established for a proposed conservatee with a court-appointed attorney was 90 percent, as opposed to the

73 percent when the proposed conservatee did not have a court-appointed attorney.37 The report suggests that court-appointed attorneys for proposed conservatees may be too collaborative with the court, court investigator, and proposed conservators. Although all parties agree that a probate conservatorship is an intervention process intended to benefit the proposed conservatee, the report suggested that court-appointed attorneys are not adversarial enough to protect the best interests of the proposed conservatee from completely losing the right to make their own decisions.38

A 2019 article entitled *A Lawyer is a Lawyer is a Lawyer* argues that "the practice of requiring or encouraging appointed attorneys to report to the court about what the attorney believes is in the best interests of the proposed conservatee should be ended, and California should instead follow state-wide, uniform procedures that encourage appointed attorneys to fulfill their duty to act solely and only as zealous advocates for their clients."39 Furthermore, "[t]he California attorney is required to be a loyal, confidential, and zealous advocate regardless of the client's mental condition."40 The authors argue that anything less could violate duties of confidentiality and loyalty and raise constitutional concerns of due process and equal-protection.41 The authors also point out that the California Supreme Court rejected ABA Model Rule 1.14, which provides:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.42

Page 16

The article contrasts the role of court-appointed attorney with guardians ad litem. The former, the authors argue, are officers of the court but have duties only to their clients.43 The latter are direct agents of the court, responsible for investigating the situation and offering a determination of the person's interests.44

. . .

The role that court-appointed attorneys play in some counties raises serious questions as to whether conservatees and proposed conservatees are getting adequate legal representation. And the fact that some courts rely on attorneys to behave more like investigators underscores the need to finally implement the 2006 reforms—the other part of this bill. By invigorating the courts' oversight powers and ensuring that clients get the robust legal representation they deserve, the bill provides important protections to vulnerable individuals, celebrity or otherwise.

Page 17

The author writes:

A conservatorship is arguably the most consequential civil restriction levied against Californians. The court, acting in what it decides as the conservatees best interest, is effectively depriving an individual of fundamental rights—to manage property, to spend money, to handle their own medical affairs, even to make everyday decisions about what to eat or who to spend time with. Such consequential, life-altering restrictions should never be applied without the presence of attorneys who are constantly advocating for a conservatee's interests, and seeking the least restrictive alternatives to the abridgment of their civil rights. Furthermore, our courts and attorneys should never—for expediency or efficiency's sake—neglect to apply the fullest extent of best practices that California statute requires.

Page 18

The Spectrum Institute applauds all aspects of the bill that would make conservatorship proceedings more adversarial, writing:

SB 724 would require the court to allow a conservatee or proposed conservatee to be represented by the attorney of their choice. The bill implements the due process right of a civil litigant to be represented by a privately retained attorney. The bill is consistent with the legislative intent manifest in various sections of the probate code.
[…]
Everyone with an attorney is entitled to have counsel be a **zealous advocate** defending their rights and promoting their stated wishes. Unfortunately, that often does not happen. In many cases, courts instruct appointed counsel to act as "the eyes and ears of the court" and to advocate for what counsel believes is in the client's best interests—even if this requires counsel to be disloyal to the client or violate their right to confidentiality. In places such as Los Angeles, local court rules such as Rule 4.125 give appointed counsel a dual role. Attorneys are told to represent the client but also to help the court resolve the case. SB724 would remove this ethical tension by clarifying that counsel has one duty: to be a **zealous advocate**.

Amendment 3

Additionally, while it is generally understood that an attorney's role is that of a zealous advocate, the term "zealous" is not used in Business and Professions Code section 6068, which governs the ethical duties of attorneys. To avoid confusion and make it clear that counsel for a conservatee or proposed conservatee must act consistent with the general rules of ethics, the following changes will be made:

Amend section 1471(e) and (f) as follows:
(e) The role of legal counsel of a conservatee or proposed conservatee *conservatee, proposed conservatee, or person alleged to lack legal capacity* is that of a **zealous advocate**, *consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.*

ALTA CALIFORNIA
REGIONAL CENTER

2241 Harvard Street, Suite 100, Sacramento, CA 95815. Tel (916) 978-6400

March 17, 2017

Thomas F. Coleman
Legal Director
Spectrum Institute
9420 Reseda Blvd., #240
Northridge, CA 91324

Mr. Coleman:

I am the Legal Services Manager of Alta California Regional Center (ACRC), a nonprofit corporation organized and existing pursuant to the laws of the State of California and contracted with the State of California to provide services and supports to individuals with developmental disabilities. Part of my responsibility at ACRC is to manage and provide oversight of conservatorships of regional center clients, including reviewing newly proposed conservatorships and monitoring clients under existing conservatorships. Based upon my years of experience in this role, I believe that the current conservatorship law and procedures in California are insufficient to protect the rights of individuals with developmental disabilities.

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. The net result is that in general conservatorships, the probate courts are deprived of objective test data reflecting the proposed conservatee's level of intellectual and adaptive functioning, as well as the regional center's recommendations regarding conservatorship, in making these incredibly important decisions.

Moreover, I have concerns over the qualifications and focus of the court-appointed attorneys assigned our clients for limited conservatorship petitions. I have personally met court-appointed attorneys who represent themselves as Spanish speaking whose Spanish is so poor that they are unable to communicate with their Spanish-speaking clients. More concerning is the lack of familiarity and training of court-appointed attorneys about individuals with developmental disabilities and their rights. It is my understanding that an individual's attorney should advocate for the client to retain

his/her civil rights. In practice, the court-appointed attorneys I have seen nearly always support removal or restriction of their own client's civil rights. I'm unaware of why this should be different for an individual with a developmental disability.

Additionally, petitioners and their attorneys are often unaware of the legal requirement to serve a copy of conservatorship petitions on the regional center at least 30 days prior to the conservatorship hearing. Savvy courts will not allow conservatorship hearings to proceed until after they receive proof the regional center has served at least 30 days before the hearing. However, I have seen multiple instances of courts granting conservatorship petitions without the regional center receiving notice, much less recommendations—this typically occurs in smaller counties.

Also, in my opinion, the presumption of attorneys and probate courts that parents and family members are always suitable conservators for their relatives with developmental disabilities should be reversed for our clients' protection. In my experience, even the most well-meaning and loving family member, once given conservatorship authority, can easily make decisions which unduly restrict the rights of the conservatee, and at worst, can seriously compromise the individual's health and safety. And the court's statutory biennial review of conservatorships (which does not always occur) has historically been insufficient to prevent this type of abuse.

Finally, conservatorship is not the least restrictive method of providing assistance and protection to individuals with developmental disabilities. Probate Code Section 1821(a)(3) requires conservatorship petitions to list all "alternatives to conservatorship considered by the petitioner or proposed conservator and reasons why those alternatives are not available." In reality, petitioners can simply check a checkbox on the petition form and need provide no explanation whatsoever of why the alternatives were not available. ACRC continues to recommend that clients and families consider and exhaust the use of less restrictive methods for providing assistance and protection to individuals with developmental disabilities before even considering seeking conservatorship. Such alternative methods include, but are not limited to, supported decision making, regional center funded services and supports, the regional center planning team process, powers of attorney, written consents for disclosure of records/information, and assignments of educational decision making rights. I note, however, that local school districts, juvenile dependency courts, and probate attorneys do not share this perspective.

Should you have any questions in this regard to this letter, please do not hesitate to contact me.

Sincerely,

Robin M. Black

Robin M. Black
Legal Services Manager
Alta California Regional Center
(916) 978-6269
rblack@altaregional.org

ASSEMBLY THIRD READING
AB 625 (Arambula)
As Amended May 24, 2021
Majority vote

SUMMARY

Directs the State Public Defender, in consultation with the California Public Defenders Association and other subject matter experts, and subject to an appropriation of funds in the annual Budget Act, to undertake a study to assess appropriate workloads for public defenders and indigent defense attorneys and to submit a report with their findings and recommendations to the Legislature no later than January 1, 2024.

Major Provisions

COMMENTS

According to the Author
According to the author, "Despite the U.S. [United States] and California Constitutions guaranteeing the right to counsel, in many places economically disadvantaged defendants are not represented or are underrepresented. Indigent defendants are often forced to wait in jail for long periods of time before their sentencing. Public defenders or assigned counsel are too often forced to oversee countless numbers of cases at once, giving short shrift to investigation, case preparation, and legal research. They often meet their clients for the first time minutes before critical proceedings. Moreover, prosecutors are frequently equipped with greater resources and larger staffs than that of public defenders. Access to an attorney means little if they lack the time, resources, or skills to be an effective advocate. The absence of strong, well-resourced indigent defense systems offends the U.S. and California Constitutions, leads to deeply unfair results, and contributes to our overburdened jail and prison systems. AB 625 will improve California's indigent defense systems to ensure quality representation for all defendants, regardless of income or social status."

Arguments in Support
According to the *California Attorneys for Criminal Justice*, "AB 625 would direct the State Public Defender to study the indigent defendant caseloads of public defenders and defense attorney. The caseloads of public defenders and indigent defense attorneys are notoriously large. Attorneys handling caseloads of upwards of 100 cases at a time is not unheard of, prosecutors get all of the resources, putting public defenders in a position to do more with less. Public defenders must work day and night to protect the constitutional rights of the accused and deserve sufficient resources. CACJ believes that the responsibility and the work that a public defender does deserves full and adequate funding.

"AB 625 will further shed light on these issues by requiring to undertake a study to determine the appropriate ratio of public defenders and indigent defense attorneys to misdemeanor and felony indigent defendants. This study will hopefully lead to greater resources being devoted by the state to indigent defense."

Arguments in Opposition
None.

FISCAL COMMENTS

According to the Assembly Appropriations Committee, one-time cost pressure (General Fund) possibly in the upper hundreds of thousands of dollars for the Office of the State Public Defender in additional staff and resources to gather and analyze data regarding the appropriate ratio of attorneys to indigent clients and to submit a report to the Legislature..

VOTES

ASM PUBLIC SAFETY: 8-0-0
YES: Jones-Sawyer, Lackey, Bauer-Kahan, Quirk, Santiago, Seyarto, Wicks, Lee

ASM APPROPRIATIONS: 16-0-0
YES: Lorena Gonzalez, Bigelow, Calderon, Carrillo, Chau, Megan Dahle, Davies, Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas

UPDATED

VERSION: May 24, 2021

CONSULTANT: Gregory Pagan / PUB. S. / (916) 319-3744 FN: 0000509

Mental Health Project
Disability and Guardianship Project

1717 E. Vista Chino A7-384 • Palm Springs, CA 92262
(818) 230-5156 • https://spectruminstitute.org/

September 7, 2021

Jorge Navarrete
Clerk and Administrator
California Supreme Court
350 McAllister St, Room 1295
San Francisco, CA 94102

Re: Addendum to Our Prior Request Asking the Court to Convene a Workgroup on Conservatorship Right to Counsel Standards

Dear Mr. Navarrete:

Spectrum Institute sent an administrative request to the Supreme Court on July 20, 2021. It asked the Court to convene a Workgroup on Conservatorship Right to Counsel Standards. The request was endorsed by several organizations which were listed in the document.

We are sending this addendum our prior request for two reasons. First, we are advising the Court of another endorsement of which we learned just after we sent the request to the Court. In addition to its LGBTQ Attorneys and Allies Section which endorsed the request, so too has the board of governors of the entire Long Beach Bar Association.

In addition, we ask you to share with the Court a new report which has just been published about public funding of indigent defense services in probate conservatorship proceedings. The report of the Funding and Fees Review Project of Spectrum Institute documents how a fragmented system of legal services in this area has no transparency or accountability. The report shares findings made as a result of an investigation into the delivery of indigent defense services in these proceedings in all 58 counties in California.

Our new report – "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf Ten copies of the executive summary are enclosed for the justices and central staff.

Respectfully submitted:

Thomas F. Coleman
Legal Director

Mental Health Project
Disability and Guardianship Project

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(818) 230-5156 • https://spectruminstitute.org/

September 7, 2021

California Legislature
Senate Judiciary Committee
Hon. Thomas Umberg, Chair
sjud.fax@sen.ca.gov

California Legislature
Assembly Judiciary Committee
Hon. Mark Stone, Chair
alison.merrilees@asm.ca.gov

Re: Public Funding of Conservatorship Indigent Legal Defense Services

Dear Committee Chairs:

Senate Bill 725 (right to counsel) would help correct systemic problems with the probate conservatorship system in California. Assembly Bill 625 (caseload study) would help identify problems that interfere with the ability of public defenders and court appointed counsel to provide conservatees and proposed conservatees with effective legal representation.

Spectrum Institute has just released a report that documents ongoing and longstanding problems with indigent legal defense services in probate conservatorship proceedings. "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf The executive summary of the report can be found at: https://spectruminstitute.org/public-funding-summary.pdf

Passage of SB 725 ad AB 625 would be a step forward, but nowhere near enough to ensure that adults with mental and developmental disabilities have access to justice in probate conservatorship proceedings.

Because of the apparent disparities in the way indigent legal defense services are delivered in California's 58 counties, we urge your committees to study whether the funding of these services should be shifted from the counties to the state. This was done years ago in child welfare proceedings order to improve the quality and consistency of legal services for children and parents. The time has come for the Legislature to consider doing the same to ensure effective legal representation for seniors and people with disabilities who are targeted by or ensnared in probate conservatorship proceedings.

Respectfully submitted:

Thomas F. Coleman
Legal Director

Mental Health Project
Disability and Guardianship Project

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(818) 230-5156 • www.spectruminstitute.org

September 7, 2021

Chairperson Tani Cantile-Sakauye
California Judicial Council
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Re: Request to Amend Court Rules and Judicial Standards

Dear Chief Justice:

We request that the Judicial Council amend the California Rules of Court and the Standards of Judicial Administration to clarify the duties of judges to take affirmative steps to ensure that litigants with known disabilities that may interfere with access to justice receive accommodations or modifications to ensure meaningful participation and effective communications in judicial proceedings.

Rule 1.100 is helpful but not sufficient. The duties of a judge under that rule are only triggered when a litigant makes a request for accommodations. Litigants with significant cognitive or communication disabilities who do not have an attorney cannot invoke the protections of that rule. Federal law requires accommodations or modifications, sua sponte, when a judge knows or has reason to believe that a litigant has disabilities that may interfere with participation in a judicial proceeding but, due to the nature or severity of the disability, the litigant is practically unable to request an accommodation. The current Rules of Court are silent on this issue and therefore provide no guidance to trial or appellate courts when such a situation arises.

The Standards of Judicial Administration contain general principles that are helpful but are not specific enough to provide proper guidance. For example, Standard 10.17(b)(1)(C) states: "All who appear before the court are given the opportunity to participate effectively without undue hardship or inconvenience." This standard is violated when the court has before it an adult with significant mental or developmental disabilities who is the target of a petition for probate conservatorship and who does not have a retained or appointed attorney. When a judge allows the case to proceed without appointing counsel for such an individual, the court is placing an undue hardship on the individual which prevents access to justice in the proceeding.

Standard 10.20(a)(1) is also violated when a judge knows that a litigant without an attorney has significant mental or developmental disabilities and the judge fails to provide that litigant with an attorney to advocate for and defend his or her rights. The standard states: "Ensure

that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants."

A recent survey of superior courts asked whether they had policies regarding providing accommodations to litigants with known or obvious disabilities even without a request – especially where the nature of the disability precludes a litigant from making such a request. Many courts responded. The answer was uniformly "no" – they do not have such a policy.

It seemed clear that someone had given advice to these independent judicial entities – perhaps someone at the Judicial Council – because nearly all of them responded with the same sentence: "In offering accommodations to court users under the Americans with Disabilities Act, the court follows the requirements of California Rules of Court, rule 1.100." That rule requires a court user to request an accommodation. It does not pertain to or require action by a court when no request is made.

Each superior court is a separate constitutionally created entity within the judicial branch. Each has its own obligations under Title II of the ADA. Any yet, these entities rely entirely on Rule1.100 to fulfill their ADA obligations even though the rule has no bearing on sua sponte ADA obligations when a litigant is unable to make a request.

We have written to the Judicial Council in the past about this problem, asking that it use its authority to provide guidance to judges about their affirmative obligations to litigants with mental or developmental disabilities that prevent them from making a request. We also made a presentation on this matter to the Council in person at one of its meetings. We have never received a response, nor are we aware of any action taken by the Council to rectify this ongoing problem – one that adversely affects a significant number of litigants, especially those who are ensnared in probate conservatorship proceedings.

We are raising this issue again because the problem surfaced in a new report we have just released. "Public Funding of Legal Services in Conservatorship Proceedings" focuses on the disparate policies and practices among the 58 counties and local superior courts regarding indigent legal defense services for conservatees and probate conservatees. The report contains information that underscores the problem that for many such litigants the superior court fails to appoint them an attorney, thereby requiring them to represent themselves – a task that they obviously cannot do because of the nature and severity of their disability.

A "whistle blower" report from the Alta California Regional Center called our attention to this problem several years ago. We previously shared that letter with the Judicial Council, but to no avail. A complaint was filed with the Sacramento County Superior Court alleging that its failure to appoint counsel for a significant number of proposed conservatees – some seniors and others adults with developmental disabilities – violated Title II of the ADA. That too was brought to the attention of the Judicial Council, again without any action to remedy this problem.

We submitted to the Judicial Council a document divided in two sections. On the left is the

pronouncement by the Council that if no request is made that no accommodation will be provided. On the right are statutory and regulatory provisions, as well as federal judicial precedents, making it crystal clear that requests for disability accommodations are not required when the disability is known or obvious to the public entity, especially when the nature of the disability precludes a request. It appears that these precedents have had no impact on the Judicial Council since no action has been taken to modify the Rules of Court or the Standards of Judicial Administration to address this matter.

One action that could be taken, as a start, would be to amend Rule 1.100 to add a provision stating that this rule is not intended to relieve courts of their obligations, sua sponte, to provide accommodations or make modifications to judicial policies and procedures when a litigant has an obvious or known disability that may interfere with meaningful participation or effective communication in a judicial proceeding. A second provision could also be added, similar to one in Washington State, advising courts that appointment of an attorney may be necessary as a disability accommodation to ensure litigants with cognitive disabilities have access to justice in judicial proceedings. (Washington State Court Rules - GR 33)

We are asking the Judicial Council, again, to take action to provide guidance to trial courts regarding their obligations to provide disability accommodations, even without request, to litigants with known or obvious disabilities – such as litigants in probate conservatorship proceedings – and that one necessary accommodation may be the appointment of counsel.

Respectfully submitted:

Thomas F. Coleman
Legal Director

References:

https://spectruminstitute.org/ada-compliance.pdf

https://disabilityandguardianship.org/teach-thyself.pdf

https://disabilityandguardianship.org/01-complaint-dd.pdf

https://disabilityandguardianship.org/cal-vs-feds.pdf

https://disabilityandguardianship.org/alta-letter.pdf

https://disabilityandguardianship.org/sacramento-essay.pdf

Mental Health Project
Disability and Guardianship Project

1717 E. Vista Chino A7-384 • Palm Springs, CA 92262
(818) 230-5156 • https://spectruminstitute.org/

September 7, 2021

Board of Trustees
California State Bar

Re: Disparities in Publicly Funded Conservatorship Indigent Legal Defense Services

Dear Board Members:

Spectrum Institute has just released a report that documents ongoing and longstanding problems with indigent legal defense services in probate conservatorship proceedings. "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf The executive summary of the report can be found at: https://spectruminstitute.org/public-funding-summary.pdf

The report raises serious concerns about disparities in the way indigent legal defense services are delivered in California's 58 counties. Such disparities indicate that state constitutional protections are being violated. General state laws mandate that counties fund and provide indigent legal defense services for conservatees and proposed conservatees. It appears that despite the constitutional mandate that laws of a general nature are uniform in operation, in these proceedings the quality of legal services is anything but uniform. Such disparities also raise due process and equal protection problems.

Federal and state disability nondicrimination laws may also be violated by a patchwork system of legal services that leave to chance whether people with disabilities are receiving the quality of representation to which they are entitled. Because these clients are not able to complain to the State Bar about deficient legal services, it is up to the State Bar to take affirmative steps to conduct at least minimal oversight of these legal services.

With these concerns and considerations in mind, we urge the State Bar to conduct a quality assurance audit of a sample of probate conservatorship cases in three counties – one with public defender representation, one with contract public defender services, and one with a court appointed counsel program – to evaluate the sufficiency of such legal services.

Respectfully submitted:

Thomas F. Coleman
Legal Director

cc: Jorge Navarrete, Supreme Court Administrator

Mental Health Project
Disability and Guardianship Project

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(818) 230-5156 • https://spectruminstitute.org/

September 7, 2021

Michael E. Cantrall
Executive Director
California Public Defenders Association

Re: Publicly Funded Conservatorship Indigent Legal Defense Services

Dear Mr. Cantrall:

Spectrum Institute has just released a report that documents ongoing and longstanding problems with indigent legal defense services in probate conservatorship proceedings. "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf The executive summary of the report can be found at: https://spectruminstitute.org/public-funding-summary.pdf

The report raises serious concerns about disparities in the way indigent legal defense services are delivered in California's 58 counties. These services are funded by counties and provided either by public defender county departments, private law firms acting as contract public defenders, or attorneys on panels managed by superior courts.

Our study indicates there are excessive caseloads in some offices, caused by under funding and under staffing. In addition, we have found a lack of performance standards to guide attorneys as they provide legal defense services to clients in these proceedings. Lack of accountability and monitoring of these services for quality assurance is another issue.

Some matters can only be addressed by the county governments that fund the services or by the State Bar that licenses and disciplines attorneys. However, there is one area that the California Public Defenders Association could take action. The association could issue a manual with suggested performance standards to help its members deliver the quality of representation that the constitution requires. Such standards, although voluntary, would also help lawyers who deliver indigent legal defense services to conservatees and proposed conservatees comply with state and federal disability nondiscrimination laws.

We urge the officers and board of the association to seriously consider this request.

Respectfully submitted:

Thomas F. Coleman
Legal Director

Mental Health Project
Disability and Guardianship Project

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(818) 230-5156 • https://spectruminstitute.org/

September 7, 2021

Carmel Angelo
Chief Executive Officer
California Association of County Executives

Re: Publicly Funded Conservatorship Indigent Legal Defense Services

Dear Ms. Angelo:

Spectrum Institute has just released a report that documents ongoing and longstanding problems with indigent legal defense services in probate conservatorship proceedings. "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf The executive summary of the report can be found at: https://spectruminstitute.org/public-funding-summary.pdf

The report raises serious concerns about disparities in the way indigent legal defense services are delivered in California's 58 counties. These services are funded by counties and provided either by public defender county departments, private law firms acting as contract public defenders, or attorneys on panels managed by superior courts.

Our study indicates there are excessive caseloads in some offices, caused by under funding and under staffing. In addition, we have found a lack of performance standards in many counties to guide attorneys as they provide legal defense services to clients in these proceedings. A lack of accountability and quality assurance monitoring is another issue.

We are urging executives in each county government to convene a team consisting of the public defender, county counsel, human resources and risk management to develop performance standards, caseload limits, and monitoring mechanisms to ensure that county-funded indigent legal services in probate conservatorship proceedings meet constitutional standards and disability nondiscrimination mandates under federal and state laws. Doing this will serve the dual purpose of improving the quality of legal services while at the same time reducing legal risks to counties for funding or operating deficient legal service programs.

We urge the association to forward this request to county executives.

Respectfully submitted:

Thomas F. Coleman
Legal Director

Mental Health Project
Disability and Guardianship Project

1717 E. Vista Chino A7-384 • Palm Springs, CA 92262
(818) 230-5156 • https://spectruminstitute.org/

September 7, 2021

Civil Grand Jury
Alameda County
1401 Lakeside Drive - Suite 1104
Oakland, CA 94612

Re: A Request to Investigate Conservatorship Indigent Legal Defense Services

To the Grand Jury:

Spectrum Institute has just released a report that documents ongoing and longstanding problems with indigent legal defense services in probate conservatorship proceedings. "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf The executive summary of the report can be found at: https://spectruminstitute.org/public-funding-summary.pdf

The report raises serious concerns about disparities in the way indigent legal defense services are delivered in California's 58 counties. These services are funded by counties and provided either by public defender county departments, private law firms acting as contract public defenders, or attorneys on panels managed by superior courts.

Our study indicates there are excessive caseloads in some offices, caused by under funding and under staffing. In addition, we have found a lack of performance standards in many counties to guide attorneys as they provide legal defense services to clients in these proceedings. A lack of accountability and quality assurance monitoring is another issue.

We are asking the civil grand jury in each county to look into the manner in which county funds are being used to provide conservatorship legal defense services. To our knowledge, no grand jury has ever looked into the way in which indigent defense services are being delivered to seniors and people with disabilities in these cases. Such a study is long over due. Our report could provide a roadmap to guide such a grand jury inquiry in your county.

Respectfully submitted:

Thomas F. Coleman
Legal Director

p.s. A similar request is being made of the civil grand jury in each of the 58 counties.

Mental Health Project
Disability and Guardianship Project

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September 7, 2021

Ms. Rebecca Bond
Disability Rights Section - Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Request to Activate and Broaden an Investigation into Conservatorship Legal Services

Dear Ms. Bond:

Spectrum Institute has just released a report that documents ongoing and longstanding problems with indigent legal defense services in probate conservatorship proceedings. "Public Funding of Legal Services in Conservatorship Proceedings" – is available online at: https://spectruminstitute.org/public-funding-report.pdf The executive summary of the report can be found at: https://spectruminstitute.org/public-funding-summary.pdf

The report raises serious concerns about disparities in the way indigent legal defense services are delivered in California's 58 counties. These services are funded by counties and provided either by public defender county departments, private law firms acting as contract public defenders, or attorneys on panels managed by superior courts.

Our study indicates there are excessive caseloads in some offices, caused by under funding and under staffing. In addition, we have found a lack of performance standards in many counties to guide attorneys as they provide legal defense services to clients in these proceedings. A lack of accountability and quality assurance monitoring is another issue.

The DOJ notified us two years ago that the ADA complaint we filed regarding deficient legal services for adults with mental and developmental disabilities in probate conservatorship proceedings remained pending for review. This new report reinforces the need for the DOJ to activate an investigation into that complaint and to broaden the inquiry statewide.

Respectfully,

Thomas F. Coleman
Legal Director

Disability and Guardianship Project

555 S. Sunrise Way, Suite 205 • Palm Springs, CA 92264
(818) 230-5156 • www.spectruminstitute.org

September 23, 2019

Ms. Rebecca Bond
Disability Rights Section
Civil Rights Division
Department of Justice
950 Pennsylvania Avenue , NW
Washington, DC 20530

Re: Update on ADA Compliance by the State of California

Dear Ms. Bond:

The State of California is systematically violating Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. These violations are occurring in judicial proceedings involving litigants with disabilities. The violations are particularly serious and acute with respect to seniors who have cognitive challenges and adults with intellectual and developmental disabilities involved in probate conservatorship proceedings.

We brought this problem to the attention of the DOJ in 2014 when we filed a voting rights complaint and again in 2015 when we filed a complaint involving deficient legal services that deprive people with disabilities access to justice in court proceedings. The investigation by the DOJ in the first complaint resulted in significant movement toward ADA compliance by the State of California in terms of the voting rights of conservatees. The second complaint is still under review by the DOJ.

Despite our best efforts over the past few years to inform elected officials in all three branches of government about ongoing ADA violations in the probate conservatorship system, not much has changed. Since these officials cannot claim ignorance of the problem, the failure to take corrective actions can best be described as willful indifference. While the primary source of the problem is the judicial branch, officials in the legislative and executive branches are contributing to the situation by failing to take any corrective action.

Tomorrow we are presenting the Judicial Council of California a report titled: "ADA Compliance: A Request to the California Judicial Council to Clarify the *Sua Sponte* Obligations of Courts to Ensure Access to Justice." This report focuses on a problem more generic than the probate conservatorship system. It involves Rule 1.100 and educational materials published by the Judicial Council that misinform judicial officers and court personnel about their affirmative obligations under the ADA and Section 504. This rule and these materials indicate that unless a disabled litigant makes a specific request for an accommodation that courts have no obligation to provide one.

The rules and materials are silent as to the *sua sponte* obligations of courts to provide accommodations for known disabilities that interfere effective communication and meaningful participation in court proceedings and activities associated with such proceedings. The report asks the Judicial Council to take immediate action to amend court rules and educational materials to bring

them into compliance with federal law. Such remedial action will likely cause judges to reconsider current practices that violate the access-to-justice mandates of the ADA and Section 504.

With respect to the probate conservatorship system, we have not only alerted officials in all three branches of government about the ADA violations we have identified, both in policies and practices, but we have made practical suggestions as to what they can do to bring the State of California into compliance with federal law. Appoint qualified and competent attorneys for all conservatees and proposed conservatees. Stop requiring many of them to represent themselves as is done in some counties. Properly train court-appointed attorneys so they are equipped to provide advocacy and defense services that ensure effective communication and meaningful participation for their clients. Develop performance standards so that ADA-compliant legal representation is required rather than voluntary. Devise ways to make the benefits of the State Bar complaint procedure accessible to litigants whose cognitive disabilities preclude them from filing complaints against attorneys who violate ethics or provide ineffective representation. Cure the judicial ethics problem of having the judges who hear these cases also operate the legal services programs that supply the attorneys who appear before them in these cases. Have judges decide cases, not coach conservatorship attorneys on what actions they should take or not take in defending their clients.

While this information may help inform our pending ADA complaints with the DOJ, please do not construe this as a new complaint. This communication and the accompanying materials are for information purposes only – at least at this time. We want to give the Judicial Council, the Supreme Court, and officials in the other branches of government some time to review this new report and take corrective action regarding rule 1.100 and related educational materials.

We also want to give them a some time to respond to the more specific problem of failure to appoint attorneys for conservatees and deficient legal services when attorneys are appointed. However, the pace at which corrective action is taken for the rule 1.100 problem and the conservatorship legal services problem should be quicker than the pace at which a new rule was developed for mandatory training for court-appointed attorneys in conservatorship proceedings. We asked for remedial action in November 2014. A new rule is bring adopted tomorrow – nearly five years later. As laudable as the new training rule may be, the delay in formulating and adopting it is unacceptable.

If the Judicial Council, Supreme Court, and State Bar do not take affirmative steps to address these ADA violations with all deliberate speed, we will approach the DOJ again. However, the next time we bring these matters to your attention we will be making a formal request for your assistance. Unfortunately, since civil rights enforcement agencies in California have declined to address these systemic ADA violations by the judicial branch, it appears that federal intervention may ultimately be necessary to secure access to justice for people with disabilities in California judicial proceedings.

Respectfully,

Thomas F. Coleman
Legal Director
tomcoleman@spectruminstitute.org

cc: Governor Gavin Newsom
Chief Justice Tani Cantil-Sakauye
Assembly Speaker Anthony Rendon
Senate President Eleni Kounalakis

U.S. Department of Justice
Civil Rights Division

Disability Rights Section - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530

June 21, 2019

VIA EMAIL

Thomas F. Coleman
Legal Director
Disability & Abuse Project
2100 Sawtelle Boulevard
Suite 204
Los Angeles, CA 90025
tomcoleman@earthlink.net

Re: *Complaint Filed with the Department of Justice Regarding Court-Appointed Attorneys in Limited Conservatorship Proceedings*

Dear Mr. Coleman:

This letter is to acknowledge that the Department of Justice received your complaints alleging violations under the Americans with Disabilities Act regarding court-appointed attorneys in limited conservatorship proceedings before California courts. The Department has taken no action with your complaint and it remains pending for review.

If you have any questions or additional relevant information, please feel free to contact Elizabeth Johnson at 202-307-3543 or by email at elizabeth.johnson@usdoj.gov.

Sincerely,

Elizabeth Johnson, Disability Rights Section,
Civil Rights Division

Legal Services Program Appears to Violate the ADA

by Thomas F. Coleman
Los Angeles Daily Journal / August 17, 2015

A legal services program operated by the Los Angeles County Superior Court does not appear to comply with Title II of the Americans with Disabilities Act. Adults with developmental disabilities are receiving deficient legal services in limited conservatorship proceedings.

The court operates a Probate Volunteer Panel (PVP) from which attorneys are appointed to represent clients who have intellectual and developmental disabilities. It is responsible for the deficient performance of these attorneys because the court approves who gets on the list, appoints them to specific cases, reviews and approves their fee claims, and mandates them to attend court-approved training programs.

> For all practical purposes, the only accommodation the court provides to these litigants is a court appointed attorney.

Yet the court has been willfully indifferent to the failure of attorneys to provide effective assistance to these clients and has knowingly allowed deficient training programs to operate for many years.

Conducting my own investigation using the court's computers, I discovered that mandatory procedures to protect the rights of proposed conservatees are frequently waived. Optional procedures that would increase the likelihood of a just result often are not utilized, even though they could have been without exceeding the court's time guidelines.

In short, proposed conservatees are not afforded the process they are due. Cases are rushed through the system. Shortcuts are used. Steps are missed. Efficiency, not quality, seems paramount to both the court and the attorneys it appoints.

In the 18 cases I looked at of one attorney, services that could have been performed but were not include: (1) objecting to the lack of an investigation by a court investigator and the lack of an investigator's report even when no investigator was involved; (2) reviewing school records for clients who were enrolled in school; (3) interviewing any staff members at these schools; (4) reviewing the regional center report in several cases; (5) interviewing the doctor who submitted the medical capacity declaration in any of the cases; (6) interviewing any of the relatives, other than the custodial parents, who were identified in the petition; (7) reviewing the most recent Individual Program Plan or any clinical evaluation reports in the regional center files in any of the cases; (8) asking for an expert to be appointed under Evidence Code Section 730 as authorized by law in any of these cases — especially in cases where the right to make sexual decisions was retained by the client upon recommendation of the attorney; and (9) developing an ADA accommodation plan for clients.

An evaluation of 25 additional cases handled by six other attorneys who represented proposed limited conservatees shows a similar pattern of waiving procedural protections

(court investigator reports and regional center reports) and failing to take advantage of procedures that were available and that would have increased access to justice and a fair result — many of which could have been utilized without exceeding the presumptive 12-hour limit for attorney services (per the general order of the presiding judge). This pattern was known to and ratified by a judge.

Title II of the ADA and Section 504 of the Rehabilitation Act place an affirmative duty on state and local courts to ensure that litigants with cognitive and communication disabilities receive access to justice. This is especially so when the litigants are forced to participate in legal proceedings. The duty is amplified, and requires the court to take action on its own motion, when the court is aware that these involuntary litigants have mental or emotional difficulties that impair their ability to participate in legal proceedings in a meaningful manner unless they receive accommodations.

Under circumstances such as those associated with limited conservatorship proceedings, the court must provide accommodations, and modify usual policies and practices, to ensure access to justice for these litigants. For all practical purposes, the only accommodation the court provides to these litigants is a court-appointed attorney.

Having provided such an accommodation, it is the responsibility of the court to ensure these attorneys are properly trained to represent clients with intellectual and developmental disabilities. But my research suggests the court has failed to ensure proper training of these attorneys.

Proposed conservatees lack the ability to know when their attorneys are performing in a deficient manner, and lack the ability to complain and demand a new attorney — so it is the responsibility of the court to put various quality assurance controls in place to ensure these attorneys are giving the clients access to justice. The court has not done so. Judges are rubber stamping the fee claims and ignoring the deficiencies evident in the reports submitted by the attorneys to the court.

There is a clear pattern of ADA violations by court-appointed attorneys, by the legal services program operated by the court, and by the training programs mandated by and implicitly approved by the court. The Los Angeles Superior Court is ultimately responsible for these violations. ◊◊◊

Comment: *After this was published in the Daily Journal, I gave the matter further thought and realized that, as the funding source of this legal services program, the* ***County of Los Angeles*** *is ultimately responsible for these ADA violations. The county is willfully allowing this to happen.*

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit education and advocacy organization promoting justice and equal rights for people with intellectual and developmental disabilities. Email him at: tomcoleman@spectruminstitute.org.

Full report is available at:
https://disabilityandguardianship.org/efficiency-vs-justice.pdf

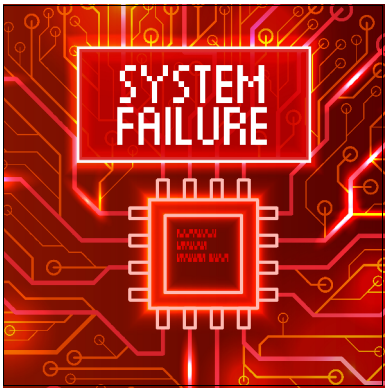
Conservatorship Training Riddled with Errors and Omissions

By Thomas F. Coleman
Daily Journal - August 24, 2021

Conservatorship reform advocates were cautiously optimistic when the Judicial Council adopted new training requirements for attorneys in probate conservatorship proceedings. The mandates of Rule 7.1103 of the California Rules of Court became effective on January 1, 2020.

For years, some of us had pushed for better educational programs for court appointed counsel in these cases. We wanted crucial topics to be included in training curricula as well as performance standards to ensure that trainings would not misinform attorneys or inadvertently encourage malpractice.

We got half a loaf. The Judicial Council expanded the list of topics on which appointed attorneys must be educated annually. Performance standards were not adopted on the theory that setting such standards is not within the council's purview.



As it turns out, this is a situation where half a loaf may not be better than no loaf at all. The proof is found in a mandatory training on limited conservatorships conducted last week by the Los Angeles County Bar Association.

A colleague of mine – also a conservatorship reform advocate – attended the webinar and gave me reports in real time of what was being taught. I went online to review the content of the training materials.

When we compared notes at the end of the webinar, we both came to the same conclusion. Training programs that are not guided by formal performance standards are a recipe for disaster.

Without a checklist of what an effective advocate must do and not do, trainings can provide misinformation and still technically cover the required issue areas. New topics specified by Rule 7.1103 include: the requirements of the Americans with Disabilities Act; case law governing probate conservatorships; legal rights of conservatees and persons with disabilities; a lawyer's ethical duties; and supported decision-making.

Because there are no monitoring mechanisms to evaluate the trainings, local bar associations can award continuing education credits for seminars that leave attendees misinformed on some topics and uninformed on others. That is what happened last week at the limited conservatorship training.

Such an educational debacle would not likely occur at a training session for criminal defense attorneys or attorneys appointed for children and parents in dependency proceedings. In both types of proceedings, there are established performance standards that specify the advocacy activities required of lawyers.

In the field of criminal law, there is a body of appellate law clarifying what attorneys must do to provide effective assistance to their clients. These rulings guide the trainings of public defenders and court-appointed attorneys. It is therefore unlikely that presenters at criminal defense seminars would go rogue by encouraging malpractice.

Counsel appointed to represent minors or parents in dependency proceedings are explicitly guided by general performance standards established by statute and by specific advocacy standards adopted by the Judicial Council. Again, it is unlikely that training programs for these attorneys would deviate from these standards.

Training programs for court appointed counsel in conservatorship proceedings have no guardrails. Presenters are free to include or omit what they wish with only one proviso – that the content pleases the sponsoring organization and the probate court judges who mandate the trainings. As a result, trainings are ad hoc and based on local judicial preferences.

Local preferences were on full display at last week's

limited conservatorship training. Judges want the attorneys to act as de facto court investigators. That is why so much of the training program focused on local court rules rather than constitutional protections and disability nondiscrimination requirements.

Local preferences also influence attorneys to settle cases rather than demand evidentiary hearings. That preference is baked into local rule 4.125, which requires appointed counsel to help the court resolve cases. Such a "secondary duty" is manifest through a requirement that attorneys file a report with the court in which they share the results of work product developed during their investigation. These reports contain facts and opinions that may undermine the prospect of the client retaining his or her rights.

Appointed attorneys take these local rules and preferences seriously. They know that if they put in too many hours and run up fees which the county pays, they may be viewed with disfavor by the judges who operate the court appointed counsel program. Such disfavor may result in fewer appointments and therefore affect their income stream. Some attorneys can earn as much a $100,000 per year from these appointments.

Back to last week's training program. Here is a sample of what was included and what was omitted. Let's start with the latter.

Although each proposed conservatee has serious disabilities that can affect their ability to have meaningful participation in the case without appropriate accommodations, not one word was mentioned about the duties of attorneys and judges under the Americans with Disabilities Act.

Although conservatorship case law is supposed to be covered, two recent appellate rulings were not discussed. One was an order of the Supreme Court decertifying for publication a Court of Appeal opinion that downplayed the importance of searching for less restrictive alternatives. The other was a Court of Appeal opinion, certified for publication, emphasizing that trial courts lack the authority to order a conservatee to visit someone against their will.

There was also no mention of the due process right of clients to effective assistance of counsel. Also not mentioned was the duty of attorneys to preserve issues for a possible appeal. Perhaps that is because, unlike other areas of law, appointed attorneys for conservatees almost never file appeals.

There was no discussion of discovery or preparing for trial. Contested court trials are unusual. Although proposed conservatees theoretically have the right to a jury trial, out of 24,000 conservatorship cases processed in Los Angeles over a recent 12-year time span, there were only two jury trials.

Also missing from the curriculum was how to use social workers or regional center multi-disciplinary teams to develop supported decision-making arrangements as a substitute for conservatorship. Not a word was spoken about an attorney's duty to ensure that an appropriate continuing care plan is adopted if a conservatorship order is granted.

As to the former: what was included in the training was just as alarming as what was omitted. Reports by court appointed attorneys are mandatory. Attorneys were instructed to include their observations and recommendations. The client's limitations should be mentioned. Attorneys are supposed to identify which rights of the client should be retained or restricted.

Requiring attorneys to file such reports contributes to violations of ethics, professional standards, constitutional obligations, and disability nondiscrimination laws. By filing such a report, a lawyer is acting more like a social worker with a law degree than a zealous advocate. A diligent advocate would challenge the constitutionality of these local rules.

Last month a coalition of 10 organizations, including Spectrum Institute and the Long Beach Bar Association, filed an administrative request with the Supreme Court asking the justices to convene a Workgroup on Conservatorship Right to Counsel Standards. The list of issues suggested for investigation did not include deficient conservatorship trainings programs. If such a workgroup is eventually created, this issue should be placed at the top of the list, with last week's training session introduced as "Exhibit A." ♢ ♢ ♢

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for conservatorship reform, disability rights, and access to mental health care. Email him at: tomcoleman@spectruminstitute.org

ALAMEDA COUNTY
PUBLIC DEFENDERS

BRENDON D. WOODS | Public Defender

Comments on Public Funding Report

(Reformatted from Email)

August 25, 2021

Hello Tom,

In order to meet the deadline, I asked John to review the report in its entirety and to provide feedback. I am still working my way through it, but I have reviewed John's comments and I agree with them. See the attached document. *(Ed. Note: Substantive Comments are attached.)*

However, I want to add a few additional comments. I do not agree with the premise that having the state take over the funding of indigent legal defense services from the counties will improve the quality of representation unless the state provides adequate funding. The dependency model you site as a success is severely underfunded. Please talk to those doing that work, especially the ones providing parent side representation. The successful models rely significantly on independent fund raising through philanthropic organizations.

Jurisdictions are reluctant to do so but I think setting a case cap and making sure appropriate funding is allocated for the number of cases handled would be a huge improvement. However, I do see some merit in a separate office that does this work within the county because it is different than core criminal defense practice that public defenders primarily specialize in. It could also remain a function of the public defender with training and perhaps making sure there is proper cross training and having it be an assignment that is occupied for a longer period of time. We can discuss that more.

Finally, I take exception to your characterizations of our meetings and what you describe as "defensiveness and lack of transparency". I would describe it as doing my due diligence. There were questions that I needed to have answered before we moved forward. I thought that it showed a level of respect and commitment to the issue, that I showed up in person, instead of having someone else from my office attend the meeting to gather more information. I also did respond and offer for Mr. Plaine to meet with you, even if it was sometime later.

I think you underestimate how difficult it is right now to operate a public defense office in the middle of a pandemic with caseloads that continue to rise without corresponding resources to handle the increase. I am hopeful that we can work together to improve the practice, but please recognize the significant issues we are facing and that our schedules may not exactly align. I hope you find our comments helpful and I am committed to improving our practice in all areas of indigent defense.

Sincerely,

Brendon

Substance recommendations:

* In the project section on page 3, paragraph 2, you mention that in the process of doing research, you discovered that, "there is also a problem with the manner in which public funds are being used to pay for legal services for indigent adults who are conservatees or proposed conservatees. Issues of under funding the public defenders, excessive caseloads, and deficient legal services for indigent adults also need to be addressed."

The body of the report focuses on the thesis that "our research has found no evidence that public funds are being used to support services that provide these vulnerable adults with effective assistance of counsel or that the attorneys who deliver these services are consistently complying with ethical duties and professional standards". The information on pages 12-52 focuses on various facets of the above thesis.

If I stand in the shoes of the targeted audience (Supreme Court, Legislature, Judicial Council, Association of Counties, PD Association, State Bar, DOJ), I was hoping to see more information on "funding". For example, what is the size of budgets the counties are operating with, what is the size of the budget given to the provider of indigent legal services (be it PD office, Contract attorney offices, or money given to superior court for appointment of counsel), and what percentage of the entire operating budget is given to indigent legal services. For the counties that appoint counsel using the Superior Court, it would be interesting to know the following: is there a cap on hours, how much does the attorney get paid, to compare that form of service delivery to Contract Attorney offices and PD offices who presumably have employees on salary. I would like to know the amount of funding each entity receives. On page 55 of the report, when you spoke about the creation of a workgroup, one of the areas of inquiry you proposed was the adequacy of county funding for conservatorship legal defense service. I was really hoping that this information would be contained in your report and expanded upon. Without it, the reader is left to speculate.

* You also make many comparisons to the juvenile dependency system and how that system evolved caseload caps and performance standards which should be adopted in the conservatorship system. A detailed section on how this evolved in juvenile court would be helpful. It would be great if you could also include how budgets for dependency services changed during this evolution since you indicated it changed from local funding to state funding.

* One of the people on the project advisor team was Alameda County Supervisor Nate Miley. It would have been interesting to hear his perspective or any county government official in the position of deciding on a budget as to what goes into making funding decisions for indigent legal services. Additionally, is the County able to "earmark" money for conservatorship representation or do they leave that up to each provider of legal services regarding how they allocate their budget and resources. What role can they play in improving indigent legal services.

* Another person on the project advisor team was Deputy Public Defender Susan Sindelar. The biography said that "she brings to the fee study the perspective of a legal advocate who is paid from county funds." It would have been interesting to hear her perspective on the

process of funding the conservatorship unit of her office. From the report, I didn't see any information that someone reached out to her.

* Including how funding works in government offices outside of California that provide in your opinion good representation would be helpful for comparison- i.e. on page 54 of the report when you discuss the Legal Aid Center of Southern Nevada.

Again, I found the information presented in the report extremely thoughtful and relevant to the role of counsel in conservatorship cases and the changes that need to be made, but it doesn't really address the funding issue which, given the title, I thought would be the focus of the report. In order to be more useful and complete, the report needs more information regarding the people (county government officials) paying those on the front line and in the trenches providing conservatorship representation. (Public Defender Offices, Contract Attorney Offices, etc.)

Comments From
Rosalind Alexander Kasparik

Advisor to the Funding and Fees Review Project

The report demonstrates that you and your legal colleagues get the problem and have some very well-considered ways to solve the guardian/conservator morass. This work is so important. I'm glad that Spectrum Institute has undertaken its study. David's spirit is too. My comments and concerns are not legal. They are general in scope and personal in detail.*

National Problem. I know you're focused on the state of California because each state has its own probate rules. I've always wondered why there aren't national/federal rules for probate conservatorship proceedings. That there's no federal oversight to meaningfully assist in our dire situations was one of the most disheartening discoveries David and I made. I called our Congresspersons and Senators naively assuming there was an oversight commission on elder abuse that involved finding and punishing guardian and fiduciary conservator abuses. There wasn't one. Could the DOJ form such a commission to be led by the work already undertaken and committed to by the advocates at Spectrum Institute?

Attorney Disinterest. Adults ensnared in conservatorship proceedings also lack the ability to find willing attorneys to act on their behalf and that of their loved ones. This was my first insurmountable hurdle that plagued and hurt us until Tom Coleman came along to volunteer his help. I paid two lawyers who both quit and did little or nothing to help David or me. We couldn't find a decent lawyer to protect even the most human of David's rights in the nursing home system. The lawyers all told me they were powerless to move David out of the most harmful of those places because I had no standing, and the Guardian Ad Litem had the court's support because she was appointed by the court.

Shift to State Funding. It's brilliant to align conservatorship legal services with education protections and rights. I hope your audience for this report sees that brilliance.

Post-Adjudication Phase. I'm glad you mention post-adjudication cases and their nebulous import to those charged with protecting people with severe disabilities. When the nursing home gave away David's bed, to get David out of a Scripps Mercy hospital holding office and released to my care, David' doctors and the lawyers at Scripps Hospital had to write letters requesting that the judge revise her orders. The judge refused to do that without Guardian Ad Litem's approval. The Guardian Ad Litem left David in a hospital office that had been converted to a makeshift room for three weeks. She refused to answer my calls, refused to respond to the proposed order an empathetic lawyer from church had prepared. In fact, she did nothing "post-adjudication" on David's case until I carried the proposed order to her office and sat—refusing to leave—until she saw me and did her job which was supposed to be helping David.. I waited all day. She came out of her office at 5:30 p.m., and said she'd read and sign off on the proposed orders. She then left David in the hospital office for another three days. David was obviously not a priority for her or the judge. I'm glad you included the "zealous advocacy" reference in your discussion of SB 724.

** Rosalind's comments arise from her experience with a conservatorship in which she and her fiancé, David Rector, were entangled for several years in San Diego.*

Comments From
Attorney Cheryl Mitchell
Advisor to the Funding and Fees Review Project

Freedom of Religion. One topic that was omitted in the discussion of constitutional rights is freedom of religion. This comes up a lot of the guardianship cases I am reviewing in Washington State. Guardians routinely deny their incapacitated persons the right to attend church services, to have visitors from their religious institutions, and to engage in religious practices. In cases where religions have prohibitions on consumption of types of food (e.g., some Jewish persons do not eat milk and meat together in the same meal, they do not eat pork products, etc.) the guardians frequently ignore these religious rules and prohibitions. Some guardians think these rules are "ridiculous."

Judicial Bias. One thing that I have observed over and over again in guardianship (conservatorship) cases is that judges appear to believe that all guardians are kind, loving, compassionate and benevolent persons and that guardianship is a panacea that will solve all of the problems a person may have. In the infamous Nevada case of guardian April Parks, the court commissioner said something like, "I love these guardians who are social worker-types." This was a quote from the story published in *The Atlantic Magazine*. I was struck by it because it demonstrated just how out-of-touch the court commissioner was with what actually happens in these cases.

Public Defender Reimbursement. I was surprised to learn that in California public defenders represent persons who are unable to afford an attorney in conservatorship cases. I have a question: Are public defenders or other attorneys appointed when a person is truly indigent, or are there rules about just what assets a person can have? In our state, attorneys are appointed for individuals who are subject to guardianship petitions when it would be a hardship for the person to hire an attorney. In many of these cases, the alleged incapacitated people own houses, but not much else. If they had to pay an attorney it would mean that they would be required to sell the house or take out a mortgage. In fact, in one case here, the guardian ad litem, who had been appointed at public expense, argued just that. She wanted the case converted to private-pay at a higher rate than the public-pay rate and she argued repeatedly that the elderly woman should be required to take out a mortgage (which the woman could not make monthly payments on) or sell her house.

Need to Educate. There is a California attorney, Bill Handel, who has a radio talk show. I think that it is a daily show, but it is only played here on Saturday evenings, so that's the only time I hear it. Bill Handel is like Don Rickles the comedian, in that he constantly pokes fun at those who call him for legal advice. Someone called him and told him that the caller's relative was fighting a conservatorship petition and the relative was being represented by the public defender. Mr. Handel ridiculed the caller, saying that public defenders never become involved in representing people in conservatorship cases. So clearly, there are a lot of people, including attorneys in California, who are totally unaware of the way in which the guardianship-conservatorship system works. There is a great deal of education that needs to be done.

Cheryl Mitchell is an attorney in Washington State.

Portions of Bill Relevant to Right to Counsel and Zealous Advocacy

AMENDED IN SENATE SEPTEMBER 3, 2021

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL No. 1194

Introduced by Assembly Member Low
~~(Coauthors: Senators Allen and Laird)~~
(Principal coauthor: Senator Allen)
(Coauthor: Senator Laird)

February 18, 2021

An act to ~~add Sections 6563 and 6584.5 to~~ *amend Section 6580 of, and to add Section 6563 to,* the Business and Professions Code, and to amend Sections 1051, *1460, 1471,* 1826, 1850, 1850.5, 1851, 1851.1, *1860, 1860.5, 1862, 1863,* 2250, ~~2250.4,~~ 2250.6, 2253, 2401, 2620, 2623, 2640, 2641, and 2653 of, to add Sections 1851.6 and 2112 to, and to add and repeal Section 1458 of, the Probate Code, relating to conservatorship.

LEGISLATIVE COUNSEL'S DIGEST

AB 1194, as amended, Low. Conservatorship.

This bill would, instead, require the court to appoint the public defender or private counsel if the conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel. The bill would generally require the court to allow representation by an attorney for whom a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference, even if the attorney is not on the court's list of court-appointed attorneys, unless the counsel *cannot provide zealous advocacy or* has a conflict of interest. The bill would specify that the role of legal counsel for a conservatee, proposed conservatee, or person alleged to lack legal capacity is that of a ~~zealous~~ *zealous, independent* advocate, observing specified legal requirements.

SEC. 6. Section 1471 of the Probate Code is amended to read:

1471. (a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, 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 ~~interest of that~~ person in the following proceedings under this division:

(1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator.

(2) A proceeding to terminate the conservatorship.

(3) A proceeding to remove the conservator.

(4) A proceeding for a court order affecting the legal capacity of the conservatee.

(5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

(b) If a conservatee or proposed conservatee ~~does not plan to retain~~ *has not retained* legal counsel and ~~has not requested the court to appoint~~ *does not plan to retain* 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.~~ *(a).*

(c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if ~~he or she is~~ *they are* able. This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

(d) If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a 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, and the attorney shall provide zealous representation as provided in subdivision (e). However, an attorney who ~~has a~~ *cannot provide zealous advocacy or who has any* conflict of interest with respect to the representation of the conservatee, proposed conservatee, or person alleged to lack legal capacity shall be disqualified.

(e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a ~~zealous advocate,~~ *zealous, independent advocate representing the wishes of their client,* consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.

(f) In an appeal or writ proceeding arising out of a proceeding described in this section, if a conservatee or proposed conservatee is not represented by legal counsel, the reviewing court shall appoint legal counsel to represent the conservatee or proposed conservatee before the court.