

State Bar ADA Alert:

Complaint System is Inaccessible
to Probate Conservatees



Comments to the Board of Trustees
and the Supreme Court on the
Annual Discipline Report

Thomas F. Coleman
Legal Director
Spectrum Institute

April 23, 2021

<https://disabilityandguardianship.org/state-bar-ada-alert.pdf>



Mental Health Project
Disability and Guardianship Project

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April 23, 2021

California Supreme Court
c/o State Bar Board of Trustees

Re: *ADA Alert!* Comments on the Annual Discipline Report for 2020

To the Court:

These comments are intended to alert the Supreme Court, and the State Bar which is an arm of the Court, that the complaint and discipline system of the State Bar is not ADA accessible.

Without modifications to existing policies and practices, the complaint and discipline system is not practically available to people with serious cognitive or communication disabilities who may have received deficient legal services or been victims of unethical practices of attorneys appointed to represent them in probate conservatorship proceedings.

We estimate that there may be as many as 70,000 adults with serious cognitive and communication disabilities who are currently living under an order of conservatorship in California. Nearly 50,000 of them are adults with intellectual and developmental disabilities. Another 20,000 or so are seniors with cognitive disabilities or people of any adult age with mental disabilities due to illnesses or injuries.

These cases remain open or active for years. In the case of young adults with developmental disabilities, they may remain active for decades. Active cases flare up from time to time, with a need for court proceedings to resolve disputes involving the conservator or conservatee or both. In these situations, the conservatees are dependent on their court appointed attorneys for legal assistance. The judges and the attorneys in these cases know that the conservatees are people with disabilities who are protected by Title II of the Americans with Disabilities Act (ADA) and its state-law equivalent. Any program or activity that is funded by the state shall meet the protections and prohibitions of Title II of the ADA and federal rules and regulations implementing the ADA. (Cal. Gvt. Code Sec. 11135)

Title II of the ADA applies to state courts. "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts." (*Tennessee v. Lane* (2004) 541 U.S. 509, 530.) Title II "applies to all programs, services, or activities of public entities, from adoption services to zoning regulation." (ADA Update: A Primer for State and Local Government, DOJ, see attachments, p. 28.) This would include the complaint and discipline system of the State Bar.

A public entity shall make reasonable modifications to policies, practices, or procedures in

order to avoid discrimination on the basis of disability. (ADA Title II Regulations, Section 35.130(b)(7))

We estimate that as many as 7,000 new probate conservatorship petitions are filed annually in California. Based on allegations made in verified petitions that initiate these proceedings, judges and the attorneys they appoint to represent these proposed conservatees know that the individuals have serious disabilities that bring them within the protections afforded by the ADA and Section 11135. The proposed conservatees are completely dependent on their appointed attorneys to defend their rights and advocate for their stated wishes.

We have done extensive research documenting that in too many cases the appointed attorneys are willfully depriving their clients of competent services and may be engaging in unethical practices. However, due to the nature of their disabilities, the clients do not know they are receiving deficient services or are victims of unethical practices. Again, due to the nature of their disabilities, the clients are not able to complain to the judges, file a complaint with the State Bar, or file ADA complaints with the appropriate state and federal civil rights enforcement agencies. They almost never have a jury trial. They are not able to appeal to seek redress in the state's appellate courts. In one case, when an interested party tried to appeal to vindicate the rights of the conservatee, the appellate court dismissed the case for lack of standing. (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62.)

The Annual Discipline Report says that highest priority in investigations is given to "cases involving vulnerable victims." In this Tier 1 priority category are cases involving "aged, infirm, incapacitated, disabled." Conservatees and proposed conservatees would, by definition, fall into this priority category. Unfortunately, violations of professional or ethical standards by their attorneys never reach the State Bar for the reasons stated above. For them, this "priority" is an illusory protection.

The Supreme Court and the State Bar should modify the policies of the complaint system to make its benefits available to this vulnerable class of litigants. The Court and the Bar should be pro-active. Title II of the ADA and Section 11135 require as much. "Some people with disabilities are not able to make an ADA accommodation request. A public entity's duty to look into and provide accommodations may be triggered when the need for accommodation is obvious." (*Updike v. Multnomah County* (9th Cir 2017) 870 F.3d 939.) Conservatorship litigants obviously need a modification of complaint system policies and procedures.

The Supreme Court and the State Bar are aware that the complaint system is not accessible in any practical way to conservatees and proposed conservatees. This problem has been brought to your attention through letters, complaints, published commentaries, reports, and presentations at meetings of the Trustees. This educational process has been ongoing since 2014. And yet, no action has been taken by the Court or the Bar to address this problem.

Two pro-active steps immediately come to mind. The State Bar, with approval of the Supreme Court, could adopt performance standards for attorneys appointed to represent conservatees and proposed conservatees. This has been done by the highest court in Maryland. The Probate and Mental Health Advisory Committee of the California Judicial Council identified the Supreme Court and the State Bar as entities with authority to

promulgate such standards. Having such guidance would reduce potential violations of ethics and professional standards and therefore indirectly bring a similar type of preventive benefit to this class of litigants that State Bar investigations do. Such investigations do not only bring accountability to offenders, they also send a signal to all attorneys that there are consequences for breaches of duty. Unfortunately, conservatorship attorneys currently know that there will be no consequences because their clients cannot complain and therefore the likelihood of a State Bar investigation is slim to none.

The second step would be for the State Bar to annually audit a sample of conservatorship cases to verify whether or not there have been violations of ethics or professional standards. Audits are a part of the State Bar's normal function. All attorneys must submit a declaration every three years that they have completed sufficient MCLE credits. Knowing that they may be audited by the Bar helps keep everyone honest. The Bar could require attorneys who are appointed to represent conservatees or proposed conservatees to file an annual report with the bar, including the case numbers of the cases in which they provided such representation. The Bar could do a random audit of a sample number of cases throughout the state. This practice would put conservatorship attorneys on notice that their performance in any given case may be audited. This knowledge would have a preventative effect to reduce willful wrongdoing. It would help make the benefits of the complaint system accessible to clients who, because of their disabilities, cannot file complaints on their own.

There may be other ways to directly or indirectly make the benefits of the complaint and discipline system available to conservatees and proposed conservatees. This is something that the Supreme Court can explore with the assistance of the recently created Ad Hoc Commission on the Discipline System.

There is growing public interest in the conservatorship system in California and guardianship systems in other states. Movies, conferences, and pending state legislation all have raised public awareness that something is not right with the way in which our vulnerable residents are being treated by the legal profession and the judiciary in these "protective" proceedings.

We urge the Supreme Court and the State Bar to become engaged in a process of finding ways to make the benefits of the complaint and discipline system accessible, directly or indirectly, to people with cognitive and communication disabilities in conservatorship proceedings – people who have been meaningfully denied access to this system.

Respectfully submitted:



Thomas F. Coleman

Legal Director, Spectrum Institute

tomcoleman@spectruminstitute.org

cc: Jorge E. Navarrete, Supreme Court Administrator

Kevin Kish, Director, Department of Fair Employment and Housing

Rebecca Bond, Chief, Disability Rights Section, Civil Rights Division, USDOJ

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BOARD OF TRUSTEES NOTICE AND AGENDA

Teleconference

The State Bar of California

www.calbar.ca.gov

Friday, April 23, 2021
1:00 p.m.—2:00 p.m.

Members of the public may access this meeting as follows:

Zoom Link: <https://calbar.zoom.us/j/91429913094>

Call-In Number: 669-900-9128

Webinar ID: 914-2991-3094

OPEN SESSION

The Chair reserves the right to alter the order of items to run an effective meeting. If you wish to assure yourself of hearing a particular discussion, please attend the entire meeting.

-- CALL FOR PUBLIC COMMENT --

Members of the public may speak to any item on the agenda. The Chair reserves the right to limit the duration of the public comment period.

700 MISCELLANEOUS

- 701 [Approval of the 2020 Annual Discipline Report](#)

CLOSED SESSION

NONE

ADJOURN

In compliance with the Americans with Disabilities Act, those requiring accommodations at this meeting should notify Sarah Cohen at 415-538-2363. Please provide notification at least 72 hours prior to the meeting to allow sufficient time to make arrangements for accommodations at this meeting.



The State Bar of *California*

Annual Discipline Report

For the Year Ending December 31, 2020

April 27, 2021

Walker Petitions

Upon determining that a complaint should stay closed, CRU prepares a closing letter to the complainant with an explanation of the reasons for declining to recommend reopening a case. Closing letters also notify complainants of their right to request California Supreme Court review pursuant to *In re Walker* (1948) 32 Cal.2d 488. CRU's closing letters explain the process for requesting review of the decision by the California Supreme Court.

As with second look cases, Walker Petition disposition data shows that only in the rarest of circumstances is the work of OCTC overturned. Table 4 provides information on the number and disposition of Walker Petitions that reached finality in the Supreme Court in each of the past four years. In 2020, the Supreme Court did not grant any Walker Petitions filed by a complaining witness.

Table 4. In 2020, the Supreme Court did not grant any Walker Petitions filed by complaining witnesses.

	2017	2018	2019	2020
Total petitions disposed	130	104	114	109
Granted	0	1	1	0
Denied or stricken ¹⁶	130 (98%)	103 (99%)	113 (99%)	109 (100%)

CASE PRIORITIZATION AND PUBLIC PROTECTION

OCTC continues to identify and prioritize the cases that represent the greatest danger to the public using a case prioritization system developed in 2018. The purpose of case prioritization is to marshal resources in a way that best protects the public from attorneys who pose the greatest threat to the public.

Highest priority cases include those that present significant, ongoing, or serious potential harm to the public; cases involving vulnerable victims including immigrants and seniors; cases of client abandonment; abusive or frivolous litigants; and cases that involve engaging in or abetting the unauthorized practice of law. OCTC devotes the most investigation and prosecution resources to pursuing these cases.

By definition then, when OCTC prioritizes cases that pose the greatest risk of harm to the public, OCTC de-prioritizes cases that present a lower risk of harm. While OCTC generally

¹⁶ Five cases were stricken due to untimely filing or failure to present the case to the Complaint Review Unit prior to filing with the Supreme Court: 3 in 2017, 1 in 2018, and 1 in 2019.

Table D: Case Prioritization System Criteria

Priority	Criteria	Details
1	Significant, Ongoing, or Serious Potential Harm to the Public	<ol style="list-style-type: none"> Respondent has prior discipline that includes an actual suspension and the current alleged misconduct has caused either significant or continuing harm, or the misconduct will cause future harm. Respondent has been disbarred, has been reinstated, and has committed new disciplinable misconduct (i.e., the current alleged misconduct is more than a low level ethical violation that is not likely to recur or is unlikely to result in discipline). Respondent, whether from a Client Trust Account or any other source, has: (a) intentionally misappropriated funds, regardless of the amount, (b) misappropriated \$25,000 or more, or (c) misappropriated funds and has not paid restitution. This criterion does not include mishandling through mere inadvertence (i.e., conduct that does not demonstrate intentional or grossly negligent appropriation). Respondent has committed misconduct against a vulnerable victim, including but not limited to aged, incapacitated, infirm, disabled, incarcerated, immigrant persons, or minors, and the misconduct has adversely affected the victim or the outcome of the matter (e.g., loss of rights or remedies), resulted in serious harm, or the misconduct was committed against three or more vulnerable victims. Respondent has entered into a business transaction with a client or acquired a pecuniary interest that is adverse to the client, and the client was significantly harmed (e.g., money, equity, or rights belonging to the client improperly came under, and remains under, the control of the respondent, the conflict has led to the abandonment of the client or a failure to abide by the client's lawful direction, etc.).
	Abandonment	<ol style="list-style-type: none"> Respondent has abandoned three or more unrelated clients and either: (a) is not cooperating with State Bar investigations, (b) has not refunded unearned fees, or (c) has not returned a client file. Respondent has failed to return a client file following a request from the State Bar to return the file and the matter is one where time is of the essence, for example, claims may become time-barred by a statute of limitations, the case is currently pending, or there are pending appeal rights. Respondent has abandoned their law practice.
	Abusive and/or Frivolous Litigants	<ol style="list-style-type: none"> Respondent has been judicially sanctioned for engaging in abusive or frivolous litigation and either: (a) respondent has engaged in a pattern of misconduct or (b) respondent is continuing to engage in abusive or frivolous litigation.
	Unauthorized Practice of Law	<ol style="list-style-type: none"> Respondent has engaged in the unauthorized practice of law and either: (a) has caused harm to two or more unrelated victims, (b) has not returned illegal or unearned fees to two or more unrelated victims, or (c) has caused harm to a vulnerable victim, including but not limited to aged, incapacitated, infirm, disabled, incarcerated, immigrant persons, or minors. Respondent has aided and abetted the unauthorized practice of law by abdicating control of his law practice to nonattorneys, resulting in client harm.
	Management Discretion	<ol style="list-style-type: none"> Other cases wherein management and/or a supervising attorney, in their discretion, concludes that respondent has caused serious harm; concludes that respondent has engaged in intentional ethical violations; or otherwise concludes the matter is appropriate for Priority One treatment.
	Except for criterion 10, regarding the unauthorized practice of law, cases are not designated Priority One unless the respondent is on active status or will be able to return to active status within one year.	

tomcoleman@spectruminstitute.org

Subject: Public Records Act (PRA) Request
Attachments: PRA - Legal Status of DDS Population 1.2019 to 12.2019.xlsx

From: Sanders, Alexandra@DDS <Alexandra.Sanders@dds.ca.gov>
Sent: Wednesday, December 9, 2020 7:43 AM
To: tomcoleman@spectruminstitute.org
Cc: Blythe, Tom@DDS <Tom.Blythe@dds.ca.gov>
Subject: Public Records Act (PRA) Request

Hi Mr. Coleman. Per your request, please see the attached data regarding conservatorships between January 2019 and December 2019.

Thank you in advance. I hope that you have a great day.

Alexandra Sanders
Department of Developmental Services
Appeals, Complaints, and Projects Section
1600 9th Street, Room 340
Sacramento, California 95814
Desk: (916) 654-1164
Fax: (916) 654-3641

**Conservatee Status of California DDS RC Population
Age 18 and Over on 01/01/2019 and 12/31/2019**

Regional Center	Legal Status								
	2-Public Guardian	3-Has Cons. - not DDS	4-Director of DDS	5-Court (Dependent Child)	7-RC Director	8-Other	9-Unknown	N-No Guardian/C onserv	R-Parent or Relative
ACRC	86	1,898	58	23	*	82	35	9,737	1,183
CVRC	57	982	12	15	*	37	*	8,310	913
ELARC	25	686	*	*	21	32	12	3,099	1,868
FDLRC	*	853	14	*	55	54	*	3,074	539
FNRC	37	736	*	*	*	23	0	3,019	677
GGRC	58	800	*	*	0	25	*	4,052	733
HRC	39	1,392	35	*	0	28	19	4,725	553
IRC	70	834	24	64	38	45	16	13,131	4,590
KRC	10	429	21	15	0	28	*	3,864	492
NBRC	21	945	14	*	*	*	16	4,197	127
NLACRC	14	1,230	21	42	*	31	*	7,797	2,368
RCEB	30	1,043	21	23	0	73	*	7,431	2,506
RCOC	*	2,271	31	13	0	*	*	9,214	115
RCRC	67	190	0	*	*	20	15	1,578	384
SARC	34	1,421	18	15	*	16	45	5,260	2,445
SCLARC	43	1,346	35	48	*	64	34	5,905	99
SDRC	26	2,686	62	34		26	25	9,362	1,828
SGPRC	19	1,173	37	30	*	30	0	4,797	1,042
TCRC	24	876	20	*	*	16	*	5,843	257
VMRC	21	310	*	14	0	131	*	5,368	851
WRC	28	404	12	*	17	14	*	2,473	1,512

Tabulation by Spectrum Institute:

The chart that appears above was provided to Spectrum Institute by the Department of Developmental Services pursuant to a Public Records Act request. The tabulations that appear below were done by Spectrum Institute of the data provided by DDS in this record.

2019 data:

Total adults who were regional center clients:	171,873
Clients in conservatorships:	49,637 (29%)
parent/relative as conservator:	25,082
DDS as conservator:	435
Not DDS as conservator:	22,505
Public guardian as conservator:	709
Regional center as conservator:	131
Other as conservator:	775
Clients not in conservatorships:	122,236

2016 data:

Comparison to 2016 data provided by DDS pursuant to Public Records Act request:	
Total adults who were regional center clients:	155,780
Clients in conservatorships:	43,341 (28%)

Adult Regional Center Consumers (Age 18 and Up)
Client Master File Data as of December 1, 2016

Request 1: The number of adult clients served by each regional center.

Request 2: The number of adult clients served by each regional center who are conservatees.

See table below and corresponding key on the following page.

Regional Center	Legal Status 2	Legal Status 3	Legal Status 4	Legal Status 5	Legal Status 7	Legal Status 9	Legal Status N	Legal Status R	Other	Grand Total
ACRC	101	1,209	59	31	3	26	8,347	1,756	71	11,603
CVRC	52	824	15	22	1	8	7,767	661	39	9,389
ELARC	31	570	8	8	20	14	2,907	1,641	29	5,228
FDLRC	6	472	13	9	55	6	2,699	817	47	4,124
FNRC	42	731	5	6	3	1	3,035	552	23	4,398
GGRC	41	659	6	8	0	5	4,014	536	29	5,298
HRC	29	846	39	18	0	15	4,134	972	18	6,071
IRC	63	304	25	65	42	13	12,322	3,671	47	16,552
KRC	5	359	26	9	4	0	3,532	387	31	4,353
NBRC	22	735	14	12	1	10	3,990	217	11	5,012
NLACRC	10	1,005	23	38	1	13	7,524	1,632	32	10,278
RCEB	46	590	25	29	6	11	6,554	2,944	69	10,274
RCOC	4	1,658	33	19	0	0	8,625	5	2	10,346
RCRC	56	196	0	4	1	14	1,568	268	14	2,121
SARC	45	1,085	19	11	3	78	4,812	2,244	25	8,322
SCLARC	55	836	41	52	3	24	5,413	147	77	6,648
SDRC	19	2,014	59	25	0	26	8,602	1,626	13	12,384
SGPRC	22	853	39	37	9	0	4,799	996	26	6,781
TCRC	46	471	21	9	1	10	4,311	1,477	40	6,386
VMRC	27	264	15	12	0	4	4,939	738	124	6,123
WRC	45	217	15	15	16	13	2,106	1,645	17	4,089
Grand Total	767	15,898	500	439	169	291	112,000	24,932	784	155,780

Legal Status Key		
<i>'Legal Status' answers the question: "Does the consumer have a judicially appointed guardian or conservator?"</i>		
Legal Status	Description	Definition
2	Public Guardian	The public guardian for the county of residence of the consumer is the consumer's conservator. (Probate Code sections 2920, 2921)
3	Has Conservator -- Not DDS	The consumer has a conservator who is not the director of the Department of Developmental Services (DDS).
4	Director of DDS	The director of DDS is appointed as either guardian or conservator of the consumer and/or estate of a consumer. (Health and Safety Code sections 416, 416.5, 416.9)
5	Court (dependent child)	A minor consumer who is adjudged by the court to be a dependent of the court because of parental issues or the child's criminal conduct. (Welfare and Institutions Code section 300 or 601)
7	Regional Center Director	The director of a regional center that is the actual probate conservator or guardian of a consumer, as contrasted with being delegated the responsibility of performing conservatorship duties by DDS when DDS is the actual conservator. (Health and Safety Code section 416.19, Probate Code sections 1500, 1514, 1801, 2351.5)
9	Unknown	
N	No Guardian/Conservator	The consumer does not have a judicially appointed guardian or conservator.
R	Consumer's Parent or Relative	A family member of the consumer has been appointed probate conservator (for an adult) or guardian (for a minor). (Probate Code sections 1500, 1514, 1801, 2351.5)
Other		The consumer has a guardian or conservator other than the possibilities above, such as a private conservator.



SHERRI R. CARTER
EXECUTIVE OFFICER / CLERK

111 NORTH HILL STREET
LOS ANGELES, CA 90012-3014

Superior Court of California
County of Los Angeles

April 30, 2014

Thomas F. Coleman
c/o Dr. Nora J. Baladerian
2100 Sawtelle, #204
Los Angeles, CA 90025

Re: Requests per Rule 10.500

Dear Mr. Coleman:

The following is written in response to your inquiry dated April 24, 2014 for per Rule 10.500.

On April 26, 2014, we had the following conservatorship cases in active inventory:

Conservatorship – Limited 7,643
Conservatorship – Dementia 2,093
Conservatorship – Other 3,341

The Probate Code mandates first annual, annual and biennial reviews, based on the type of conservatorship ordered by the court.

The information regarding guardianship cases "Subject to Annual Reviews" or "Biennial Reviews" is not available in any document or report.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret Little".

Margaret Little, Ph.D.
Senior Administrator
Family Law & Probate Administration

ML:rma

	2019			2020		
Filing Month	Limited Conservatorship	General Conservatorship	Filing Month Total	Limited Conservatorship	General Conservatorship	Filing Month Total
January	17	18	35	32	12	44
February	32	21	53	39	17	56
March	28	23	51	27	10	37
April	32	22	54	19	11	30
May	26	25	51	21	6	27
June	32	23	55	35	16	51
July	36	28	64	40	14	54
August	38	22	60	26	20	46
September	31	22	53	24	17	41
October	31	24	55	33	17	50
November	36	19	55	30	7	37
December	33	20	53	29	8	37
Filing Year Total	372	267	639	355	155	510
Grand Total						1,149

Data Source – CAVE (Court Analytics Virtual Environment) – as of 03/29/2021

* New petitions include Petition of Appointment of Conservator and Petition for Successor Conservator

ADA Case Study

Example of ADA Violations in a Limited Conservatorship Case

A petition for limited conservatorship was filed on August 22, 2012. The court appointed an attorney to represent the proposed conservatee on September 14, 2012. The petition was granted on April 14, 2014. The following actions of the court-appointed attorney violated the Americans with Disabilities Act by denying someone with a developmental disability access to justice and depriving him of meaningful participation in the case.

1. **No ADA Plan.** The attorney failed to develop an ADA plan for the client to determine the best way to have meaningful communications with the client and maximize his participation in the case.

2. **No IPP Review.** The attorney failed to request an Individual Program Plan (IPP) Review with the regional center and to have a professional appointed to determine the capacities of the client in the seven decision-making areas in question. An IPP review also would have examined if there were lesser restrictive alternatives in any of those seven areas.

3. **Home Visit.** When the attorney visited the home of his client, the attorney directed his entire conversation with the mother of his client, even though the client was present and even though a communication facilitator was present and available to assist the client in communicating with the attorney. When the attorney left the home, the client asked his mother if the attorney thought he was deaf since he never attempted to speak directly with him.

4. **School Visit.** When the attorney visited his client at the client's school, the attorney refused to allow the client to use assisted communication technology (facilitated communication). Instead, the attorney used yes/no flash cards and told the client to answer his questions by pointing to one of the cards. Even though the flash card system was failing to produce consistent answers, the attorney refused to change to the client's preferred method of communication.

5. **Voting Rights.** When the mother asked the attorney if her son could retain the right to vote, since he had indicated a desire to vote, the attorney replied that the retention of voting rights would be inconsistent with the purpose of a conservatorship. The attorney later informed the court that his client was unable to complete an affidavit of voter registration even though the attorney never attempted to have his client fill out such an application, with or without assistance. The attorney was unfamiliar with federal voting rights laws, including ADA accommodation requirements.

6. **Violation of Confidentiality.** The client signed MC-410, an ADA accommodation request form asking that he be allowed to use facilitated communication in his case, both in and out of court. When the attorney received this form from the client, sent to the attorney by Thomas F. Coleman who the client had asked to help him as a support person, the attorney did not forward the form to the court as required by law. Instead, the attorney sent the form to the attorneys for the other parties. Form MC-410 is a confidential form that is intended as a communication between court personnel and the person making the ADA request.

7. **Disloyalty to Client.** The attorney filed a report with the court recommending that decision-making authority be taken away from the client in all seven areas in question, including the right to make social decisions. The attorney knew that the client wanted to retain the right to make social decisions. He also knew that the regional center has recommended that the client retain authority over social decisions. Ultimately, when confronted with evidence of his client's capacity to make such decisions, the attorney changed his mind. However, the attorney still recommended that his client be required to have regular "Skype" visits with his father, despite knowing that his client feared his father, did not want to communicate with him, and his therapist recommended against mandatory communications.

Access to Justice Denied: Another Example of ADA Violations by a Court-Appointed Attorney

by Thomas F. Coleman

The following is an excerpt from an email I received from a court-appointed attorney in Los Angeles who read about the class action complaint to the Department of Justice.

He provided an example of how the previous court-appointed attorney in the case failed to provide the client access to justice.

Here is what he said in an email sent to me on July 6, 2015:

“I subbed in on a limited conservatorship over a young woman. In the numerous hearings over the past two years, she never came to court - PVP waived her appearance on all the hearings and the 3 Cap Decls [capacity declarations] filed by the same psychologist in this period of time stated that she was medically unable to attend even though she was able and willing and had her own car and valid driver's license. To make it worse, Regional Center found that she was not developmentally disabled - They had her evaluated and tested by a PhD who confirmed this conclusion as well. Yet the appointment happened. Now I am fighting to terminate the limited. I have read various works of yours over the past year. I find you to have exceptional insights on such matters and to be a good resource on the issues I must address.”

Autistic Man Denied Freedom of Association

Lawyer Advocates for Removal of Her Client's Rights

by Thomas F. Coleman

In 2005, Gregory Demer's mother filed a petition asking the Los Angeles Superior Court to appoint her as the limited conservator of her adult son. Gregory, an autistic young man, had just turned 18. He needed help with major life decisions, especially medical and financial decisions. His mother did not seek to control his social life, so Gregory retained the right to make social decisions.

As Gregory progressed, he moved into an apartment with a roommate. Three shifts of support staff shared responsibility to assist him with his needs. Gregory worked part time and engaged in a variety of social, recreational, and volunteer activities. He developed a rich and enjoyable life.

As his time was being filled with activities of his own choosing, Gregory would often decline other optional opportunities on weekends. His parents, who were divorced, reacted differently to the manner in which Gregory was exercising his freedom. His mother was fine with Gregory choosing to see her or not, whenever he wished. His father felt differently and sought orders to obtain orders to force Gregory into a custody arrangement.

After a year, drained financially by legal fees and the stress of orders she could not enforce, Gregory's mother resigned as conservator. A professional conservator was chosen to take her place. The new conservator was also very supportive of Gregory's freedom of choice in social matters. She would encourage him to visit his parents, but she did not pressure him. When he often chose his own activities over visiting with his parents, she accepted his choices. This did not sit well with Gregory's father.

Once again, frequent court battles occurred over Gregory's resistance to visit with his father. The new conservator was replaced with a professional fiduciary company which was less supportive of Gregory's freedom. Long-standing support staff

who had supported Gregory's freedom, and who Gregory liked, were replaced. The court ordered increasing restrictions on Gregory's freedom, even though he technically retained his social rights. Gregory's court-appointed attorney vacillated between being a social worker with a law degree and a real advocate. Despite his mother's efforts to support Gregory's freedom of choice, the judge made three orders over a period of a few years.

The first order created a schedule. Of every three weekends, Gregory could have social freedom on one; the second he was required to stay with his father, and the third with his mother. His mother did not ask for or want such power. She told the court that Gregory could see her or not as he wished.

Gregory started evading going with his father, often saying he was scared of him. Sometimes he would leave his apartment before his father arrived. Other times he would not open the door. His father then obtained a new court order requiring the support staff to "prompt and redirect" Gregory to stay until pickup. This required them to persuade him not to leave, but if he did, they were ordered to follow him and call the father to tell him where Gregory was located so he could find Gregory and pick him up.

Gregory's attorney acquiesced to the order. He did not object or file an appeal. So Gregory's mother objected and appealed, challenging both orders as being a violation of Gregory's constitutional rights. The court did not decide the case on the merits, but reversed on a technical ground that a parent lacks "standing" to appeal for an adult child.

Not satisfied with the current encroachment on Gregory's freedom, the conservators filed a petition to take all of Gregory's social decision-making rights from him. They wanted full authority to make social decisions for him. This power grab appeared to be an attempt to put an end to the ongoing litiga-

tion in reaction to Gregory's repeated statements that he did not want to visit with his father and his "civil disobedience" in locking his door or leaving home before his father would arrive.

Despite this pending petition, the court dismissed Gregory's court-appointed attorney. This left Gregory without any protection. His mother lacked standing to appeal and he now had no attorney. Fortunately, Gregory learned about his right to ask for an attorney, so he did. When the judge received a note from Gregory, the judge was obligated to appoint a new attorney, so one was appointed.

Gregory's supporters hoped the new attorney would fight for his rights. They were sorely disappointed when they saw a pattern of conduct by the attorney that actually worked against Gregory. The attorney apparently decided that Gregory did not know what he wanted and that his stated wishes carried no meaning. Therefore, she ignored his requests to keep his social rights and for freedom to choose whether or not to visit with his father.

The attorney decided that, in her opinion, Gregory was better off having paid strangers make these decisions for him. She surrendered his rights by arguing against her own client's wishes. She ignored evidence in support of him retaining his social rights. She did not ask for an evidentiary hearing, nor did she make the conservators prove their case by clear and convincing evidence. Gregory's attorney did all the heavy lifting for her client's opposing parties. She even cross-examined Gregory as though he were a hostile witness.

Without an evidentiary hearing, the judge entered an order stripping Gregory of his social rights. Gregory now lives in social bondage. The court order legalizes conduct which, without the order, would be considered kidnapping and false imprisonment.

Gregory is forced to visit with his father whether he wants to or not. During these visits, the court order gives his father authority to choose the activities. Despite the fact that Gregory has expressed his opposition to going to church on Sundays – expressed to many different people over the course of many years – he is taken to church anyway. This violates his right to freedom of choice in matters of

religious practices.

After his social rights were taken away completely, Gregory wrote a note stating his objection to the order of the court and asking for help. His supporters inquired with dozens of disability rights organizations but none of them would get involved. Perhaps a review of available evidence will cause them to reconsider.

Spectrum Institute has studied this case extensively. I focused on the civil rights aspect of this case. My colleague, Dr. Nora J. Baladerian, reviewed the case as a clinical psychologist who works with victims of abuse who have developmental disabilities. I am dismayed by the lack of true advocacy in this case. She is stunned that a court would enter orders that impose psychological and emotional abuse against someone with a developmental disability.

There was ample evidence to support Gregory's social rights – evidence that was not presented to the court. A reasonably competent attorney, acting as a diligent and conscientious advocate, would have presented to the court all evidence supporting the retention of the client's social rights.

For Gregory, justice requires that a new lawyer be appointed – a true advocate whose first course of action should be fighting to restore Gregory's freedom of association.

For thousands of others who will someday find themselves facing a conservatorship, justice requires major changes in educational requirements and performance standards for lawyers appointed to represent people with developmental disabilities. Proposals for such changes are pending with the Probate and Mental Health Advisory Committee of the California Judicial Council. ♦♦♦

Go to: <http://disabilityandabuse.org/gregorys-case/>

Thomas F. Coleman is an attorney with more than 40 years of experience advocating for populations historically subjected to discrimination and injustice. He is Executive Director of the Disability and Guardianship Project of Spectrum Institute. Email: tomcoleman@spectruminstitute.org

Access to Justice for the Disabled

By Thomas F. Coleman
Los Angeles Daily Journal
January 11, 2018

Over her lifetime, Theresa, now 84, was able to accumulate enough assets to finance a comfortable lifestyle in her golden years. She hired a financial consultant to help her invest the money. When the time came, Theresa moved into an independent living center in Los Angeles County where she made new friends. Theresa has no relatives.

The financial consultant introduced Theresa to a fiduciary. Theresa was asked to sign papers, which she did. Theresa later became aware that the papers gave the fiduciary a financial power of attorney. When she realized this, Theresa revoked the document – an action the fiduciary refused to accept.

The fiduciary went on the offensive by filing a petition to have Theresa placed under an order of conservatorship, asking that the fiduciary be appointed as conservator. The result would be ongoing fees paid to the fiduciary out of Theresa's sizeable estate.

Theresa demanded that her bank release her funds so she could open new accounts elsewhere. Caught between the competing demands of Theresa and the fiduciary, the bank would only give her a small amount of money – enough for Theresa to move to a new independent living center in Orange County.

With the help of an interested and friendly attorney, Theresa was able to make the move.

In response to the conservatorship petition, the Los Angeles County Superior Court appointed an attorney to represent Theresa in the proceedings. Unfortunately, the attorney aligned himself with the goals of the petitioner and has been actively advocating that his client be placed under an order of conservatorship. This was done despite recommendations to the contrary from a psychologist who examined

Theresa, a police detective specializing in elder abuse, and an elder care service provider. The attorney apparently believed that he knew what was best for Theresa, regardless of her wishes and despite ample evidence that she is competent.

Had Theresa's appointed attorney chosen to advocate for his client's right to make her own decisions, he would have had plenty of evidentiary ammunition.

After evaluating Theresa on multiple occasions, a neuropsychologist concluded that she "does not need to be conserved." Her declaration warned that Theresa may be a victim of financial abuse. The attorney's response? According to the psychologist's sworn statement: "He was angry, aggressive, and hostile. . . . He did not want to hear anything that did not involve [her] being put into a conservatorship."

As for possible financial abuse, a police detective who investigated the matter reported: "I have personally spent time interviewing Theresa . . . and found her to be attentive, understood my questions, and was able to carry on a conversation. She also had logical reasoning for her past financial decisions. It's my opinion, she did not appear dependent and had a clear understanding of the wrong doing she is receiving at the hands of others." The detective's opinion was ignored by Theresa's appointed attorney.

The senior housing consultant who helped Theresa find the new place in Anaheim gave examples of how Theresa was making good financial decisions "based on reasonable risks vs. rewards analysis." That too was rejected.

Fortunately for Theresa, the friendly attorney who assisted her in moving to Orange County, continues to take an interest in her case. He and another legal

A core promise
of the Americans
with Disabilities
Act is access to
justice for people
with disabilities.

colleague have been helping Theresa fight to keep her rights. Although they have appeared with Theresa in court, the judge has not yet recognized their role as her legal advocates. Instead, Theresa is stuck paying the fees of a court-appointed lawyer – someone who is arguing against her wishes.

I am not surprised by Theresa's story. This case is an acute example of chronic dysfunction in a legal services program that all too often finds court-appointed attorneys advocating against their clients wishes or failing to do any meaningful advocacy at all.

My audits of dozens of conservatorship cases reveal a pattern and practice of appointed attorneys actively denying their clients access to justice.

Last year, my organization, the Spectrum Institute, wrote to the California Supreme Court to oppose a new rule proposed by the State Bar regarding lawyer-client communications – a rule that fails to even mention the Americans with Disabilities Act. That matter is still pending.

We met with the director of the Department of Fair Employment and Housing last March. DFEH has authority to investigate complaints against public entities that violate the ADA. State courts are such public entities. We were told they lack the resources to open a system-wide investigation but to bring them individual cases. This is such a case.

We made a presentation to the Probate and Mental Health Advisory Committee of the Judicial Council in 2014 and submitted a report to them in 2015. We documented proof of deficiencies in conservatorship policies and practices and asked for new rules to require ADA-compliant advocacy services by court-appointed attorneys. A two year-project by the committee on this subject is in its final phase.

The Judicial Council will soon release proposed new court rules on this subject for public comment. These rules will specify the duties of court-appointed attorneys who represent respondents in conservatorship proceedings.

Current court rules are vague and flimsy. It is time for the Judicial Council to flex its rule-making muscles and protect vulnerable litigants in these proceedings – proceedings in which their life-long assets and cherished personal liberties are threatened.

At the core of a constellation of legal rights that should protect these litigants is the promise of the ADA that people with disabilities should receive access to justice. This goal would be advanced through the adoption of ADA-compliant standards of practice, mandatory training programs, and effective mechanisms to monitor the performance of court-appointed attorneys in conservatorship cases.

As for Theresa, her case has a hearing scheduled in the coming weeks. But the stress of knowing that her appointed attorney is advocating against her has already taken a toll.

Theresa recently had a heart attack and is currently in a rehabilitation facility. She attributes the stress to the betrayal of her court-appointed attorney and the fear of having her freedom taken away and control of her life and her assets given to complete strangers.

The court should immediately remove the appointed attorney. Theresa should be allowed to have the legal team of her choice represent her – lawyers whom she trusts will use available evidence to support her right to manage her own life. To do otherwise would deny Theresa access to justice and would constitute a judicially-inflicted ADA violation of the highest order. ♦♦♦

Thomas F. Coleman is legal director of Spectrum Institute – a nonprofit organization advocating for reforms in California's conservatorship system and in state guardianship systems throughout the nation. Spectrum has filed class-based complaints with state and federal officials, asking them to correct continuing violations of the Americans with Disabilities Act by the conservatorship system in Los Angeles County and statewide.

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Role of the Courts: An Example of Failure to Protect

The Case of Mickey – Los Angeles County

by Thomas F. Coleman

The alleged abuse of Mickey was what first brought the limited conservatorship system to our attention. Mickey's brother Joseph contacted Dr. Nora Baladerian because his reports to Adult Protective Services and the Sheriff did not result in any intervention. Joseph provided photos of Mickey almost naked on the grass in the back yard in handcuffs. He was severely underweight and looked terrible.

We intervened and finally got APS and the Sheriff to take action. Mickey was removed from the home. He was taken to the hospital where he stayed for about 10 days. The hospital suspected possible abuse by the parents so they issued a "Do Not Announce" order so the parents would not know he was there.

Mickey, who was in his mid-30s, had been in a limited conservatorship for years. His parents were his conservators. I checked the court records and found that the court investigator was not doing the biennial reviews as required by law. There was one span of time where no review was done for several years.

APS notified the probate court and the court appointed an attorney for Mickey. The attorney conducted "an investigation" which amounted to calling APS and speaking with the alleged abusers (parents). The attorney never contacted Joseph, even though he was the one who took the photos and who knew how the parents were treating Mickey. Joseph was never contacted by the court investigator either. A pro forma report was filed by the attorney with the court and the parents continued to be conservators. No hearing was conducted into the allegations of abuse.

APS said they could not find an alternative home for Mickey – even though Joseph was available for this purpose – and so the hospital released Mickey to the parents. A few weeks later Mickey was dead.

The parents wanted a quick cremation. I told Joseph to call the coroner and to demand an autopsy. An autopsy was done. The autopsy said the cause of death was undetermined because the coroner could not tell from the information he had whether the parents had been neglectful. But the autopsy report shows many indicators that something was very wrong – dehydration, bruises, cuts, severely underweight, neighbors hearing cries for help, and much more.

The parents had the gall to sue the county. That lawsuit was recently dismissed. The court found that

the county acted properly in removing Mickey from the home. There is a link below to a document that lists facts supporting the decision of APS to intervene.

Last year, Nora asked for the county's Death Review Team to investigate the case. She has asked over and over again. The prosecutor finally inquired of Nora today (March 23, 2015) about why she wanted a review. Nora sent them the autopsy report and a list of undisputed facts from the dismissal of the civil case..

Looking at the larger picture of abuse and disability, we did a survey of abuse of people with disabilities and published the report two years ago. Here is a link. <http://disabilityandabuse.org/survey/index.htm>

The bottom line is that by the time people with developmental disabilities turn 18, on average, the majority of them have been victims of abuse. That is why I wrote an essay on Trauma Informed Justice and why the limited conservatorship system should be careful to screen for possible abuse.

<http://disabilityandabuse.org/conferences/trauma-informed-justice.pdf>

With the high rate of abuse of people with developmental disabilities, the judges, attorneys, and investigators who operate the limited conservatorship system should administer trauma informed justice.

There are more than 40,000 adults with intellectual and developmental disabilities under conservatorships in California. Some 5,000 new disability cases are added to the conservatorship rolls each year.

Court investigators should be trained about abuse of people with I/DD and how to conduct investigations. Court appointed attorneys representing limited conservatees should also be trained in abuse, as well as how to conduct interviews of people with intellectual, cognitive, and communication disabilities. This is required by ADA law but is not happening.

Mickey's case raises serious questions about the adequacy of current practices to protect dependent adults who are under the "protection" of the courts in California. If knowledge of his case can help improve the system, then Mickey will not have died in vain ♦♦♦

autopsy report and other facts online:
<http://spectruminstitute.org/victims/>

Jury Trials Are an Elusive Right for Proposed Conservatees

By Thomas F. Coleman

Daily Journal / Nov. 17, 2020

The California Legislature has declared the right to a trial by jury in both civil and criminal cases to be a “cherished right” that is a “fundamental component of the American legal system.” Assembly Concurrent Resolution No. 118, March 12, 1998. The right to a jury trial is enshrined in the state constitution. Cal. Const., art. I, Section 16.

However, a trial by jury is not an absolute right in every case. Jury trials are not constitutionally required in cases that are essentially equitable in nature. *Nationwide Biweekly Administration, Inc. v. Superior Court* 9 Cal.5th 279 (2020) That is why most cases in probate court, such as will contests, are tried by a judge rather than a jury.

Notwithstanding this constitutional limitation, the Legislature has provided that in probate conservatorship proceedings – cases in which fundamental liberties are at stake – a proposed conservatee may demand a jury trial. Probate Code Section 1827.

A petition for a conservatorship of the person seeks to strip a proposed conservatee of the right to make decisions regarding his or her residence, medical care, marriage, sexual relationships, and/or social contacts. A petition for a conservatorship of the estate asks the court to remove a proposed conservatee’s right to make financial decisions.

These are rights worth fighting for. With a court trial, the rights of the proposed conservatee depend on the ruling of just one person – the judge. With a jury trial, the proposed conservatee retains his or her decision-making rights unless the petitioner convinces nine people to render a verdict based on clear and convincing evidence that the proposed conservatee is unable to care for his or her personal or financial needs even with third party assistance.

From a logical point of view, there is a strategic advantage for a proposed conservatee to demand a jury trial. A jury makes it statistically harder for the petitioner to prevail and easier for the proposed conservatee to retain his or her rights.

Probate conservatorship proceedings generally involve seniors with cognitive challenges, adults with a brain deficiency from an illness or injury, or adults with developmental disabilities.



There are more than 5,000 probate conservatorship cases filed each year in California. One would think that a fair share of these cases would be decided by juries. Perhaps five to ten percent. But that is not the case.

The number of jury trials in probate conservatorship cases in California is slightly more than zero. A review of court statistics for 2016-2017 showed only one jury trial in probate courts throughout the entire state. “Probate (Estates, Guardianships, Conservatorships) – Methods of Disposition, by County” (2018 Court Statistics Report, p. 168) Judicial Council reports for other years showed the number of jury trials in the state’s probate courts ranging from zero to three annually.

Attorneys representing petitioners and objectors cannot demand a jury trial. Only a proposed conservatee can. But they don’t.

I asked Lisa MacCarley, a seasoned practitioner in estates and conservatorships, about the lack of jury trials in probate conservatorship cases. This is what she said. “I have been representing clients in probate courts throughout Southern California for over 25 years. In all that time, I have never seen or heard of a jury trial in a conservatorship case.”

I probed deeper, asking Ms. MacCarley if she had an

explanation for the absence of jury trial demands. She pointed to systemic problems.

In counties where the public defender doesn't handle conservatorships, these involuntary litigants are represented by court-appointed attorneys. In Los Angeles, these lawyers have been given a conflicting mandate by a local court rule to help the judges resolve the cases.

Moreover, many of these attorneys are dependent on further appointments for their income stream. The judges appoint them to cases, authorize the amount of fees they are paid, and also decide if they receive appointments in future cases. The attorneys know that the judges discourage trials in general, and jury trials especially, because they take up too much judicial time and create a backlog on an already overloaded docket. Thus, no jury trial demands are ever made.

In counties where the public defender represents proposed conservatees there is a different disincentive for demanding a jury trial. Such demands are almost never made by public defenders due to their heavy caseloads. Even though many of these public lawyers are excellent litigators, they don't have the time for a multi-day jury trial in a conservatorship case.

Ms. MacCarley's explanation for a lack of jury trials may be correct, but I have come up with an additional reason why attorneys for proposed conservatees avoid them. The lawyers are intimidated by the unsettled state of case law in probate conservatorships – a situation caused by a lack of appeals.

In all cases, jurors are told their duty is to decide the facts from the evidence admitted at trial and then apply those facts to the law as they have been instructed by the court. For most civil cases, the Judicial Council has approved a set of jury instructions. This template makes the legal component of a jury trial relatively easy for lawyers and judges.

Despite the existence of general conservatorships since the 1950s and limited conservatorships since the 1980s, the Judicial Council has never found time to create a set of jury instructions for these cases. As a result, trial lawyers would have to develop proposed jury instructions on their own. This takes time and

time is money. Writing on a blank slate also poses a risk of submitting erroneous instructions which could result in malpractice liability.

Thus, the lack of approved jury instructions creates another disincentive for lawyers to demand a jury trial. To remove this obstacle, I recently developed a set of model instructions for such cases. The guidebook is titled "Proposed Jury Instructions for Probate Conservatorship Cases: A Practice Guide for California Attorneys." It is available online without cost.

The guidebook is based on several years of research into constitutional law, statutes, and judicial precedents that apply to probate conservatorship proceedings. The first edition focuses on limited conservatorships of the person. It also includes practice tips on preparing for trial. Future additions will add sections on limited conservatorships of the estate and general conservatorships of the person and the estate.

This new primer for attorneys is being submitted to the Judicial Council with a request for the agency to devote the necessary resources to update its *California Approved Civil Instructions* manual, also known as CACI, to include a set of approved instructions for the four types of probate conservatorship cases.

If the Judicial Council were to update the manual, one disincentive for jury trial demands would be removed. The other systemic obstacles mentioned by Ms. MacCarley will require additional actions by all three branches of government.

It does not take a genius to deduct that something is wrong with a court system where there is only one jury trial out of 5,000 cases filed annually. Members of the bench and bar should feel uncomfortable with this statistic. I know that I am. ♦♦♦

Thomas F. Coleman is the legal director of Spectrum Institute – a nonprofit organization promoting conservatorship reforms in California and guardianship reforms nationally. Contacted him by email at: tomcoleman@spectruminstitute.org.

The Daily Journal, California's premier legal newspaper, is read by thousands of attorneys and judges throughout the state.

Limited Conservatorship Appeals Compared with Other Types of Appeals

A Review of Appellate Cases by Spectrum Institute

May 14, 2019

In May 2019, attorney Thomas F. Coleman, legal director of Spectrum Institute did a review of appeals filed by limited conservatees in California between 1989 and 2019. He conducted a word search on the *Case Text* appellate data base for the terms “probate” and “limited conservatorship.” He then reviewed the few cases that were identified to determine which of them were filed by a limited conservatee rather than by other parties to the case. He found only two such appeals by limited conservatees. One was in Orange County in 2013 and the other was the appeal of O.B. in Santa Barbara County in 2018. In Los Angeles County, he could find no appeals by limited conservatees during the last 30 years.

Coleman then did a comparison with several other types of legal proceedings.

In juvenile dependency proceedings where a minor is declared a dependent of the court due to abuse or neglect (Welfare and Institutions Code Section 300), he did a similar search on the *Case Text* database. He found 33 instances where the minor appealed during 1989 to 2019.

In juvenile delinquency cases (Welfare and Institutions Code Section 602), his word search of appeals on *Case Text* found potentially hundreds of appeals by minors. There were so many appellate cases identified that contained the search terms that he narrowed the review to cases in 2017 and 2018. In 2017, he found 48 appeals by minors. In 2018, he found 19.

Coleman then did a review of appeals filed by conservatees in LPS conservatorships. He did a word search on the *Cast Text* database for the terms “LPS” and “conservatee.” He reviewed each case that was identified to determine whether the case involved an appeal by a LPS conservatee. The number of cases identified was so great that he narrowed his review to appellate opinions issued from 2015 to the present. He identified 41 appeals statewide by LPS conservatees during that short time period.

In contrast to these LPS conservatorships, Coleman’s search for appeals from conservatorship orders in general probate conservatorships found only three appeals statewide by conservatees from 2015 to the present. While these appeals are more frequent than by limited conservatees, they are much less frequent than appeals in the other types of cases that were reviewed.

Based on this research, Coleman observed that although appeals are not uncommon by LPS conservatees, by minors in juvenile dependency cases, and by minors in juvenile delinquency cases, and while they are somewhat uncommon by general probate conservatees, appeals by limited conservatees from probate conservatorship orders are uniquely rare.

Legal System Without Appeals Should Raise Eyebrows

By Thomas F. Coleman

Our legal system presupposes a considerable number of contested hearings and a fair number of appeals. Appellate courts play a vital role in keeping the system honest.

Published appellate decisions create a body of case law that instructs trial judges and the entire legal profession about the correct interpretation of statutes and constitutional mandates. Appeals are essential to the life blood of the legal system – judicial precedent.

Having served as a court-appointed appellate attorney for over 15 years, I know the critical role that appellate courts play in monitoring the activities of trial judges and attorneys. Alleged errors are scrutinized on appeal and the opinion of the appellate court determines whether the rules were violated by the participants in the trial court.

Knowing that proceedings are being recorded and might be appealed can have a prophylactic effect. People are more careful when they believe their actions may be seen by others, especially by people in higher authority. The reverse is also true. When people believe they are not being watched or when they think their actions are not subject to review, they act differently.

I have looked at statistics published by the Los Angeles Superior Court and by the Judicial Council of California. Annual reports verify that contested hearings or trials occur in large numbers on virtually every subject matter and every type of case. Statistics also verify that the Courts of Appeal in California are kept busy deciding appeals from judgments involving child custody disputes, divorces, civil litigation, wills and estates, juvenile dependency, juvenile delinquency and criminal convictions.

Contested hearings and appeals should not only be expected, they should be valued. Appeals correct policy defects and operational flaws. They instruct judges and attorneys on how to conduct themselves within the law.

Now comes the kicker. There is a category of cases that has almost no contested hearings and virtually no appeals – limited conservatorship proceedings for adults with intellectual and developmental disabilities. Some 5,000 of these cases are processed in California each year, with 1,200 of them in Los Angeles County alone.

I found that, at least in Los Angeles, these cases are handled with “assembly line” efficiency. Petitions are filed to take away the rights of adults to make decisions regarding finances, residence, medical care, social contacts, and sexual relations. Opposition is rare.

Court-appointed attorneys for proposed conservatees are given a “dual role” by local court rules. One duty is to help the court resolve the case. The attorneys seem to be very good in that role, and not so good at defending

the rights of the clients, since nearly all cases are settled with the clients losing their decision-making rights.

These attorneys *never* file an appeal for their clients, so the Court of Appeal never sees how the judges or the attorneys handle these limited conservatorship cases. The probate court judges who process these cases know their actions will not be reviewed on appeal.

A probate judge recently told a group of court-appointed attorneys at a training last year that they are not required to advise clients about their right to appeal. Attorneys are usually released as counsel when the conservatorship order is granted. Clients, therefore, have no attorney to assist them in filing an appeal.

The California Appellate Project states it has never seen an appeal by a limited conservatee. A search of case law shows there are no published opinions deciding appeals filed by limited conservatees.

Show me a legal system that has no appeals and I will show you a rigged system. Consider me a whistle-blower if you wish, but this cannot continue. Something must be done.

One solution would be to pass a bill clarifying that a “next friend” can file an appeal for someone who lacks competency to do it for himself or herself. Such a proposal, known as Gregory’s Law, is being circulated now.

Gregory’s Law would allow a relative or friend to file a “next friend” appeal to challenge the orders of judges or the conduct of appointed attorneys that infringe the rights of limited conservatees. Clarification is needed because a published opinion (Conservatorship of Gregory D. 214 Cal.App.4th 62 (2013)) declared that only the limited conservatee may appeal to complain about these issues.

That creates a Catch 22 for limited conservatees. Because of the nature of their disabilities, they lack the understanding of how to appeal. Their appointed attorneys won’t appeal because it is they who surrendered the rights of their clients. So ongoing violations of the rights of people with disabilities are never reviewed on appeal.

The best solution would be for attorneys to serve their primary duty, defending the rights of their clients. This should be their only focus. The court rule giving them a secondary duty to help settle cases should be eliminated.

Thomas F. Coleman is the legal director of the Disability and Abuse Project of Spectrum Institute.

Daily Journal

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State Bar of California

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[The State Bar of California](#) is a public corporation to which all attorneys licensed to practice law in California must belong.

Candidates for admission to practice law are examined by the State Bar, which certifies to the Supreme Court those who meet admission requirements. Rules of professional conduct, binding upon lawyers following approval by the Supreme Court, are formulated and enforced by the State Bar.

In the late 1980s, the California lawyer discipline system went through its first major reform. That reform established the nation's first full-time professional State Bar Court. The California State Bar Court acts as the administrative arm of the California Supreme Court in the adjudication of disciplinary and regulatory matters involving California attorneys. The mission of the State Bar Court is to hear and decide cases fairly, correctly and efficiently for the protection of the public, the courts and the legal profession. It may impose private or public reprimands and recommend to the Supreme Court that an attorney be disciplined by either suspension or disbarment. Since 1989, the court has used full-time judges appointed by the California Supreme Court.

Commission on Judicial Nominees Evaluation: State law requires the State Bar's Commission on Judicial Nominees Evaluation to review the qualifications of persons being considered by the Governor for appointment to the courts.

No. 02-1667.
U.S. Supreme Court

Tennessee v. Lane

541 U.S. 509 (2004)

Decided May 17th, 2004

*513 STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 534. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 535. REHNQUIST, C.J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 538. SCALIA, J., *post*, p. 554, and THOMAS, J., *post*, p. 565, filed dissenting opinions.

JUSTICE STEVENS delivered the opinion of the Court.

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, [42 U.S.C. §§ 12131-12165](#), provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." § 12132. The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment.

I

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and

ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. *514 At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the motion without opinion, and the State appealed.¹ The United States intervened to defend Title II's abrogation of the States' Eleventh Amendment immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

1. In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf Eddy, Inc.*, [506 U.S. 139 \(1993\)](#), we held that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court or-

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services*." [42 U.S.C. § 12101\(a\)\(3\)](#) (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

*530 V

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II — unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under § 5 — reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole.¹⁸ Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can *531 validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judi-

cial services, we need go no further. See *United States v. Raines*, [362 U.S. 17, 26 \(1960\)](#).

18. ¹⁹ Contrary to THE CHIEF JUSTICE, *post*, at 551-552, neither *Garrett* nor *Florida Prepaid* lends support to the proposition that the *Boerne* test requires courts in all cases to "measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce." In fact, the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine "the full breadth of the statute" all at once. Moreover, *Garrett* and *Florida Prepaid*, like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right; for that reason, neither speaks to the issue presented in this case. Nor is THE CHIEF JUSTICE's approach compelled by the nature of the *Boerne* inquiry. The answer to the question *Boerne* asks — whether a piece of legislation attempts substantively to redefine a constitutional guarantee — logically focuses on the manner in which the legislation operates to enforce that particular guarantee. It is unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.

19. In *Raines*, a State subject to suit under the Civil Rights Act of 1957 contended that the law exceeded Congress' power to enforce the Fifteenth Amendment because it prohibited "any person," and not just state actors, from interfering with voting rights. We rejected that argument, concluding that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." [362 U.S., at 24-25](#).

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a

long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response." *Hibbs*, [538 U.S., at 737](#) (internal quotation marks omitted).

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. [42 U.S.C. § 12131\(2\)](#). But Title II does not require States to employ any and all means to make judicial ^{*532} services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. [28 CFR § 35.151 \(2003\)](#). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. § 35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid.* And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. *Boddie*, [401 U.S., at 379](#) (internal quotation marks and citation omitted).²⁰ Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive ^{*533} filing fees in certain family-law and criminal cases,²¹ the duty to provide transcripts to criminal defendants seeking review of their convictions,²² and the duty to provide counsel to certain criminal defendants.²³ Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, [521 U.S., at 532](#); *Kimel*, [528 U.S., at 86](#).²⁴ It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

20. Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne's* prohibition on irrational discrimination. See *Garrett*, 531 U.S., at 372.

21. *Boddie v. Connecticut*, [401 U.S. 371 \(1971\)](#) (divorce filing fee); *M.L.B. v. S.L.J.*, [519 U.S. 102 \(1996\)](#) (record fee in parental rights termination action); *Smith v. Bennett*, [365 U.S. 708 \(1961\)](#) (filing fee for habeas petitions); *Burns v. Ohio*, [360 U.S. 252 \(1959\)](#) (filing fee for direct appeal in criminal case).

22. *Griffin v. Illinois*, [351 U.S. 12 \(1956\)](#).

23. *Gideon v. Wainwright*, [372 U.S. 335 \(1963\)](#) (trial counsel for persons charged with felony offenses); *Douglas v. California*, [372 U.S. 353 \(1963\)](#) (counsel for direct appeals as of right).

24. THE CHIEF JUSTICE contends that Title II cannot be understood as remedial legislation be-



AMERICANS WITH DISABILITIES ACT

ADA Update: A Primer for State and Local Governments

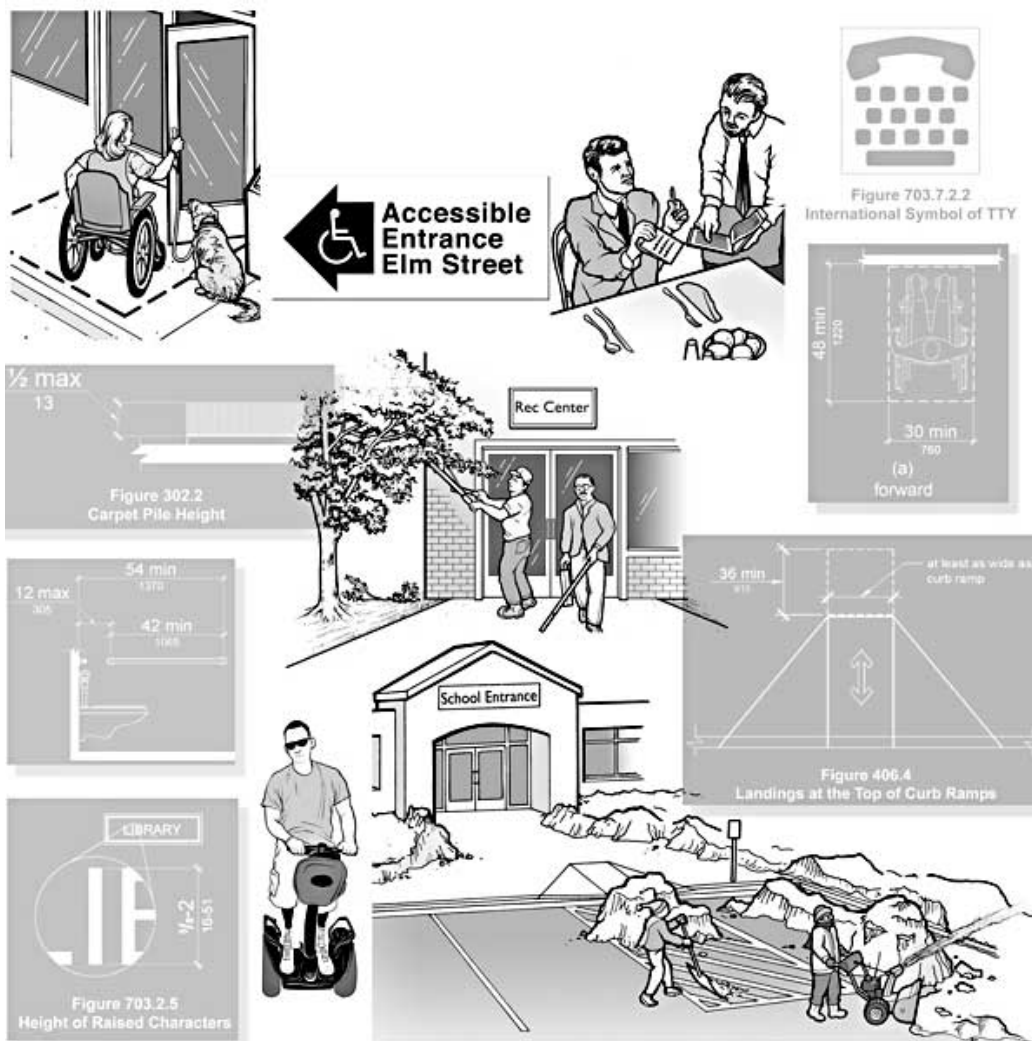


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Introduction

More than 55 million Americans –18% of our population–have disabilities, and they, like all Americans, participate in a variety of programs, services, and activities provided by their State and local governments. This includes many people who became disabled while serving in the military. And, by the year 2030, approximately 71.5 million baby boomers will be over age 65 and will need services and surroundings that meet their age-related physical needs.

People with disabilities have too often been excluded from participating in basic civic activities like using the public transportation system, serving on a jury, voting, seeking refuge at an emergency shelter, or simply attending a high school sports event with family and friends. The Americans with Disabilities Act (ADA) is a Federal civil rights law that prohibits discrimination against people with disabilities. Under this law, people with disabilities are entitled to all of the rights, privileges, advantages, and opportunities that others have when participating in civic activities.

The Department of Justice revised its regulations implementing the ADA in September 2010. The new rules clarify issues that arose over the previous 20 years and contain new requirements, including the 2010 ADA Standards for Accessible Design (2010 Standards). This document provides general guidance to assist State and local governments in understanding and complying with the ADA's requirements. For more comprehensive information about specific requirements, government officials can consult the [regulation](#), the [2010 Standards](#), and the Department's [technical assistance publications](#).

Who is Protected by the ADA?

The ADA protects the rights of people who have a physical or mental impairment that substantially limits their ability to perform one or more major life activities, such as breathing, walking, reading, thinking, seeing, hearing, or working. It does not apply to people whose impairment is unsubstantial, such as someone who is slightly nearsighted or someone who is mildly allergic to pollen. However, it does apply to people whose disability is substantial but can be moderated or mitigated, such as someone with diabetes that can normally be controlled with medication or someone who uses leg braces to walk, as well as to people who are temporarily substantially limited in their ability to perform a major life activity. The ADA also applies to people who have a record of having a substantial impairment (e.g., a person with cancer that is in remission) or are regarded as having such an impairment (e.g., a person who has scars from a severe burn).

Who Has Responsibilities under the ADA?

Title II of the ADA applies to all State and local governments and all departments, agencies, special purpose districts,

and other instrumentalities of State or local government (“public entities”). It applies to all programs, services, or activities of public entities, from adoption services to zoning regulation. Title II entities that contract with other entities to provide public services (such as non-profit organizations that operate drug treatment programs or convenience stores that sell state lottery tickets) also have an obligation to ensure that their contractors do not discriminate against people with disabilities.

GENERAL NONDISCRIMINATION REQUIREMENTS

Basic Principles

Equal treatment is a fundamental purpose of the ADA. People with disabilities must not be treated in a different or inferior manner. For example:

- A city museum with an oriental carpet at the front entrance cannot make people who use wheelchairs use the back door out of concern for wear and tear on the carpet, if others are allowed to use the front entrance.
- A public health clinic cannot require an individual with a mental illness to come for check-ups after all other patients have been seen, based on an assumption that this patient’s behavior will be disturbing to other patients.
- A county parks and recreation department cannot require people who are blind or have vision loss to be accompanied by a companion when hiking on a public trail.

The integration of people with disabilities into the mainstream of American life is a fundamental purpose of the ADA. Historically, public entities provided separate programs for people with disabilities and denied them the right to participate in the programs provided to everyone else. The ADA prohibits public entities from isolating, separating, or denying people with disabilities the opportunity to participate in the programs that are offered to others. Programs, activities, and services must be provided to people with disabilities in integrated settings. The ADA neither requires nor prohibits programs specifically for people with disabilities. But, when a public entity offers a special program as an alternative, individuals with disabilities have the right to choose whether to participate in the special program or in the regular program. For example:

- A county parks and recreation department may choose to provide a special swim program for people with arthritis. But it may not deny a person with arthritis the right to swim during pool hours for the general public.
- A state may be violating the ADA’s integration mandate if it relies on segregated sheltered workshops to provide employment services for people with intellectual or developmental disabilities who could participate in integrated alternatives, like integrated supported employment with reasonable modifications; or if it relies on segregated adult care homes for residential services for people with mental illness who could live in integrated settings like scattered-site, permanent supportive housing.
- A city government may offer a program that allows people with disabilities to park for free at accessible metered parking spaces, but the ADA does not require cities to provide such programs.

People with disabilities have to meet the essential eligibility requirements, such as age, income, or educational background, needed to participate in a public program, service, or activity, just like everyone else. The ADA does not entitle them to waivers, exceptions, or preferential treatment. However, a public entity may not impose eligibility criteria that screen out or tend to screen out individuals with disabilities unless the criteria are necessary for the provision of the service, program, or activity being offered. For example:

- A citizen with a disability who is eighteen years of age or older, resides in the jurisdiction, and has registered to vote is “qualified” to vote in general elections.
- A school child with a disability whose family income is above the level allowed for an income-based free lunch program is “not qualified” for the program.
- If an educational background in architecture is a prerequisite to serve on a city board that reviews and approves building plans, a person with a disability who advocates for accessibility but lacks this background does not meet the qualifications to serve on this board.

- Requiring people to show a driver's license as proof of identity in order to enter a secured government building would unfairly screen out people whose disability prevents them from getting a driver's license. Staff must accept a state-issued non-driver ID as an alternative.

Rules that are necessary for safe operation of a program, service, or activity are allowed, but they must be based on a current, objective assessment of the actual risk, not on assumptions, stereotypes, or generalizations about people who have disabilities. For example:

- A parks and recreation department may require all participants to pass a swim test in order to participate in an agency-sponsored white-water rafting expedition. This policy is legitimate because of the actual risk of harm to people who would not be able to swim to safety if the raft capsized.
- A rescue squad cannot refuse to transport a person based on the fact that he or she has HIV. This is not legitimate, because transporting a person with HIV does not pose a risk to first responders who use universal precautions.
- A Department of Motor Vehicles may require that all drivers over age 75 pass a road test to renew their driver's license. It is not acceptable to apply this rule only to drivers with disabilities.

There are two exceptions to these general principles.

1) The ADA allows (and may require - see below) different treatment of a person with a disability in situations where such treatment is necessary in order for a person with a disability to participate in a civic activity. For example, if an elected city council member has a disability that prevents her from attending council meetings in person, delivering papers to her home and allowing her to participate by telephone or videoconferencing would enable her to carry out her duties.

2) There are some situations where it simply is not possible to integrate people with disabilities without fundamentally altering the nature of a program, service, or activity. For example, moving a beach volleyball program into a gymnasium, so a player who uses a wheelchair can participate on a flat surface without sand, would "fundamentally alter" the nature of the game. The ADA does not require changes of this nature.

In some cases, "equal" (identical) treatment is not enough. As explained in the next few sections, the ADA also requires public entities to make certain accommodations in order for people with disabilities to have a fair and equal opportunity to participate in civic programs and activities.

Reasonable Modification of Policies and Procedures

Many routine policies, practices, and procedures are adopted by public entities without thinking about how they might affect people with disabilities. Sometimes a practice that seems neutral makes it difficult or impossible for a person with a disability to participate. In these cases, the ADA requires public entities to make "reasonable modifications" in their usual ways of doing things when necessary to accommodate people who have disabilities. For example:

- A person who uses crutches may have difficulty waiting in a long line to vote or register for college classes. The ADA does not require that the person be moved to the front of the line (although this would be permissible), but staff must provide a chair for him and note where he is in line, so he doesn't lose his place.
- A person who has an intellectual or cognitive disability may need assistance in completing an application for public benefits.
- A public agency that does not allow people to bring food into its facility may need to make an exception for a person who has diabetes and needs to eat frequently to control his glucose level.
- A city or county ordinance that prohibits animals in public places must be modified to allow people with disabilities who use service animals to access public places. (This topic is discussed more fully later.)
- A city or county ordinance that prohibits motorized devices on public sidewalks must be modified for people with disabilities who use motorized mobility devices that can be used safely on sidewalks. (This topic is discussed more fully later.)

ADA Title II Regulations

Applicable to State Bar Complaint Procedures

Summary:

Complaints. An ADA complaint may be filed by an individual who believes that a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity. (Section 35.170(a)) Complaints may be filed on behalf of classes by third parties. (Section 35.104)

Government Services. The prohibitions against discrimination on the basis of disability apply to all services, programs, or activities of a public entity. (Section 35.102(a)) A public entity includes a state or local government, or any department, agency, or instrumentality of a state or local government. (Section 34.104)

Notice, Self Evaluation, Complaint Procedure. A public entity shall make available to the beneficiaries of its services information about the ADA and its applicability to the entity's services. (Section 35.106) A public entity shall conduct a self evaluation of its services and programs to determine if they comply with the requirements of the ADA and if they do not then to modify them in a manner to make them compliant. (Section 35.105) A public entity with 50 or more employees shall adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would violate the ADA. (Section 35.107)

ADA Duties. A public entity shall not deny the **benefit of its services** to someone on the basis of his or her disability. (Section 35.130(a)) The opportunity to benefit from services shall be provided on an **equal basis** as provided to participants without a disability. (Section 35.130(b)) A public entity shall make **reasonable modifications** to policies, practices, or procedures in order to avoid discrimination on the basis of disability. (Section 35.130(b)(7)) A public entity shall take appropriate steps to ensure that **communications** with service recipients with disabilities are as **effective** as communications with others. (Section 35.160)

Regulations:

§ 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S. C. 12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

§ 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of this part.

§ 35.104 Definitions.

For purposes this part, the term—

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Public entity means—

- (1) Any State or local government;
- (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

§ 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

§ 35.106 Notice

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 35.107 Designation of responsible employee and adoption of grievance procedures

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

§ 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an **opportunity to participate** in or benefit from the aid, benefit, or service that is not **equal to that afforded others**;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(b) (7) (i) A public entity shall make **reasonable modifications** in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Subpart E—Communications

§ 35.160 General.

(a) (1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

Subpart F—Compliance Procedures

§ 35.170 Complaints

- (a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.
- (b) *Time for filing.* A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.
- (c) *Where to file.* An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

References:

These excerpts have been taken from the regulations found online at:

https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#a35101

Title II applies to state and local courts. [Tennessee v. Lane, 541 U.S. 509, 531 \(2004\).](#)

Courts must comply with the ADA in judicial proceedings. <https://www.ada.gov/cjta.html>

Guardianship proceedings are services that are subject to the mandates of the ADA.

https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html

§ 35.172 Investigations and compliance reviews.

- (a) The designated agency shall investigate complaints for which it is responsible under § 35.171.
- (b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.

§ 35.190 Designated Agencies.

- (6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, and the **administration of justice, including courts** and correctional institutions . . .

Limited Conservatorships and the Denial of Access to Justice: Who is Responsible under the ADA?

A Suggested Focus of Inquiry for the U.S. Department of Justice

By Thomas F. Coleman

Limited Conservatorship Proceedings

1. Limited conservatorships are legal proceedings initiated because someone believes that an adult who has an intellectual or developmental disability is unable to care for his or her basic needs due to an incapacity to make major life decisions.
2. A petition to place the person under a conservatorship is generally filed by a parent or relative who asks the probate court to give them or another designated person the authority to make such decisions for the adult in question.
3. The petition is served on the adult who is then required to respond. The adult becomes an involuntary litigant. Due to cognitive and communication disabilities, the adult is not able to defend himself or herself or to participate in the proceedings in a meaningful way without assistance.

The Americans with Disabilities Act

4. Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 require public agencies, including courts, to take necessary steps to ensure that people with disabilities have meaningful access to the services they offer. The service offered by courts is the administration of justice. Section 504 applies mandates similar to the ADA to public agencies that receive federal funds. Most courts receive some federal funding.
5. Generally a public agency must modify its normal policies or provide an accommodation to a person with a disability *upon request*. However, when the agency knows that the person has a disability and that the nature of the disability precludes or impedes them from making a request for an accommodation, the agency has an affirmative duty to assess the situation and provide an accommodation *without request*.
6. The type of accommodation provided to the person must be sufficient to enable the person to have access to the services and to participate in the services in a meaningful manner. A violation of the ADA and Section 504 occurs when the supports and services provided to someone with a disability are not sufficient to give the person meaningful access to the services of the agency.
7. The only significant accommodation that California courts provide to proposed limited conservatees to give them access to justice in these proceedings is the appointment of an attorney. Since they cannot represent themselves, these involuntary litigants depend on their court-appointed attorney to advocate for their wishes and to defend their rights.
8. The administration of justice in these cases is a process of deciding whether the allegations of the

petition are true, whether they are supported by clear and convincing evidence, whether there are less restrictive alternatives to conservatorship, whether the person nominated to act as conservator is qualified, and whether that person is the best choice for conservator. The adult does not have meaningful access to justice unless the process that is required by law is actually followed. The adult is completely dependent on the court-appointed attorney to ensure that constitutional and statutory requirements for conservatorship proceedings are followed by all participants to the proceedings.

9. Due process of law entitles the adult to *effective* assistance of counsel. To provide effective assistance, the attorney must: (a) have sufficient expertise to deal with issues involving cognitive and communication disabilities, capacity to make decisions, and constitutional and statutory rights of people with developmental disabilities; (b) obey ethical requirements of confidentiality and loyalty, (c) conduct a thorough investigation of the sufficiency of the allegations and evidence in support of the petition; (d) develop evidence to rebut those allegations or to defend the retention of rights by the client; (e) file appropriate objections; (f) demand an evidentiary hearing when appropriate; and (g) assist the client in filing a notice of appeal to challenge errors by the trial court. If the attorney does not provide effective assistance, the client has been denied meaningful access to justice as required by the ADA and Section 504.

Evidence of ADA Violations by Attorneys

10. Spectrum Institute has conducted a thorough investigation of the limited conservatorship system in California, with a special focus on Los Angeles County. The investigation has yielded significant evidence that court-appointed attorneys are not providing their clients meaningful access to justice as required by federal disability laws. The investigation has also documented that the violations are not isolated instances by a few attorneys. Audits of cases show systematic violations by many attorneys – violations that are known to the court. The denial of access to justice for people with developmental disabilities in limited conservatorship cases is systemic.

11. Three individual cases investigated by Spectrum Institute in depth show the seriousness and wide range of ADA access-to-justice violations. The case of Michael Parisio involved allegations of abuse by his conservators. The court-appointed attorney failed to properly investigate the allegations. Michael eventually died. The case of Gregory Demer involved allegations that his court-appointed attorney failed to protect his social rights – the right to decide for himself who to socialize with and who to avoid. It was alleged that his attorney actually advocated against her client and violated ethical duties of loyalty and confidentiality. As a result of not having someone to advocate for him, Gregory is forced to visit regularly with a parent who he says he does not want to see and of whom he says he is afraid. He has been relegated to a life of social servitude. The case of Stephen Lopate involved allegations of numerous ADA violations by his appointed attorney. The attorney refused to allow Stephen, who was mostly nonverbal, to use his chosen method of communication by typing with partial assistance from a support person. The attorney initially dismissed Stephen's right to vote as "inconsistent with conservatorship." He violated client confidentiality and did not properly advocate for his client's wishes not to visit his father.

12. The ADA violations in these cases are not isolated instances. Spectrum Institute conducted an audit of the performance of court-appointed attorneys in Los Angeles in dozens of other cases. The audit revealed that the attorneys did not conduct proper investigations and generally rushed the cases through the system. Many of them devoted only 4 or 5 hours to a case, from start to finish. They did not object to the failure of the regional centers to file capacity assessment reports on time. They

did not object to the failure of the court to appoint an investigator to objectively assess the need for a conservatorship or whether the proposed conservator was qualified or whether the home in which the conservatee would live was safe. The attorneys did not ask for an expert to be appointed to conduct an evaluation of their client's abilities. They did not use the resources of the regional centers to evaluate whether there were feasible alternatives to conservatorship for their clients.

Evidence of Failure to Train Attorneys

13. Under Section 504 and Title II of the ADA, the court has the responsibility to provide access to justice for litigants with cognitive and communication disabilities. In limited conservatorship cases, the court attempts to fulfill this obligation through the appointment of counsel for the litigant.

14. Having extended an accommodation intended to provide access to justice for involuntary litigants with serious disabilities, the court has an obligation to ensure that the attorneys are qualified to represent clients with special needs. Appointing an unqualified attorney is not providing the litigant access to justice. Whether an attorney is qualified or not should not be left to chance. The court should know, in advance of the appointment, that the attorney has the necessary qualifications and experience to represent a client with cognitive and communication disabilities in a proceeding involving specialized legal, medical, and psychological issues.

15. The Los Angeles County Superior Court purports to satisfy its Title II obligation by limiting appointments to attorneys who are listed on a Probate Volunteer Panel. To get on the PVP list and remain on the list, an attorney needs to attend trainings that are mandated by the court. The mandatory trainings have been delegated by the court to the Los Angeles County Bar Association.

16. Spectrum Institute has audited the mandatory PVP trainings conducted by the bar association for the past several years. The trainings are seriously deficient. Many issues essential to effective assistance of counsel have never been addressed. Some seminars have given misinformation to attorneys. Most of the legal, medical, and psychological issues inherent in effective advocacy have been absent from these trainings. The court is aware of what topics are covered or not, since judges participate in the planning of the trainings and attend the trainings. Thus, the court is responsible for the deficiencies. The court is aware that the attorneys have not received sufficient training to provide effective representation to clients with special needs in limited conservatorship proceedings.

Agencies Responsible for These ADA Violations

Los Angeles County Superior Court

17. The Los Angeles County Superior Court has a responsibility to provide litigants with developmental disabilities access to justice in limited conservatorship proceedings. The court has attempted to fulfill this responsibility by appointing an attorney to represent these litigants. Although a public entity can delegate duties, this does not absolve the entity of its supervisory duties to ensure that the agent or contractor provides meaningful access to the services of the public entity.

18. The Superior Court knows that conservatorship respondents cannot participate in the proceedings without the assistance of an attorney. The court knows that these litigants depend entirely on their court-appointed attorneys to ensure that the proceedings are conducted according to the mandates of the law. In other words, the court knows the litigants rely on their attorneys to make sure they are afforded due process. Due process is the service the court provides.

19. The court is aware that these litigants will not know whether or not their attorneys are giving them access to justice. The court also knows that the litigants are not able to complain about ineffective assistance of counsel or to appeal when they are denied due process. Without effective assistance of counsel, the litigants are not given meaningful access to justice. Therefore, it is the responsibility of the court to adopt procedures to ensure the attorneys are qualified and that they are complying with performance standards that are consistent with ADA requirements.

20. The Los Angeles County Superior Court has not adopted training and performance standards that are ADA compliant. There are no performance standards. The trainings mandated by the court are severely deficient. The deficiencies have been brought to the court's attention and yet the deficiencies have not been corrected.

21. The court knows that the actual performance of the appointed attorneys is deficient. The attorneys submit a report in each case which is reviewed by a judge. An audit of dozens of such reports shows that the judges are aware that the attorneys are not performing activities essential to effective advocacy. The attorneys also submit fee claims in which they detail the services they have performed. The fee claims also alert the court as to services the attorneys did not perform. An audit of dozens of fee claims shows that the court is aware that attorneys are performing deficiently. Despite having such knowledge, the judges reappoint the attorneys with deficient performances over and over again to new cases.

22. The court is also creating a barrier to ADA-compliant performance by these attorneys by having adopted a local court rule that gives the attorneys a dual role. In addition to being an advocate for their clients, the attorneys are expected to "assist the court in the resolution of the matter to be decided." This rule creates a conflict of interest for the attorneys. Based on this secondary duty, attorneys are violating client confidences and acting in a manner that is disloyal to the client. The court has been asked by Spectrum Institute to rescind this rule but has failed to do so.

County of Los Angeles

23. The County of Los Angeles funds the legal services program that supplies attorneys for respondents in limited conservatorship proceedings. The court-appointed attorneys submit fee claims for their services, they are approved by the court, and the county then sends a check to the attorneys. The county has no quality assurance controls for the legal services program it funds. It simply pays the fees as ordered by the court. Attorneys with deficient performance are paid. There are no performance audits. The county does not monitor the training programs.

24. The Board of Supervisors has a choice as to the method of providing legal services to conservatorship respondents. It can fund the PVP program operated by the court; or it can designate the Office of the Public Defender to represent these clients; or it can contract with a nonprofit organization to provide such legal services. Quality controls can be included in any of these options.

25. The deficiencies of the PVP legal services program has been brought to the attention of the Board of Supervisors by Spectrum Institute. The supervisors were alerted that the program is violating the ADA rights of conservatorship respondents. The board was advised that the county is itself violating Section 504 and violating the ADA by funding an ADA-noncompliant legal services program with willful indifference to the harm being caused to conservatorship respondents. The Board of Supervisors has failed to take corrective action.

Judicial Council of California

26. The Judicial Council of California is an agency within the judicial branch of government that was created by the California Constitution. Although the chairperson of the Judicial Council is the Chief Justice of California, the Council is an entity separate and distinct from the Supreme Court of California. It operates independently from the Supreme Court.

27. The Judicial Council is responsible for enacting rules and creating standards governing the performance of attorneys and judges in legal proceedings in the trial and appellate courts. It has the authority to enact rules and standards regarding the training and performance of attorneys.

28. The Judicial Council was alerted by Spectrum Institute of systemic deficiencies in limited conservatorship proceedings. It was informed that these deficiencies violate due process as well as the ADA and Section 504. It was asked to adopt rules for training and performance standards for court-appointed attorneys in limited conservatorship proceedings. Despite having this information for over a year, it has not taken action to develop such rules or standards.

29. The Judicial Council is a public entity subject to Section 504 and Title II of the ADA.

State Bar of California

30. The State Bar of California is a public corporation. All licensed attorneys must be a member in good standing of the State Bar. As a public entity, the State Bar is subject to the mandates of Section 504 and Title II of the ADA.

31. The State Bar has adopted rules of professional conduct that impose ethical and performance standards for licensed attorneys. It has adopted a system whereby clients can complain about violations of these standards. When complaints are filed, the State Bar investigates them, and if a violation is found to occur, it imposes appropriate discipline and requires appropriate corrective action.

32. Because of their cognitive and communication disabilities, clients of court-appointed attorneys in limited conservatorship proceedings are not able to file complaints with the State Bar. This is something the State Bar knows or should know. As a result, the State Bar should have an alternative method of monitoring the performance of attorneys who represent such clients, especially when deficient performance comes to the attention of the State Bar through methods other than specific complaints by clients with special needs.

33. Spectrum Institute has brought the problem of deficient performance of PVP attorneys to the attention of the State Bar on several occasions. The State Bar was asked to convene a task force to investigate the problem and recommend solutions. The State Bar did not respond to these requests. As a result, it is allowing the rights of litigants with developmental disabilities to be violated on a systematic basis without taking correction action, much less even investigating.

34. The State Bar of California requires attorneys to show proof of at least 25 continuing education credits every three years in order to have an active license to practice law. The State Bar decides which continuing education providers are allowed to give credits for seminars and educational programs.

35. The State Bar has authorized the Los Angeles County Bar Association to give continuing

education credits to attorneys who attend educational programs sponsored by the County Bar. The County Bar operates the training programs for PVP attorneys who are appointed by the Los Angeles County Superior Court to represent respondents in conservatorship cases. The court mandates that attorneys attend these programs in order to receive appointments to these cases. The court participates in the development of these programs and actively participates in the seminars. Judges of the court show their approval of these seminars by entrusting this educational function to the County Bar, year after year.

36. Spectrum Institute has brought to the attention of the State Bar the deficiencies with these seminars. It has asked for an audit of the seminars that have been given over the past several years.

Supreme Court of California

37. The State Bar of California is an arm of the Supreme Court of California. The Supreme Court is the supervisory entity to which the State Bar is responsible.

38. Spectrum Institute has brought to the attention of the Supreme Court the deficiencies of the training programs of the Los Angeles County Bar Association. It has alerted the court of its request that the State Bar audit these seminars as well as its previous request that the State Bar convene a Task Force on Access to Justice in Limited Conservatorship Proceedings. The court was asked to encourage the State Bar to convene such a task force and to monitor the response of the State Bar to the request for an audit of the PVP training program operated by the County Bar Association.

Court-Appointed Attorneys

39. Attorneys who are appointed to represent clients with special needs in limited conservatorship proceedings themselves have a responsibility under the ADA. Since they are agents of the court due to their appointment by the court to represent these clients, the attorneys are subject to Title II of the ADA. Their duties under Title II – as a public agency – also stems from the fact that their services are paid for by public funds. The attorneys may also have ADA duties pursuant to Title III which governs public accommodations, including providers of legal services.

40. The attorneys have a responsibility, under State Bar rules, not to accept a case for which they lack the necessary training or skills. They have a duty, under state law as well as the ADA, to acquire the appropriate skills prior to taking such a case. Evidence shows a pattern that attorneys representing clients in limited conservatorship cases do not have the necessary training and skills.

41. In addition to the complaint filed with the DOJ for the class of limited conservatees, a complaint was also filed on behalf of Mr. Gregory Demer. An inquiry into the performance of Mr. Demer's attorney could serve as the basis for a remedial template to instruct the entire panel of PVP attorneys.

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for guardianship and conservatorship reform. Spectrum Institute has filed complaints with the U.S. Department of Justice regarding the denial of access to justice for people with developmental disabilities in limited conservatorship proceedings in California. The focus of the complaints is the systematically deficient performance of court-appointed attorneys in these cases.

www.spectruminstitute.org / tomcoleman@spectruminsitute.org

“If no request for an accommodation is made, the court need not provide one.”

– *Judicial Council*
2017 Brochure *



* Rule 1.100 and all Judicial Council educational materials are erroneously premised on the need for a request.

Any program or activity that is funded by the state shall meet the protections and prohibitions of Title II of the ADA and federal rules and regulations implementing the ADA. (Cal. Gvt. Code Sec. 11135)

A public entity must offer accommodations for *known* physical or mental limitations. (Title II Technical Assistance Manual of DOJ)

Even without a request, an entity has an obligation to provide an accommodation when it knows or reasonably should know that a person has a disability and needs a modification. (DOJ Guidance Memo to Criminal Justice Agencies, January 2017)

Some people with disabilities are not able to make an ADA accommodation request. A public entity’s duty to look into and provide accommodations may be triggered when the need for accommodation is obvious. (*Updike v. Multnomah County* (9th Cir 2017) 870 F.3d 939)

It is the knowledge of a disability and the need for accommodation that gives rise to a legal duty, not a request. (*Pierce v. District of Columbia* (D.D.C. 2015) 128 F.Supp.3d 250)

A request for accommodation is not necessary if a public entity has knowledge that a person has a disability that may require an accommodation in order to participate fully in the services. Sometimes the disability and need are obvious. (*Robertson v. Las Animas* (10th Cir. 2007) 500 F.3d 1185)

The failure to expressly request an accommodation is not fatal to an ADA claim where an entity otherwise had knowledge of an individual’s disability and needs but took no action. (*A.G. v. Paradise Valley* (9th Cir. 2016) 815 F.3d 1195)

The import of the ADA is that a covered entity should provide an accommodation for *known* disabilities. A request is one way, but not the only way, an entity gains such knowledge. To require a request from those who are unable to make a request would eliminate an entire class of disabled persons from the protection of the ADA. (*Brady v. Walmart* (2nd Cir. 2008) 531 F.3d 127)

Supreme Court and State Bar Can Develop Attorney Performance Standards

The Mental Health Advisory Committee of the California Judicial Council has determined that, without specific legislative authorization, the Judicial Council lacks the authority to develop specific performance standards for attorneys representing respondents in probate conservatorship proceedings. However, the Supreme Court and the State Bar have authority to do so under existing law. The following comments are taken from two reports issued by the advisory committee.

Comment of Probate and Mental Health Advisory Committee (see page 26 of the report at this link: <https://disabilityandguardianship.org/pmhac-2.pdf>

“The committee appreciates CANHR’s comment and agrees that clear specification of the role and duties of counsel retained or appointed to represent a (proposed) ward or conservatee is desirable. The committee does not, however, recommend that the rules provide that specification directly. Generally speaking, it is the province of the Legislature (see, e.g., Bus. & Prof. Code, § 6068) **and the Supreme Court** (see, e.g., Rules Prof. Conduct, rules 1.2–1.4 (eff. Nov. 1, 2018)) **to specify the role and duties of an attorney** and to authorize any exceptions.”

Comment of Probate and Mental Health Advisory Committee (see page 5 of the report at this link: <https://disabilityandguardianship.org/pmhac-1.pdf>

“The committee considered whether to directly specify the standards of professional conduct applicable to attorneys appointed by the court to represent (proposed) conservatees and wards. 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**. The State Bar Act (Bus. & Prof. Code, §§ 6000–6243) and the Rules of Professional Conduct govern the attorney-client relationship. The Judicial Council and the lower courts are not free to depart from this statutory and regulatory framework; any rule of court must be consistent with statute.”



Keeping your MCLE records



Attorneys must track their own hours and report compliance to the State Bar at the end of their three-year compliance period.

If your MCLE report is audited, you must be prepared to provide:

- Certificates of attendance for classes you take
- Records of self-study activities that includes the following information: course title, provider, time spent in the activity, subject matter of the activity and the activity date
- Proof of exempt status

You are required to keep these records for at least a year from the time you reported.

Audits

It is very important that you collect and keep your records of attendance in MCLE activities and self-study. Every year, the State Bar conducts an audit of the group that has filed its MCLE compliance reports.

Attorneys who do not have records showing they completed the required 25 hours may be subject to a penalty. If they still have not met the requirement by November, they will be placed on administrative inactive status and will not be eligible to practice law.

False declarations of compliance could lead to discipline.

Related links

Download a [Personal MCLE Log](#) you can use to keep track of your credit hours

Find your [MCLE compliance group](#)



**OPEN SESSION
AGENDA ITEM
702 NOVEMBER 2020**

DATE: November 19, 2020

TO: Members, Board of Trustees

FROM: Lisa Chavez, Director, Office of Research & Institutional Accountability

SUBJECT: Ad Hoc Commission on the Discipline System: Recommendations for Composition and Charter

EXECUTIVE SUMMARY

This agenda item follows up on the September 2020 Board of Trustees meeting at which the Board directed State Bar staff to develop plans to establish an ad hoc commission on the State Bar discipline system in consultation with leadership of the Regulation and Discipline Committee. This item includes recommendations on the commission charge, size, and composition.

BACKGROUND

Following receipt of a report on disparities in the discipline system, the Board directed staff to develop an action plan to address the factors that contribute to the disproportionate discipline of Black, male attorneys. At the July 2020 Board meeting, staff presented Trustees with 12 potential reforms developed by Professor Christopher Robertson to address disparate discipline imposed on Black attorneys. The Board directed staff to implement and evaluate a number of these reforms, including exploring ways to improve respondent representation, archiving complaints closed without discipline that are more than five years old, pursuing risk-based regulation options to prevent RA-Bank Matters, and studying complaints dismissed without discipline. Progress on this work is outlined in Board of Trustees Agenda Item 703.

The work described above will build on the dozens of initiatives, policies, and procedures the State Bar has implemented over the last several years to improve access and protection of the public served by the State Bar. OCTC in particular has also undergone numerous, major organizational changes designed to process cases more efficiently and effectively, as well as to focus resources on protecting the most vulnerable victims of attorney misconduct and the

misconduct of those who hold themselves out to be attorneys, thereby defrauding the public in the process. Among the changes introduced in the past five years are initiatives to:

- Improve access to the complaint process;
- Improve the treatment of complaining witnesses;
- Enhance operational efficiency;
- Improve the use of technology; and
- Identify and prioritize cases posing the most significant public protection risk.

Finally, the State Bar has developed a research agenda to be carried out over the next 12 months, addressing topics such as risk-based regulation, efficiency, procedural justice, and disparities in the discipline system. This research agenda will largely rely on routinely collected data available in administrative databases, but will be supplemented with data gleaned from in-depth reviews of narratives available in case files where applicable.

In addition to these efforts, the discipline system could nonetheless benefit from a comprehensive re-examination of its policies and procedures. OCTC's efforts to prioritize cases have led to important improvements that demonstrate significantly upgraded mechanisms for protecting the public than those that previously existed. Nonetheless, in many cases, the time to disposition remains lengthier than optimal, and the sheer number of older cases awaiting resolution still needs to be addressed. Additionally, the immense work that has been done is ripe for review to evaluate fairness and equity, ensures a keen focus on the State Bar's public protection mission, and continues to review outcomes to understand and address disparities that may exist based on race or gender. The Board of Trustees therefore directed staff to develop plans for an Ad Hoc Commission on the Discipline System. The commission would review work that has already been done (as well as work currently in progress), build upon initiatives that have been implemented, evaluate such initiatives, and integrate the many initiatives into a coherent whole to develop additional insight on how to improve the discipline system overall.

DISCUSSION

Staff worked with Regulation and Discipline Committee leadership to outline the Ad Hoc Commission's charter, size, and stakeholder composition.

Charter

The Ad Hoc Commission on the Discipline System will take inventory of the changes that have been proposed and implemented in the Office of Chief Trial Counsel since 2016 and evaluate their impact on public protection. The evaluation will focus on the impact of these reforms on a number of key aspects of the discipline system, including:

- Procedural justice and the experiences and perceptions of the system by complaining witnesses and respondents;
- Workload and operational efficiency of case processing;

- Case prioritization and differentiated case-flow management; and
- The efficacy of the system for preventing future attorney misconduct.

In particular, this body will:

- Review the full catalogue of reforms OCTC has implemented and identify one or more sets of processes, policies, and procedures to focus on;
- Evaluate if these processes, policies and procedures had their intended effect; and
- Based on this evaluation, recommend additional or revised reforms.

In so doing, the commission will review research studies that have been completed and determine whether additional research is needed. It will also review research studies in progress and generate policy recommendations as results become available.

Another key element of the State Bar's discipline system is the State Bar Court, which on its own initiative, also continually evaluates its processes to improve the adjudication of cases. With the participation of the State Bar Court, the commission may examine the structure of the court, principally issues involving its independence and autonomy.

As a guiding principle, the commission will focus on the dual goals of ensuring public protection and fairness in the discipline system.

Composition

The Ad Hoc Commission will consist of 19 members appointed by the Board of Trustees. Members will represent key institutional entities that focus on public protection and reflect the state's diversity, both demographic and geographic. As a guideline, below are areas from which commission members will be sought and the recommended number of members from each:

- Council on Access and Fairness (2)
- California Medical Board (1)
- Department of Consumer Affairs (1)
- California Lawyers Association (1)
- Association of Discipline Defense Counsel (2)
- National Organization of Bar Counsel (1)
- California criminal justice system (prosecutor, defense counsel, judge) (3)
- State Bar Board of Trustees (2)
- Office of Chief Trial Counsel (2)
- State Bar Court (2)
- Affinity Bar Associations (2)

The commission will be staffed by the State Bar. It will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates to be provided to the Board of Trustees.

FISCAL/PERSONNEL IMPACT

In addition to personnel costs for staffing this committee and expenses for meetings, it is anticipated that expenses will be incurred to hire a consultant to conduct research as needed.

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: b. Develop and implement transparent and accurate reporting and tracking of the health and efficacy of the discipline system, and measures to improve the fairness and efficacy of the discipline system to include: (a) an updated workload study for OCTC; (b) identification of staffing and resource needs based on the results of that study; (c) evaluating the different points of contact between the State Bar and Complaining Witnesses/Respondents to identify areas where modifications to the form or content of communication could improve the sense of procedural fairness; and (d) pilot changes in the form or content of communication w/ Complaining Witnesses and Respondents to identify measures that will improve the sense of procedural fairness by complaining witnesses or Respondent Attorneys.

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the following charter will guide the work of the Ad Hoc Commission on the Discipline System:

The Ad Hoc Commission on the Discipline System will take inventory of the changes that have been proposed and implemented in the Office of Chief Trial Counsel since 2016 and evaluate their impact on public protection. The evaluation will focus on the impact of these reforms on a number of key aspects of the discipline system, including:

- Procedural justice and the experiences and perceptions of the system by complaining witnesses and respondents;
- Workload and operational efficiency of case processing;
- Case prioritization and differentiated case-flow management; and

- The efficacy of the system for preventing future attorney misconduct.

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- Review the full catalogue of reforms OCTC has implemented and identify one or more sets of processes, policies, and procedures to focus on;
- Evaluate if these processes, policies and procedures had their intended effect; and
- Based on this evaluation, recommend additional or revised reforms.

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- State Bar Court (2)
- Affinity Bar Associations (2)

The commission will be staffed by the State Bar. It will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates to be provided to the Board of Trustees and it is

FURTHER RESOLVED, that the Board of Trustees directs State Bar staff to solicit membership for the Ad Hoc Commission and it is

FURTHER RESOLVED, that the Ad Hoc Commission on the Discipline System will begin its work in early 2021 and present a final report on its findings and recommendations no later than June 30, 2022, with periodic status updates provided to the Board of Trustees.

ATTACHMENT(S) LIST

A. None



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www.disabilityandabuse.org • tomcoleman@disabilityandabuse.org

November 25, 2014

Mr. Craig Holden
President, State Bar of California
Lewis, Brisbois, Bisgaard, & Smith
221 N. Figueroa Street, Suite 1200
Los Angeles, CA 90012

Re: Task Force on Limited Conservatorships

Dear Mr. Holden:

In August I wrote a letter to the State Bar President and the Board of Trustees with a request that a Task Force on Limited Conservatorships be convened. (See the enclosed letter.) The purpose of the Task Force would be to investigate whether public defenders and court-appointed attorneys are fulfilling ethical duties, adhering to professional standards, and following constitutional requirements for effective assistance of counsel in limited conservatorship proceedings.

Some counties use the services of public defenders in such cases, while other counties appoint private attorneys to represent adults with developmental disabilities in limited conservatorship cases. An analysis of the performance of court-appointed attorneys in Los Angeles County shows that serious deficiencies exist in the performance of such attorneys and that the training of the attorneys is deficient as well. Because some of the problems with the Limited Conservatorship System are systemic and pertain to defects in statutes and court rules, it is likely that conservatees in other counties are also receiving ineffective assistance of counsel.

I invite you, and new members of the Board of Trustees, to visit a page on our website with more information about the problems we have identified with attorney performance in these cases. See: www.disabilityandabuse.org/pvp The problems with the Limited Conservatorship System are much greater and run much deeper than the performance of attorneys. A new report by the Coalition for Compassionate Care of California confirms the findings of our own report, *Justice Denied*, that such problems involve the practices of judges, court investigators, and Regional Centers, as well. (See the enclosed press release about the new report, *Thinking Ahead Matters*.)

This issue should be placed on the agenda of a meeting of the Board of Trustees. I recently spoke to an advisory committee of the Judicial Council and would be pleased to make a similar presentation to the State Bar Board of Trustees. (See the enclosed Daily Journal news story.)

Very truly yours,

A handwritten signature in blue ink that reads "Thomas F. Coleman".

THOMAS F. COLEMAN
Legal Director



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www.disabilityandabuse.org • nora-baladerian@verizon.net

August 29, 2014

Louis J. Rodriguez
President, California State Bar
c/o Public Defender
320 W. Temple Street
Los Angeles, CA 90012

Re: Request for a State Bar Task Force on Limited Conservatorships

Dear Mr. Rodriguez:

The Disability and Abuse Project has been studying the Limited Conservatorship System in California. Limited conservatorship proceedings are used to determine whether to appoint a conservator for an adult with a developmental disability, and if so, which rights to take away from the conservatee. People are generally conserved as young adults and remain conserved for life.

Earlier this year we issued a report – “Justice Denied: How California’s Limited Conservatorship System is Failing to Protect the Rights of People with Developmental Disabilities.” That report (online at www.disabilityandabuse.org/conferences/justice-denied.pdf) found systemic failures and numerous rights violations committed by judges and the attorneys they appoint to represent limited conservatees.


A new report, released in the form of an educational guidebook, details constitutional infringements and ethics violations by these court-appointed attorneys. Breaches of confidentiality and loyalty and conflicts of interest are allowed to occur – indeed they are affirmatively encouraged – by policies and practices of the Probate Court in Los Angeles. They may also be occurring in other counties throughout the state. (See: “A Strategic Guide for Court Appointed Attorneys in Limited Conservatorship Cases” which is found online at www.disabilityandabuse.org/pvp).

We are asking that the Board of Trustees to convene a Task Force on Limited Conservatorships to look into this matter. The Task Force could make recommendations on how to improve the performance of attorneys who represent limited conservatees and recommend changes in policies and practices to guard against constitutional and ethical violations of the type documented by our studies.

Thousands of limited conservatees are affected by these practices. These vulnerable adults do not have the ability to file complaints against the system in general or against specific attorneys appointed to represent them in individual cases. We are therefore making this request on their behalf. We hope that our request is favorably received by the Board of Trustees and that appropriate action is taken.

cc: All Trustees

Very truly yours,


Thomas F. Coleman
Legal Director

Conservatorships reviewed

Judicial committee mulls whether to recommend that the state revamp training

By Paul Jones
Daily Journal Staff Writer

SAN FRANCISCO — A judicial committee may recommend the state revamp judge and attorney training in the wake of a disability rights group's allegations of problems with how California courts award parents and guardians control over developmentally disabled people.

That's the potential upshot of a meeting Friday by the Judicial Council's Probate and Mental Health Advisory Committee, where judges heard from attorney and disability rights advocate Thomas F. Coleman of the nonprofit Disability and Abuse Project. Coleman said he's uncovered numerous problems with the handling of conservatorship cases, and he wants a special task force to investigate alleged conflicts of interest in the manner in which courts treat developmentally disabled parties.

Conservatorship cases involve courts granting legal authority to guardians to take control over elements of a person's life, such as medical and financial matters. Developmentally disabled people are often subject to conservatorship cases when they reach legal adulthood and parents seek to continue caring for them. But some disability rights advocates, including Coleman's group, complain disabled people's rights are often undermined in court.

Specifically, Coleman claimed he has found problems in Los Angeles County Superior Court that include the court's decision to end the use of independent investigators who verify if a developmentally disabled person

needs to be taken care of, and to what extent. He also said attorneys who are hired by courts to represent disabled parties are pushed to provide sensitive information about their clients to the court in order to speedily resolve conservatorship matters.

"Any attorney is supposed to represent their clients' wishes and protect their clients' rights. These attorneys don't do that," he said. "A local court rule tells them they have a secondary duty ... to help the court resolve the cases ... They gather information about their clients' strengths, weaknesses, abilities and inabilities" and then present potentially damaging information to the court.

Statewide, Coleman said regional centers set up to assist disabled people are poorly equipped to provide important information about parties in conservatorship cases.

Contra Costa County Superior Court Judge John Sugiyama chairs the Probate and Mental Health Advisory Committee. Despite the Disability and Abuse Project's goal for a statewide task force to review court practices in conservatorship cases, Sugiyama and other judges said the money wasn't available, and indicated the committee wouldn't recommend such a task force to the Judicial Council. However, Sugiyama said he wanted to pursue the possibility of altering training for judges and attorneys to highlight some of the issues raised by Coleman.

"As you're aware, being a lawyer facing courtrooms that are being darkened, staff members that are being laid off, it's going to be very difficult for the judicial branch to find money to support a task force," Sugiyama said, urging Coleman to pursue the idea with lawmakers.

However, "This is what I suggest — one thing we can do immediately pertains to the training of judicial officers and

court-appointed counsel," Sugiyama said. "That is something we can enforce. We can impose the requirement on judges overseeing limited conservatorships and court-appointed counsel."

The commission members also suggested pursuing new standards for regional centers, whose reports can influence the outcome of conservatorship cases.

Coleman said he'd work with the committee to develop changes that could help address some of the issues raised by his group. That could lead to the judicial branch formally enacting new training requirements to improve protection of disabled parties' rights.

However, outside of the meeting he said he still wants a broader review of the conservatorship system.

"I feel that they are sincerely interested in seeing reform occur in some areas," he said. But "the powers that be should be able to find the money to staff such a task force. A comprehensive review is long overdue and needed."

In 2006 the judicial branch created a task force to look into general conservatorships, which mainly involve senior citizens, he said.

Coleman said he and the Disability and Abuse Project were previously successful in pushing for changes to state law that clarified a disabled person's right to vote couldn't be removed simply because they required assistance filling out a voter registration form. AB 1311 was signed by Gov. Jerry Brown earlier this year. The group has also filed a Department of Justice complaint more generally alleging the state's voter competency laws amount to literacy tests. Coleman said he might consider pursuing a Department of Justice complaint if the conservatorship system isn't more broadly reviewed.

California Coalition Joins Call for Limited Conservatorship Reforms

Momentum is Building for a Statewide Review

The call for reform of the Limited Conservatorship System in California just got louder with the release of a report that echoes concerns and criticisms raised earlier this year by the [*Justice Denied*](#) report of Disability and Abuse Project of Spectrum Institute.

The new report, titled [*Thinking Ahead Matters*](#) was released by the Coalition for Compassionate Concern of California, whose research was done with the assistance of disability rights and disability services organizations and agencies, such as The Arc of California, Disability Rights California, the state Department of Developmental Services, and the California State Council on Developmental Disabilities.

Both reports show that more than 40,000 adults with developmental disabilities are under a limited conservatorship. The research underlying both reports discloses major deficiencies in the procedures utilized for creating these conservatorships and for reviewing them periodically as required by law.

The failures noted in the reports require a statewide review of policies governing the Limited Conservatorship System and the practices of judges, court-appointed attorneys, court investigators, petitioners, conservators, and Regional Centers.

The failure of the Legislature to designate an agency to monitor the practices of the participants in this system forms a major part of the problem. Inadequate training of judges, attorneys, and investigators is another major deficiency. Practices vary from county to county, thereby depriving people with developmental disabilities of equal protection of the law.

The Disability and Abuse Project sounded the alarm earlier this year through reports and conferences disclosing many deficiencies in the Limited Conservatorship System. In a [presentation](#) to the Judicial Council of California in San Francisco on November 14, the organization called for a statewide Task Force on Limited Conservatorships. When an Advisory Committee cited insufficient funding as an obstacle to creating such a task force, the organization wrote a [letter](#) to the Chief Justice reiterating the need for a statewide review and suggesting possible sources for funding.

Now that the report of the California Coalition has come to light – a report that reinforces and amplifies on the findings of the *Justice Denied* report – perhaps the Chief Justice will expedite the formation of a Task Force on Limited Conservatorships. The 40,000 adults who are currently under the control of this system, and the 5,000 more who are added to it each year, deserve as much.

To access the reports and for information: <http://disabilityandabuse.org/conservatorship-reform.htm>



Thomas F. Coleman, Legal Director
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Disability and Guardianship Project

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December 12, 2016

State Bar of California
Commission on Access to Justice
180 Howard Street
San Francisco, CA 94105

Attn: Ms. Kelli Evans, Office of Legal Services

Re: Improving Access to Justice in Limited Conservatorship Proceedings

Dear Commissioners:

I have asked Ms. Evans to forward to you the attached materials with the hope that you will find time to review them prior to the Commission's meeting in January. I believe this may be the first time that access to justice for adults with intellectual and developmental disabilities has been brought to the Commission's attention.

I have been studying the limited conservatorship system in California for the past several years and have written extensively on systemic problems – both in policy and practice – that contribute to the ongoing denial of access to justice for this class of litigants. If the attached materials spark an interest in learning more about the problems with this system, and what can be done to improve access to justice in limited conservatorship proceedings, you can go to the Digital Law Library on Disability and Guardianship. (<http://spectruminstitute.org/library/>) There, you will find more than 220 reports and articles on this subject. Much of the material focuses specifically on California.

The attached article published in the Daily Journal on November 2, 2016 discusses how litigants with cognitive and communication disabilities lack meaningful access to complaint procedures when their attorneys fail to perform legal services adequately. The attached 2016 Annual Agenda of the Probate and Mental Health Advisory Committee shows that the Judicial Council is beginning to take a look at problems I brought to their attention regarding the lack of standards for qualifications, performance, and training of court-appointed attorneys in limited conservatorship proceedings. The attached brochure of the Due Process *Plus* White Paper to the Department of Justice shows the scope and complexity of the problems concerning access to advocacy services – as required by the ADA.

I recently sent the State Bar a resolution for this Commission to consider adopting. If I can be of any assistance to the Commission as it considers this resolution or otherwise reviews these issues, please feel free to contact me.

Respectfully submitted:

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org



Disability awareness all day, every day

We Need to Fix Complaint Procedures for Disabled Litigants

by Thomas F. Coleman

Did you know that October was Disability Awareness Month? That designation provides an opportunity for private-sector businesses to recognize the contributions and needs of workers and customers with disabilities. In terms of the public sector,

Disability Awareness Month is a time that judges and attorneys are reminded they may need to take extra steps to provide access to justice to litigants with disabilities.

In keeping with the spirit of that month, I sent a letter to the State Bar of California in October 2015 to bring to its attention deficiencies in legal services provided by court-appointed attorneys representing clients with cognitive disabilities in conservatorship proceedings. I sent a similar letter to the California Supreme Court. Now that another Disability Awareness Month has come and gone, I am still waiting for a reply from the bar association and the court.

For judges and attorneys who interact with litigants who have cognitive disabilities, every single day must be disability awareness day. Awareness of the special needs of such litigants is not optional or something that should be considered one month each year. The Americans with Disabilities Act – and its mandate that litigants with disabilities are provided access to justice – require that each day must be disability awareness day for the judiciary and the legal profession.

Attorneys who represent clients with cognitive disabilities are bound by the same rules governing attorney-client relationships as are attorneys who represent clients without disabilities. Rules of professional conduct, promulgated by the Supreme Court and enforced by the State Bar, require attorneys to perform competently, avoid conflicts of interest, and adhere to ethical duties of undivided loyalty and utmost confidentiality. They must also

communicate effectively with their clients. A violation of any of these duties – rooted in common law, statutes, and rules of court – may be addressed through a variety of complaint procedures.

In a criminal proceeding, for example, a disgruntled defendant can ask the court to replace a court-appointed attorney who the defendant feels is performing incompetently. This triggers what is known as a “Marsden” hearing where the defendant can air any grievances in a confidential hearing. A “Marsden” procedure is theoretically available to respondents in conservatorship cases. If the complaint is found to have merit, a new attorney is appointed.

A client who has received ineffective assistance of counsel in a legal proceeding has the right to appeal to bring the complaint to the attention of an appellate court. If the appeal is successful, a new trial may be ordered.

A client who has been victimized by an attorney’s misconduct or incompetent services can file a complaint with the State Bar. If an investigation shows probable cause that statutes or court rules were violated, an administrative hearing is conducted which may result in discipline to the attorney.

These complaint procedures are theoretically available to all clients, but in reality they are not accessible to litigants with cognitive disabilities. Because

of the nature of such disabilities, litigants in conservatorship proceedings, for example, would not know whether their attorneys are performing incompetently, have a conflict of interest, have been disloyal, or have violated the duty of confidentiality. This type of a disability also makes them unaware that complaint procedures are available or to understand how to go about filing such a complaint.

Clients with cognitive disabilities are, in a practical sense, unable to make a Marsden motion, file an appeal, or lodge a complaint with the bar association. Unless the judiciary and the legal profession take affirmative measures to provide such clients meaningful access to these complaint procedures, litigants with cognitive disabilities will continue to be excluded from this aspect of the administration of justice.

Solutions are available if only they are sought. There are three public entities in California – each of which has obligations under Title II of the ADA – that should seek solutions so that litigants with cognitive disabilities have access to these attorney complaint procedures.

The Judicial Council of California adopts rules governing trial and appellate court procedures. It should consider a new rule to give “next friend” standing to a third party to make a Marsden motion on behalf of a respondent in a conservatorship proceeding. A more liberal rule on standing should also be adopted to allow a third party to file an appeal when the rights of a litigant with a cognitive disability have been violated due to attorney misconduct or judicial error or abuse of discretion.

The State Bar of California has a major role to play. Knowing that clients with cognitive disabilities will generally not be aware of attorney misconduct or incompetent services, the bar association should allow a third party to initiate a complaint against an attorney suspected of violating rules of professional conduct.

The State Bar can also take pro-active measures to minimize deficient legal services to litigants with cognitive disabilities. For example, it can monitor

training programs for public defenders and court-appointed attorneys who represent respondents in conservatorship proceedings to ensure they are ADA-compliant and that they make the attorneys qualified to handle such cases. MCLE credits should only be allowed for ADA-certified educational programs.

The State Bar also can annually audit a sample of conservatorship cases throughout the state to verify, after the fact, that the attorneys truly provided the clients effective advocacy services. Knowing that his or her case might be selected for an audit could have a positive effect on attorney performance.

In addition to its adjudicative role in litigation, the California Supreme Court has an administrative function as well. It is a “public entity” with responsibilities under Title II of the ADA to ensure access to justice for litigants with disabilities. It should exercise its administrative responsibilities by convening, or instructing the State Bar to convene, a Task Force on Access to Attorney Complaint Procedures. Such a task force – composed of attorneys, judges, and representatives of organizations advocating for seniors and people with intellectual disabilities – would delve deeper into how to give clients with cognitive disabilities better access to justice if and when their attorneys fail them.

If the state judiciary and the legal profession heed this call to action, perhaps when Disability Awareness Month rolls around in October 2017, the Supreme Court, the State Bar, and the Judicial Council will have found some viable methods of providing meaningful access to these complaint procedures for litigants with intellectual disabilities. ♦♦♦

Thomas F. Coleman is the legal director of the Disability and Abuse Project of Spectrum Institute.
Email: tomcoleman@spectruminstitute.org
Website: www.spectruminstitute.org

Published on November 2, 2016

Daily Journal

California's premiere legal newspaper

D R A F T

Resolution of the Commission on Access to Justice to
Convene a Workgroup on Limited Conservatorships

Whereas, data from the Department of Developmental Services indicates that more than 40,000 adults with intellectual and developmental disabilities have open conservatorship cases in which they are currently under the protection of the superior courts in California. It is estimated that up to 5,000 new conservatorship petitions are filed each year seeking to place such individuals under the protection of the superior courts; and

Whereas, California has created limited conservatorship proceedings exclusively for the protection of adults with developmental disabilities; and

Whereas, information has been brought to the attention of the State Bar of California that systemic problems with the limited conservatorship system, including alleged deficiencies in policies, practices, and procedures of judges, attorneys, and other participants in such proceedings, may be depriving adults with developmental disabilities of access to justice as respondents in such cases; and

Whereas, due to the nature of their cognitive, communication, and other disabilities, limited conservatorship respondents are generally unable to complain, either individually or as a class, about the denial of access to justice; and

Whereas, the vast majority of limited conservatorship respondents are indigents; and

Whereas, Spectrum Institute is a nonprofit organization that has been studying the limited conservatorship system in California and has reported numerous deficiencies in various aspects of this system that it states are denying access to justice to people with intellectual and developmental disabilities; and

Whereas, Spectrum Institute has brought these alleged deficiencies to the attention of relevant local, state, and federal agencies, but no coordinated action has been taken yet to study or address them on a statewide basis; and

Whereas, attorney Thomas F. Coleman, as legal director of Spectrum Institute, has extensively researched the limited conservatorship system and the role of its various participants, including judges, court-appointed attorneys, court investigators, capacity assessment experts, and regional centers, and has published numerous articles and reports suggesting ways that the system can be improved and how these participants can better provide limited conservatorship respondents with access to justice in these cases; and

Whereas, the role of court-appointed attorneys for limited conservatorship respondents, whether they be private attorneys or public defenders, is foundational to these respondents receiving access to justice and having meaningful participation in their cases; and

Whereas, if court-appointed attorneys were to provide their clients effective advocacy and defense services in these cases, such services would help to ensure that such clients would receive due process of law and would help ensure that all other participants in these cases comply with their own statutory and constitutional duties; and

Whereas, there are currently no statewide standards for qualifications, performance, or training of court-appointed attorneys in limited conservatorship proceedings; and

Whereas, due to the nature of their disabilities, respondents in limited conservatorship proceedings may lack access to the normal procedures used by litigants to complain about and remedy deficiencies in judicial proceedings, including deficiencies in the performance of their attorneys – such complaint procedures including “Marsden” motions and hearings in the superior courts, appeals to California’s appellate courts, and administrative complaints to the State Bar; and

Whereas, there are no state or local agencies monitoring the performance of court-appointed attorneys to determine if such attorneys are providing advocacy and defense services that comply with statutory requirements, court rules, ethical standards, constitutional duties, or access-to-justice mandates of the Americans with Disabilities Act; and

Whereas, the Judicial Council of California has authorized its Probate and Mental Health Advisory Committee to study proposals submitted to it by Spectrum Institute and to develop new court rules on standards for qualifications, performance, and training of court-appointed attorneys in limited conservatorship cases; and

Whereas, the Advisory Committee will be releasing a draft of proposed new rules for public comment in the near future; and

Whereas, some of the access-to-justice problems identified by Spectrum Institute with limited conservatorship proceedings are beyond the purview of the current work of the Advisory Committee but are within the jurisdiction of the State Bar of California to study; and

Whereas, a review of the limited conservatorship system and recommendations for improving access to justice in such proceedings needs to be done by a study group composed of individuals with experience and expertise in the field of developmental disabilities, the administration of justice, and/or the application of the Americans with Disabilities Act to judicial proceedings involving litigants with such disabilities; and

Whereas, such a study group should be composed of individuals who do not have a potential or perceived conflict of interest or bias favoring the status quo – such as attorneys and judges currently involved in limited conservatorship proceedings, or involved in the appointment or payment of court-appointed attorneys, or involved in the training of such attorneys. However, individuals who are currently involved with limited conservatorships in such ways can participate as subject matter experts who submit information to a study group for its consideration;

Now, therefore, be it resolved, that:

1. The California Commission on Access to Justice hereby convenes a Workgroup on Limited Conservatorships.
2. The Workgroup shall review proposals developed by the Probate and Mental Health Advisory Committee pertaining to the improved administration of justice in limited conservatorship proceedings and shall provide comments to the Judicial Council about those proposals.
3. The Workgroup shall also review proposals submitted to it by research, education, and advocacy organizations and agencies, and subject-matter experts, on how to improve access to justice for people with intellectual and developmental disabilities in limited conservatorship proceedings and how to improve access to justice to such litigants in ancillary proceedings involving appeals to California's appellate courts and administrative complaints to the State Bar.
4. Members of the Workgroup should include self-advocates who have intellectual and developmental disabilities; representatives of disability rights advocacy organizations and agencies; professors who teach legal ethics; judges, private attorneys, and public defenders who are currently not involved in limited conservatorship proceedings but who have experience with litigants who have intellectual and developmental disabilities; former staff members of regional centers; medical and mental health professionals with expertise in capacity assessments; a representative of the Department of Developmental Services; and an ADA specialist with the State Bar of California.
5. Having extensively studied the limited conservatorship system and published numerous articles and reports on the subject over the past few years, attorney Thomas F. Coleman is appointed to serve as a special advisor to the Workgroup; and
6. The Workgroup shall develop one or more reports to the Commission on Access to Justice containing comments on new court rules proposed by the Probate and Mental Health Advisory Committee, as well as recommendations for actions that should be taken by the Legislature, the Judicial Council, the State Bar, the Supreme Court, the Superior Court of the State of California, and other relevant state and local agencies and organizations to improve access to justice for people with intellectual and developmental disabilities in limited conservatorships and other ancillary proceedings.
7. The report on proposals from the Probate and Mental Health Advisory Committee shall be submitted in a timely manner so that the Commission may provide comments on such proposals to the Judicial Council within the timetable established by the Judicial Council.
8. Other reports may be submitted by the Workgroup to the Commission as the Workgroup determines they are ready for the Commission's consideration.

Adopted by the Commission at its meeting on _____.

Tom Coleman - Spectrum Institute

From: Spectrum Institute <tomcoleman@spectruminstitute.org>
Sent: Friday, April 7, 2017 2:48 PM
To: 'Louisa.Ayrapetyan@calbar.ca.gov'
Subject: FW: Op-Ed Articles
Attachments: daily-journal-op-ed-booklet.pdf

Louisa,

I received an email reply from Kelli informing me that you are the contact person with the Access to Justice Commission now.

So I am resending this to you.

Tom

-----Original Message-----

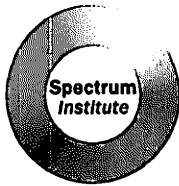
From: Spectrum Institute [mailto:tomcoleman@spectruminstitute.org]
Sent: Friday, April 7, 2017 12:35 PM
To: 'Patricia' <Patricia.Lee@calbar.ca.gov>; 'George' <George.Leal@calbar.ca.gov>; 'Evans, Kelli' <Kelli.Evans@calbar.ca.gov>
Subject: Op-Ed Articles

Today I pulled together all of the op-ed articles I have written about conservatorship reform that were published by the Daily Journal.

I thought it would be helpful to have them all in one place.

I am sharing them with people who are currently looking at these issues, so I thought I should send them to some of you at the State Bar.

I look forward to hearing from the State Bar as to what actions it will take to help ensure that people with developmental disabilities receive access to justice in limited conservatorship proceedings.



Disability and Guardianship Project
Disability and Abuse Project
9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

February 6, 2017

Ms. Elizabeth Rindskopf Parker
Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Request for Pro-Active Measures to Enhance Access to Justice for People
with Developmental Disabilities in Limited Conservatorship Proceedings

Dear Ms. Parker:

Over the past few weeks I have been in communication with three senior staff members at the State Bar. They have all expressed an interest in having the State Bar respond to the problems I have raised regarding impediments to access to justice in limited conservatorship proceedings. However, no actions have been mentioned yet as to how the State Bar will specifically address these issues.

I encourage the State Bar to take proactive steps to remedy systemic deficiencies in the performance of attorneys appointed to represent people with disabilities in these proceedings. Currently, there are no performance standards to which these attorneys are expected to comply. Trainings are sporadic and insufficient to inform attorneys on how to provide ADA-compliant services to their special needs clients. There are no monitoring mechanisms in place to determine the quality of the services being provided by county-funded legal services programs that serve these clients. Complaint systems are not accessible to litigants with cognitive and communication disabilities.

I am enclosing a few documents that will give you and your staff a better understanding of the scope and severity of these problems. If each public entity with responsibility for some aspect of the system would take remedial action, the system as a whole would soon show improvement.

The State Bar should not defer to the Judicial Council. The Probate and Mental Health Advisory Committee has dropped "performance standards" from its agenda. It has not indicated any progress on training standards. The State Bar should lead the reform effort, not follow the judiciary.

If it would help, I can come to San Francisco for an in-person meeting with you and your staff.

Respectfully submitted:

A handwritten signature in cursive script that reads "Thomas F. Coleman".

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

cc: Mr. George Leal, Ms. Patricia Lee, Ms. Kelli Evans

Tom Coleman - Spectrum Institute

-----Original Message-----

From: Spectrum Institute [mailto:tomcoleman@spectruminstitute.org]

Sent: Monday, February 6, 2017 6:41 AM

To: 'patricia.lee@calbar.ca.gov' <patricia.lee@calbar.ca.gov>; 'Leal, George' <George.Leal@calbar.ca.gov>; 'Evans, Kelli' <Kelli.Evans@calbar.ca.gov>

Subject: Letter to Executive Director

Patricia, Kelli, and George,

Today I am sending a letter (and enclosures) to the Executive Director of the State Bar of California. I thought a follow up communication to her was appropriate. She should receive the packet of materials by Wednesday.

With over 2,000 pages of materials written about the need for reform of the limited conservatorship system, I felt it would be helpful to select a few pages that explain the scope and depth of the problems.

It appears that the Probate and Mental Health Advisory Committee is narrowing its focus and slowing its pace. Performance standards seem to have been dropped from its agenda. The timeline has now been extended to January 1, 2019.

That advisory committee is imbedded within the judiciary. It is directed by judges. As a result, it lacks the element of advocacy that is needed to move us closer to an improved system.

The State Bar, in contrast, is an association of lawyers. It has the ability to advocate. It can lead a reform effort.

I was disappointed when the Executive Committee of the Commission on Access to Justice decided to delay and defer action so it could follow what the Judicial Council may do. I think there is a parallel track on which the State Bar can move -- where it takes its own independent look at the problems and develops its own set of proposals for improvements. Advocacy for improved access to justice is sorely needed, and the State Bar can provide advocacy whereas a judicial advisory committee cannot.

Perhaps it would be beneficial for me to meet with the Executive Director and key staff people in person in the near future to discuss the path forward.

Thanks for all of the time you have devoted to reviewing the materials I have sent to you and for spending so much time with me on the phone.

Tom Coleman
Spectrum Institute

Tom Coleman - Spectrum Institute

From: Spectrum Institute [mailto:tomcoleman@spectruminstitute.org]

Sent: Friday, February 3, 2017 8:23 AM

To: 'Evans, Kelli' <Kelli.Evans@calbar.ca.gov>

Cc: 'patricia.lee@calbar.ca.gov' <patricia.lee@calbar.ca.gov>; 'Leal, George' <George.Leal@calbar.ca.gov>

Subject: follow up request to the Commission

Hi Kelli,

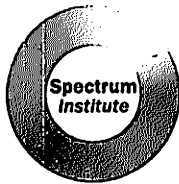
I would like the Commission on Access to Justice to reconsider deferring action on the issues I have raised. The executive committee seemed inclined to wait for the Judicial Council to act first.

In light of the information I have been able to gather in recent days (see below), it appears that the advisory committee will be acting very slowly on these issues. Already one year has passed and they say they have not identified any of our proposals that are within the purview of the Judicial Council. They have extended their work for yet another year. This delay is not helpful.

More troubling is the disappearance of “performance standards” from their new work plan. Certainly this is something that is unquestionably in the purview of the State Bar, and with respect to this class of litigants, within the purview of the Commission on Access to Justice.

I am requesting the Commission to form a Workgroup on Performance Standards for court-appointed attorneys representing clients in limited conservatorships. This is foundational to providing access to justice – including access to effective advocacy services – to a class of involuntary litigants with cognitive and communication disabilities. I would be pleased to assist the workgroup in its research and development of such standards.

Tom Coleman
Spectrum Institute



Disability and Guardianship Project

9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

December 12, 2016

State Bar of California
Commission on Access to Justice
180 Howard Street
San Francisco, CA 94105

Attn: Ms. Kelli Evans, Office of Legal Services

Re: Improving Access to Justice in Limited Conservatorship Proceedings

Dear Commissioners:

I have asked Ms. Evans to forward to you the attached materials with the hope that you will find time to review them prior to the Commission's meeting in January. I believe this may be the first time that access to justice for adults with intellectual and developmental disabilities has been brought to the Commission's attention.

I have been studying the limited conservatorship system in California for the past several years and have written extensively on systemic problems – both in policy and practice – that contribute to the ongoing denial of access to justice for this class of litigants. If the attached materials spark an interest in learning more about the problems with this system, and what can be done to improve access to justice in limited conservatorship proceedings, you can go to the Digital Law Library on Disability and Guardianship. (<http://spectruminstitute.org/library/>) There, you will find more than 220 reports and articles on this subject. Much of the material focuses specifically on California.

The attached article published in the Daily Journal on November 2, 2016 discusses how litigants with cognitive and communication disabilities lack meaningful access to complaint procedures when their attorneys fail to perform legal services adequately. The attached 2016 Annual Agenda of the Probate and Mental Health Advisory Committee shows that the Judicial Council is beginning to take a look at problems I brought to their attention regarding the lack of standards for qualifications, performance, and training of court-appointed attorneys in limited conservatorship proceedings. The attached brochure of the Due Process *Plus* White Paper to the Department of Justice shows the scope and complexity of the problems concerning access to advocacy services – as required by the ADA.

I recently sent the State Bar a resolution for this Commission to consider adopting. If I can be of any assistance to the Commission as it considers this resolution or otherwise reviews these issues, please feel free to contact me.

Respectfully submitted:

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Making the State Bar Complaint System ADA Accessible

By Thomas F. Coleman
Daily Journal / November 29, 2019

The California State Bar has its main office in a commercial building in San Francisco. Such structures must comply with the physical access requirements of the Americans with Disabilities Act.

Common areas of the entire building as well as the offices of the State Bar must be accessible to people with disabilities. Being an association for lawyers, I have no doubt that State Bar employees are very familiar with ADA's physical access requirements. But I have reason to doubt their awareness of the organization's duties to ensure that people with mental disabilities have full and equal access to services of the State Bar.

As an arm of the Supreme Court, the State Bar is a government agency. Government Code Section 11135 requires all state-funded agencies to obey Title II of the ADA. This includes compliance with regulations and judicial decisions implementing Title II and other federal disability rights laws.

Federal regulations and judicial opinions make it clear that the ADA protects more than physical access. People with physical *and* mental disabilities must be provided meaningful participation in all services that a public entity offers.

Because State Bar officials know that clients of some attorneys have mental disabilities that diminish their access to bar association services, federal law requires the organization to remove unnecessary barriers to participation by these individuals in those services.

One of the most important programs of the State Bar is its complaint system, the primary purpose of which is to assure the protection of the public. (*Tenner v. State Bar*, 28 Cal.3d 202, 206 (1980))

Investigating complaints serves other goals too, such as protecting the integrity of the judicial system and legal profession, maintaining high professional standards for attorneys, and preserving public confidence in the legal profession. (*Gold v. State Bar*, 49 Cal.3d 908, 913 (1989)) These goals are frustrated when a segment of the public lacks meaningful access to this system.

The State Bar professes a policy that people with disabilities should have full and equal access to its proceedings, services, and programs. Its website says that people with disabilities can contact the State Bar for "help or reasonable accommodation in connection with filing a misconduct complaint against an attorney licensed by the State Bar."

The website is silent, however, about how someone with a cognitive disability would gain access to the complaint process. Some disabilities make it impossible for people to make a request for assistance

or to even know when they are a victim of attorney misconduct.

Research by Spectrum Institute into the practices of court-appointed attorneys representing seniors and other adults with disabilities in conservatorship proceedings has revealed a pattern of ethical violations and many instances of blatant malpractice. Family members involved in conservatorship proceedings also have observed such violations being committed against their disabled loved-ones.

When witnesses to attorney misconduct have filed complaints with the State Bar against court-appointed attorneys, they have been told they lack standing to complain. They have been informed that only the actual client or an authorized representative may initiate the investigation process.



This is a Catch-22 for clients with mental disabilities. A complaint will only be investigated when the actual client files it, but some clients with such disabilities are unable to do so.

I recently raised this issue with an official at the State Bar and got the same response – no third party standing is allowed. Reference was made to Business and Professions Code Section 6093.5.

Section 6093.5 says no such thing. That statute deals with communications *from* the State Bar to third parties, not communications *to* the State Bar. Once I realized this statutory rationale was illusory, I did some more research. What I found were authorities that completely contradict this unjustified excuse for denying investigations.

Business and Professions Code Section 6044 authorizes the State Bar, with or without the filing of a complaint, to initiate and conduct investigations of all matters relating to the discipline of a lawyer or any other matter within its jurisdiction. Business and Professions Code Section 6077 gives it the power to discipline attorneys who willfully breach the rules of professional conduct. Therefore, even if a communication to the State Bar about attorney misconduct were not considered to be a formal complaint, an investigation could be initiated anyway.

The State Bar is sending inconsistent messages. When it wants to close a complaint without investigation, staff members tell families or others that only the actual client can file a complaint. This advice directly contradicts a website statement that “The State Bar’s Office of Chief Trial Counsel handles complaints from clients, members of the public, and other attorneys over unethical professional conduct.”

So there it is in black and white. Members of the public are authorized to file complaints when they become aware that an attorney has breached ethical or professional duties.

Attorneys who become aware of such misconduct can also file complaints. Although they may not have a legal duty to do so, attorneys may have a

moral or ethical obligation to report known improprieties of other lawyers to the State Bar (San Francisco Bar Association Opinion 1977-1). A moral obligation is even more imperative when the victim is someone with a cognitive disability.

The failure of the State Bar to process third-party complaints undermines its own policies on accessibility, is inconsistent with provisions of the State Bar Act, and also violates Title II of the ADA. This failure not only tarnishes the organization’s own reputation but also implicates the California Supreme Court since the State Bar operates under the supervision of that court.

By giving bad information to the public about who may file complaints, employees of the State Bar are violating Business and Professions Code Section 6092.5. That statute obligates the State Bar to “Inform the public, local bar associations and other organizations, and any other interested parties about the work of the State Bar and the right of all persons to make a complaint.” *All persons*. There is no ambiguity in that.

New legislation is not needed to fix this problem. Business and Professions Code Section 6086 delegates authority to the board of trustees to adopt rules for “the mode of procedure in all cases of complaints against licensees.”

The first step to make the complaint process accessible to people with cognitive disabilities is for the trustees to implement what the law already allows – third party standing to initiate complaints. Other measures should also be explored, such as annual audits of attorney performance in a random sample of conservatorship cases and imposing discipline when an audit reveals misconduct.

If the State Bar does not initiate such reforms on its own volition, the California Supreme Court should direct it to so, thereby making ADA accessibility to the complaint and disciplinary system a reality.

Thomas F. Coleman is legal director of the Disability and Guardianship Project of Spectrum Institute. Email him at: tomcoleman@spectruminstitute.org

A Conversation with Leah Wilson

Executive Director of the California State Bar

In preparation for a phone call between Thomas F. Coleman, legal director of the Disability and Guardianship Project of Spectrum Institute, and State Bar Executive Director Leah Wilson on November 19, 2019, these talking points were developed to help guide the conversation.

1. Class Demographics

Spectrum Institute is concerned about legal services for seniors and other adults with disabilities in probate conservatorship proceedings – litigation in which their assets are targeted and their fundamental rights are placed at risk.

We believe that about 60,000 adults are currently living under orders of conservatorship in California. About 40,000 of them are adults with developmental disabilities while the other 20,000 include seniors with cognitive challenges and adults of all ages who have acquired cognitive disabilities due to injuries or illnesses. About 5,000 new probate conservatorship proceedings are initiated each year throughout the state.

These numbers are estimates. Neither the Judicial Council nor the State Bar knows how many open probate conservatorship cases exist, how many conservatees who are supposed to be under the “protection” of the courts cannot be located by court investigators, how large the case loads of such investigators are, or how backlogged they are in conducting statutorily-required biennial reviews.

The State Bar should take actions to address this unacceptable informational void.

2. Denial of Legal Services

Many members of this class are not afforded an attorney in superior court conservatorship proceed-

ings. This problem is especially acute in Sacramento and surrounding counties.

The Court of Appeal has no policy regarding the appointment counsel in conservatorship appeals for members of this class who are appellants or respondents in such appellate proceedings. In one current appeal out of Alameda County, the senior whose assets are in dispute was not represented by counsel in the trial court and is not being represented by counsel on appeal. Despite being advised by Spectrum Institute of its ADA duty to appoint counsel for her as a respondent in the

appeal, the Court of Appeal has taken no action. As a result, the use of her assets to pay disputed legal fees will be decided without her participation. This is not access to justice.

The denial of legal representation is a problem that should be addressed by the State Bar.

3. Deficient Legal Services

In Los Angeles County, judges are refusing to allow members of this class to retain their own attorneys, instead forcing court-appointed attorneys on them. The constitutional right to be represented by an attorney of one’s choice is being violated.

A rule of the Alameda County Superior Court gives a monopoly to one law firm for court appointments to represent *respondents* in conservatorship proceedings who have assets. There was no RFP issued or open bidding process used. The court does not have any quality assurance controls for these services, nor does the court have a complaint process for these litigants. The law firm, Legal Assistance for Seniors, has an actual or apparent conflict of interest because it is under contract with the court to provide legal advice to *petitioners* who are not represented by counsel.



talkingpoints

In places such as Los Angeles County, a local court rule requires appointed attorneys to play a dual role in providing legal services to these litigants. One role is to assist the judges in resolving cases by acting as “the eyes and ears of the court.” In this role, attorneys file reports recommending what they think is in the best interests of their clients.

Many attorneys are not acting as zealous advocates for their clients. They are violating ethical duties of loyalty and confidentiality. Based on this “dual role” court rule, some attorneys actively advocate *against* the stated wishes of their clients.

These serious ethical and performance problems should be addressed by the State Bar.

4. Deficient Legal Education

For several years, Spectrum Institute reviewed the training program mandated by the Los Angeles Superior Court and operated by the local bar association. Many presenters were unqualified. Important topics were not covered. In other areas, misinformation was given to those who attended. Attorneys were given MCLE credits for these deficient training programs because the bar association had been given MCLE *pre-approval* for *all* of its education programs no matter how deficient.

We brought these problems to the attention of the Judicial Council in November 2014 and a few months later we proposed specific changes to court rules on mandatory educational requirements for court-appointed attorneys in probate conservatorship proceedings. After several years of study and deliberations by its Probate and Mental Health Advisory Committee, the Judicial Council has adopted new training requirements. The new court rule takes effect on January 1, 2020.

Now the real work begins. The State Bar should become actively involved in the implementation process. It should require providers to submit plans for their training programs under this new rule so that the quality can be reviewed by the State Bar prior to authorizing MCLE credits for them. Blanket pre-approval should not occur.

5. Deficient Judicial Education

Many judges who process probate conservatorship cases lack experience in this area of the law. In some counties, judges with experience in criminal or civil or juvenile law are assigned to handle adult conservatorship proceedings without adequate prior experience or training. In some counties, judges are rotated in and out of probate courts without regard to the effect this lack of knowledge has on this vulnerable class of litigants. Judicial Council training materials on judicial duties under the Americans with Disabilities Act are deficient.

The State Bar should review these problems and promote better education and training requirements for judges who handle conservatorship cases.

6. Inaccessible Complaint Program

The State Bar has a program where clients who believe they have received deficient legal services can file complaints against their attorneys. These complaints are investigated and action is taken on complaints that are sustained.

The effects of this complaint program are both remedial and preventive. In addition to providing relief to individual clients, the knowledge that such a program exists and the issuance of public disciplinary actions in some cases causes attorneys to think twice before violating ethical rules or providing deficient legal services.

Unfortunately, due to the nature and severity of their disabilities, clients in probate conservatorship proceedings do not have practical access to the complaint system. They either do not know when they are receiving deficient legal services or they lack the ability to file complaints.

The State Bar should devise methods to ensure that members of this class receive the preventive and remedial benefits of this program.

www.spectruminstitute.org/talking-points.pdf

tomcoleman@spectruminstitute.org

November 10, 2019

Mr. Alan Steinbrecher
Chair, Board of Trustees
State Bar of California

Re: Public Comment and Request for Action

Dear Mr. Steinbrecher:

On behalf of Spectrum Institute, I am submitting these written comments and attachments to the Board of Trustees in lieu of my personal appearance at the board's meeting on November 14. I will be in San Francisco that day and very much wanted to address the board in person. Unfortunately, the Judicial Council has scheduled its meeting at the same time and I have an ongoing commitment to appear at its meetings to advocate for reforms in the probate conservatorship system.

The State Bar of California should be playing a major role in protecting the right of seniors and other adults with disabilities to effective representation of counsel in judicial proceedings. That right is being routinely violated both in policy and practice in probate conservatorship proceedings. Conservatees and proposed conservatees are all too often victims of willful violations of ethics and professional standards by court-appointed attorneys who represent them. Because of their cognitive disabilities, this population lacks the practical ability to access the complaint system of the State Bar. As a result, individuals and the class as a whole are not able to receive the remedial and prophylactic benefits of the complaint system.

I would like to have ongoing conversations with the Executive Director of the State Bar and the staff who operate the complaint system, the office of attorney regulation, and the office of certification about these matters.

This communication to you follows years of unsuccessful attempts to engage the leadership of the State Bar on these issues. This track record reflects poorly on the Supreme Court of California since the State Bar operates under the supervision of that Court.

I look forward to receiving a positive response to this request – one that sets in motion a series of meetings and conversations focused on improving legal services for seniors and people with disabilities who find themselves involuntarily entangled in probate conservatorship proceedings.

Respectfully yours,

A handwritten signature in blue ink that reads "Thomas F. Coleman". The signature is fluid and cursive, with the first name "Thomas" being the most prominent part.

Thomas F. Coleman
Legal Director
Spectrum Institute
(818) 482-4485

p.s. Please share this communication with all members of the Board of Trustees. I was only able to find email addresses for a few of them.

Attached: Comments on Strategic Plan; ADA Request to State Bar

cc: Members of the State Bar Board of Trustees
Ms. Leah Wilson, Executive Director
Mr. Jorge Navarrete, Supreme Court Administrator

A Commentary by Spectrum Institute
on the 2017–2022 Strategic Plan
of the State Bar of California

Board of Trustees Meeting / November 14, 2019

**The Strategic Plan is Failing Seniors and Other
Adults with Disabilities Who Are Involuntary
Litigants in Probate Conservatorship Proceedings**

Mission Statement

“The State Bar of California's mission is to protect the public and includes the primary functions of licensing, **regulation and discipline** of attorneys; the advancement of the **ethical and competent practice of law**; and support of efforts for **greater access** to, and inclusion in, the legal system.”

Comment: The goals articulated in the mission statement of the State Bar are not being implemented effectively in probate conservatorship proceedings. Seniors and other adults with cognitive disabilities are sometimes not being represented by counsel at all, and when they do receive appointed counsel, many of these attorneys are not providing services that are ethical and competent. These litigants are not receiving the benefit of the State Bar’s regulatory system and do not have meaningful access to the discipline system. The State Bar should develop specific methods to give these litigants greater access to ethical and competent representation and when that does not occur to give them access to the complaint and discipline system.

Goal 2:

“Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California . . .”

Objectives:

“No later than July 1, 2021, create a fully articulated preventative education approach to include a self-assessment component as well as client trust accounting modules which may be mandatory for some attorneys.”

Comment: There should be a preventative education approach developed for public defenders and private attorneys who are appointed to represent seniors and other adults with disabilities in probate conservatorship proceedings. Due to their cognitive and communication disabilities, most of these litigants are not able to access the complaint and discipline system of the State Bar. Therefore, a preventative education approach should be developed to reduce the risk of incompetent representation and ethics violations by these attorneys.

Goal 4:

“Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias . . .”

Objectives:

“Study and implement improved programmatic approaches to increasing access to justice.”

Comment: The State Bar should review problems that have been identified, in both policy and practices, that deprive seniors and other adults with disabilities from having access to justice in probate conservatorship proceedings. Many of these problems have been identified by family members of conservatees who have seen these problems firsthand and by disability rights organizations that have identified the problems through research and investigation of the conservatorship system. Once the State Bar becomes familiar with these problems, it should develop programmatic approaches in legal education, regulation, and discipline to increase access to justice for this vulnerable population.

Goal 5:

“Proactively inform and educate all stakeholders . . . about the State Bar’s responsibilities, initiatives, and resources.”

Comment: Litigants represented by public defenders and appointed private attorneys in probate conservatorship proceedings should be considered stakeholders for purposes of this goal. These individuals and the various disability rights organizations advocating for their rights need to be informed of exactly how the State Bar will ensure that adults with cognitive disabilities will have meaningful access to the State Bar’s discipline system and how they will benefit from proactive education and regulation of attorneys by the State Bar. Right now, this population is not being considered by the State Bar as it develops goals and objectives and as it implements its strategic plan.

Conclusion

The State Bar of California receives state funds and is therefore subject to Government Code Section 11135. This statute incorporates the protections and mandates of Title II of the Americans with Disabilities Act. The ADA requires that once a public entity is aware that a recipient or beneficiary of its services has a disability that may preclude the meaningful participation in or the receipt of benefits of those services, it should take proactive measures to ensure meaningful participation.

The State Bar has adopted regulations regarding ethics and professional responsibilities to ensure that recipients of legal services have ethical and competent legal representation. When these standards are violated, the State Bar has a system of investigation and discipline to address alleged violations. This regulatory and disciplinary system is premised on an assumption that clients can identify transgressions and report them to the State Bar for investigation. This assumption does not realistically apply to clients with serious cognitive and communication disabilities. The State Bar, *and the Supreme Court as supervisor of the State Bar*, have never acknowledged this access-to-justice gap for clients with such disabilities. Section 11135 and Title II of the ADA require an investigation into this problem and the development of effective approaches to correct it.

Thomas F. Coleman, Legal Director, Spectrum Institute
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Disability and Guardianship Project

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October 1, 2019

Leah Wilson, Executive Director
Alan Steinbrecher, Chair
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Ensuring ADA-Compliant Trainings for Court-Appointed Conservatorship Attorneys

Dear Ms. Wilson and Mr. Steinbrecher:

Last week the Judicial Council of California approved a new rule requiring court-appointed attorneys representing clients in probate conservatorship proceedings to receive training on a variety of topics. The rule is effective January 1, 2020.

Our organization proposed these new training requirements several years ago and have been monitoring the work of the Judicial Council ever since. With the adoption of this rule, the role of the Judicial Council has essentially ended. Now it is the responsibility of the State Bar to ensure that the intended beneficiaries of the rule – seniors and people with disabilities – have attorneys who are properly trained on all of the required topics. This responsibility, of necessity, involves the Mandatory Continuing Legal Education (MCLE) credit approval process.

The State Bar has two procedures for MCLE credit approval: single activity approval and multiple activity approval. In the former process, a provider must submit materials to the State Bar for approval of a specific seminar or educational venture. In the latter process, a provider such as a local bar association, obtains blanket approval in advance which permits it to offer MCLE credits for any and all of its educational activities.

The multiple activity approval process has not worked well in places such as Los Angeles County. For several years, the superior court and the county bar jointly conducted training programs for court-appointed attorneys who represent clients in probate conservatorship proceedings. Audits of those trainings revealed that many topics which should have been covered were not and that misinformation was being provided on topics that were covered. Unethical practices were sometimes promoted by the trainings. The multiple activity MCLE approval process contributed to this problem. Organizers of the trainings essentially had been given a blank check from the State Bar and they abused the trust that is inherent in such blanket pre-approval.

These deficient trainings contributed to deficient representation of vulnerable adults who, because of cognitive disabilities, had no way of realizing that their attorneys were performing deficiently. Due to their disabilities, these clients were not able to file complaints with the State Bar. As a result, the attorneys were allowed to engage in deficient advocacy and defense in case after case. Audits of dozens of cases in Los Angeles confirmed ineffective representation by such attorneys.

Spectrum Institute filed a complaint with the United States Department of Justice alleging that deficient trainings, ineffective representation, and the lack of a monitoring mechanism to ensure quality representation for these litigants with cognitive disabilities all constituted violations of the Americans with Disabilities Act. That complaint is still under review by the DOJ.

We once filed a complaint with the State Bar about deficient trainings in Los Angeles County. When we received no response from the State Bar for nearly a year, we wrote to the Supreme Court. Since the State Bar is an arm of the Supreme Court, that judicial entity is essentially the administrative supervisor of the State Bar. In response to our communication, the Supreme Court contacted the State Bar to nudge it into action.

When we started to receive inquiries from various staff members at the State Bar – communications which gave us hope that the State Bar would get proactive – we withdrew the specific complaint that was pending. We hoped that the State Bar would take actions to ensure that seniors and people with disabilities would receive effective representation by well-trained attorneys. Unfortunately, that never happened.

These staff members were either transferred to other positions, left the State Bar entirely, or simply stopped communicating. So our hope for pro-active measures by the State Bar was short lived. To this day, despite years of communications to officials and state members of the State Bar about deficient trainings and deficient representation, and their adverse effects on seniors and people with disabilities, the State Bar has taken no action whatsoever to address these problems.

The adoption of this new training rule provides an opportunity for the State Bar to use its authority to ensure that only high quality trainings receive MCLE credit approval. It could appoint an advisory committee of academics and practitioners with expertise in constitutional law, disability rights, capacity assessments, less restrictive alternatives, the ADA, and other topics mandated by the new rule. These advisors could review applications from providers who want to conduct trainings under the new rule and make recommendations for approval or disapproval of MCLE credit.

The State Bar, as an arm of the Supreme Court, is a public entity with duties under Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, and Section 11135 of the Government Code. These laws cover all activities of the State Bar, including its MCLE approval process and its complaint procedures. Failure to protect litigants with significant disabilities – in light of the problems that have already been brought to the attention of the State Bar – would constitute a violation of these state and federal laws. Of necessity, this would implicate the Supreme Court since it is the public entity that oversees the State Bar.

We look forward to learning what the State Bar will do to ensure that the intended beneficiaries of the new training rule actually receive the ultimate benefits the rule was designed to achieve.

Respectfully,



Thomas F. Coleman

Legal Director

tomcoleman@spectruminstitute.org

cc: Jorge E. Navarrete, Supreme Court Administrator
Rebecca Bond, Disability Rights Section, U.S. Dept. of Justice

ATTACHMENTS

Status of ADA Complaint to the Department of Justice

Guardianship Matrix: Participants and Issues in a Conservatorship Proceeding

Materials Submitted to the Judicial Council in Support of the New Rules

Letter from Jorge Navarrete, Administrator of the California Supreme Court

Communications with the State Bar (2014 - 2018)

New Training Rules Approved by the Judicial Council on September 24, 2019

Letter and Attachments Are Available Online:

<http://disabilityandabuse.org/state-bar-mcle-request.pdf>



Disability and Guardianship Project

1717 E. Vista Chino A7-384 • Palm Springs, CA 92264
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January 24, 2020

California State Bar
Board of Trustees
Los Angeles Meeting

Re: Public Comment on Item 701 (Strategic Plan) and Item 113 (Legislative Priorities)

Spectrum Institute requests that the Board of Trustees take two actions in 2020:

- (1) Support a bill to protect the right to counsel for conservatorship respondents; and
- (2) Make the complaint system more accessible to people with cognitive disabilities.

Right to Counsel Bill. A bill we have developed and which is supported by several organizations would direct the State Bar to develop performance standards for attorneys who are appointed to represent seniors and other people with disabilities in probate conservatorships proceedings. Such standards are sorely needed. This is consistent with Goal 4(b) of the Strategic Plan to improve programmatic approaches to increasing access to justice. I refer you to a report on this bill published on the Spectrum Institute website. (<https://spectruminstitute.org/counsel.pdf>)

Complaint System Accessibility. The public should be informed that anyone who is aware of violations of the rules of professional conduct by an attorney may file a complaint with the State Bar against the alleged offender. Some people have been told that third party complaints are not allowed. This misinformation is inconsistent with Goal 5(b) which calls for effective communication about public protection to external audiences. I refer you to a commentary on this subject published in the Daily Journal legal newspaper on November 29, 2019. (<https://disabilityandabuse.org/complaint-system-accessibility.pdf>)

Seniors and other people with disabilities involved in conservatorship proceedings will not have access to justice unless they receive representation by competent counsel and unless the State Bar takes pro-active measures to make the complaint system accessible to them.

Respectfully,

Thomas F. Coleman
Legal Director
(818) 482-4485

Spectrum Institute

To: sean.selegue@arnoldporter.com
Subject: Request to speak at public comment segment of open meeting of State Bar Trustees

Mr. Sean SeLegue
Chair, Board of Trustees
California State Bar

Dear Mr. SeLegue:

I would like to speak during the public comment segment of the open meeting of the State Bar Board of Trustees on March 19, 2021 at 9:00 a.m. I will be attending the meeting online.

I plan to address Agenda Item #115 dealing with an amendment to the State Bar's 2021 legislative priorities.

I notice that the agenda item references the goal of the Strategic Plan to support access to legal services for low- and moderate-income Californians. It also refers to the objective to support increased funding and enhanced outcome measures for legal services.

Spectrum Institute supports this goal and this objective. However, we believe that the State Bar should devote some time and resources to address the problem of deficient legal services being provided to low- and moderate-income Californians who become entangled, involuntarily, into probate conservatorship proceedings. We believe that in addition to initiating some pro-active measures to address this problem – which the State Bar has not yet done – it should support bills that protect the right to counsel and oppose those that diminish this right by undermining access to a competent attorney who provides zealous advocacy adhering to ethical rules of loyalty and confidentiality.

We would like to discuss with your staff the pro-active steps the State Bar could initiate. We would also like to discuss with your legislative director two bills which are pending: SB 724 which protects the right to counsel, and AB 596 which is a Trojan Horse bill which undermines this right. I call your attention to a commentary in the Daily Journal about AB 596.

<https://www.dailyjournal.com/articles/361671-ab-596-a-trojan-horse-bill-diminishes-the-right-to-counsel>

I look forward to addressing the board on March 19. Please share this email with the other trustees.

Respectfully yours,

Thomas F. Coleman
Legal Director
Spectrum Institute
(818) 230-5156
<https://spectruminstitute.org/>



BOARD OF TRUSTEES NOTICE AND AGENDA

Teleconference

The State Bar of California

www.calbar.ca.gov

Thursday, March 18, 2021—Friday, March 19, 2021
Thurs., 10:30 a.m. —

The Board of Trustees Meeting is spread over two days. Closed Session will begin on Thursday at 10:30 a.m. Public comment for Closed Session items will be taken on Thursday before the Board goes into Closed Session.

Open Session will begin on Friday at 9:00 a.m. Public Comment for Open Session items will be taken on Friday upon recommencement of the meeting. If Closed Session does not conclude on Thursday, the remaining Closed Session items will be heard on Friday upon conclusion of Open Session.

Members of the public may access this meeting as follows:

Zoom Link: <https://calbar.zoom.us/j/99073123818>

Call-In Number: 669-900-9128

Webinar ID: 990-7312-3818

OPEN SESSION

The Chair reserves the right to alter the order of items to run an effective meeting. If you wish to assure yourself of hearing a particular discussion, please attend the entire meeting.



-- CALL FOR PUBLIC COMMENT --

Members of the public may speak to any item on the agenda. The Chair reserves the right to limit the duration of the public comment period.

10 MINUTES

[Open Session Minutes - January 22, 2021](#)

30 CHAIR'S REPORT

40 STAFF REPORTS

41 Executive Director

Report from Executive Director

50 CONSENT AGENDA

50-1 [Approval of Specified Contracts Pursuant to Business and Professions Code](#)



Updated 2017-2022 Strategic Plan Rev. 3 : 3.k.

54-181 Q4 Board and Management Travel Expenses

100 REPORTS OF BOARD COMMITTEES

110 Board Executive Committee

X

115 Approval of Addition to 2021 Legislative Priorities

Updated 2017-2022 Strategic Plan Rev. 3 : 4.a.

120 Regulation and Discipline Committee

140 Finance Committee

180 Audit Committee

700 MISCELLANEOUS

701 Status Update on Recommendations to Address Disparities in the Discipline System (MacLeod/Chavez)

Updated 2017-2022 Strategic Plan Rev. 3 : 2.b.

702 Proposed State Bar Rule 3.453 Governing Client Security Fund Payment Plans for Nondisbarred and Nonresigned Licensees: Request for Emergency Adoption as an Interim Rule and Request to Circulate for Public Comment for Later Adoption as a Permanent Rule (Kaur)

Updated 2017-2022 Strategic Plan Rev. 3 : 2.d.

703 State Bar Metrics Report (Hershkowitz/Chavez)

704 Approval of Planned Updates to the State Bar Website to Implement Recent Rule Changes Addressing Public Licensee Information and Required Reporting (Ruano)

Updated 2017-2022 Strategic Plan Rev. 3 : 2.g.

705 Discussion Regarding the Appointment of the State Bar Executive Director (Duran/Sowell)

CLOSED SESSION

1000 MINUTES

Closed Session Minutes - January 21–22, 2021

**Closed pursuant to Government Code §§ 11126 - 11126.2.*

5000 CLOSED CONSENT

7000 MISCELLANEOUS

7001 *In re Gregory Harper on Discipline, California Supreme Court Case No. S265240 (filed November 25, 2020)*

**Closed pursuant to Government Code § 11126(e)(1).*

services for low- and moderate-income Californians. State Bar staff propose sending a letter to the Chair of the Assembly Committee on Budget in support of increased funding for the Equal Access Fund and adding this to the 2021 legislative priorities of the State Bar.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 4. Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

* Objective: a. Support increased funding and enhanced outcome measures for Legal Services.

RECOMMENDATIONS

Should the Board Executive Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board Executive Committee recommends that the Board of Trustees approves adding support for additional funding for the Equal Access Fund to the State Bar's 2021 legislative priorities.

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees, upon recommendation of the Board Executive Committee approves adding support for additional funding for the Equal Access Fund to the State Bar's 2021 legislative priorities.

ATTACHMENT(S) LIST

A. Draft letter of support for Assembly Judiciary Committee proposal

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