

# Proposed Rule Aims to Improve Legal Advocacy in Conservatorship Proceedings

By Thomas F. Coleman  
*Los Angeles Daily Journal*  
April 13, 2018

When it comes to reforming the conservatorship system in California, the legal bureaucracy moves slowly and incrementally.

In 2014, a small group of advocates made a presentation to an advisory committee of the California Judicial Council asking for new rules to ensure access to justice for people with cognitive and communication disabilities who find themselves entangled in conservatorship proceedings.

In 2015, the California Judicial Council approved a two-year project for the Probate and Mental Health Advisory Committee to develop performance and training standards for attorneys in conservatorship cases. A year later, the committee dropped the performance standards aspect and limited its scope to training and experience requirements.

The committee's work product was posted on the Judicial Council's website on Monday. The deadline for public comment is June 8.

A close reading of the proposal left me mildly pleased. After further study, I felt cautiously hopeful.

This rule change would not ensure access to justice for people with disabilities in conservatorship proceedings. But the proposal is a step in the right direction.

One good aspect is that the revision to Rule 7.1101 of the California Rules of Court would apply to attorneys appointed in general and limited conservatorships. This could have a beneficial effect on seniors as well as adults with developmental disabilities. Thus, more people could potentially benefit.

Another positive aspect is the training requirements included in the committee's proposal. Among the most important training requirements are subject matters that are crucial to effective advocacy and defense practices for people who have serious cognitive and communication disabilities.

According to the committee's proposal, subjects that must be covered in mandatory continuing education courses include the rights of persons with disabilities under state and federal law, like the Americans with Disabilities Act. Training on strategies for communicating with a client who has cognitive disabilities, ascertaining the client's wishes, and presenting those wishes to the court is also required.

The recognition, evaluation, and understanding of abuse of people with disabilities is a must. Training is required on the effects of physical, intellectual, and developmental disabilities on a person's capacity to function and make decisions. How to identify and effectively collaborate with experts from other disciplines is also part of the mandatory training.

So far so good. But some significant problems remain.

As currently worded, existing Rule 7.1101 declares that its continuing education requirements "are minimums." Local courts are allowed to establish more stringent continuing education requirements for court-appointed attorneys in these cases. This proposal takes away that flexibility for local courts. That is a step backward. Local courts should continue to have the authority to demand more from the attorneys they appoint to represent special needs litigants.



One major omission in subject matter is the failure to require training on less restrictive alternatives to conservatorship, including the identification of community resources that would make such alternatives feasible. There is a growing movement for supported decision-making as an alternative to guardianship and conservatorship in California and throughout the nation. It is essential to have attorneys who are trained on such alternatives and that they insist that court investigators, petitioners, and judges consider them. This subject matter should be added to the committee's proposal.

Even if the committee were to make these suggested changes, there is much more work to do to ensure access to justice for seniors and people with disabilities in conservatorship proceedings.

Attorneys could sit through such trainings but not implement the principles in actual practice. Without detailed requirements for training contents, without performance standards, without adequate funding for legal services, and without effective monitoring mechanisms, the training components in the committee's proposal are only theoretically beneficial to these vulnerable clients.

The State Bar of California needs to put flesh on the bones of this educational framework. Specific content needs to be required by the State Bar before authorizing CLE credits for any training program. There should not be a blanket authorization to local bar associations allowing them to include whatever they want in such trainings. That is what has been happening now and some of the training programs are sorely lacking.

There should be performance standards to which the trainings relate. Attorneys need to know in no uncertain terms exactly what is expected of them in each of the areas of training. These should not be seminars on "best practices" which can be ignored. It may take legislation to specify performance standards, or the county governments that pay the attorneys can attach performance standards to the money flow. However it occurs, performance standards are a must.

Speaking of funding for legal services, it must be adequate enough to enable court-appointed attorneys

to perform the legal services they are told they should deliver to these clients. It would be unfair for a court to authorize 10 hours of services in a case when, in fact, it would take 20 hours to do all of the things mentioned in the training program or detailed in the performance standards.

Most of these clients cannot complain to the court or to the State Bar about ineffective assistance of counsel, conflicts of interest, or violations of ethical standards such as confidentiality and loyalty. The nature of their disabilities precludes them from understanding such things, much less filing formal complaints about deficiencies in legal services.

In order to make the complaint process accessible to clients with such disabilities, there should be random audits of a sample of attorneys in each county. As the funding source for the legal services – and as the public entity responsible for ensuring ADA-compliant legal services – the county could contract with the State Bar to conduct such audits.

Indeed, there is much more work to do in order for seniors and people with disabilities to have meaningful access to effective advocacy and defense services in conservatorship proceedings. The committee's proposal is an honorable first step.

The next step is for the Probate and Mental Health Advisory Committee to adopt the modifications suggested here. But most importantly, once these changes go into effect on Jan. 1, 2019, advocates for conservatorship reform need to work closely with the State Bar, the Legislature, and boards of supervisors in all of the counties to implement the additional reforms upon which true access to justice depends.◇

Thomas F. Coleman is legal director of the Spectrum Institute, a nonprofit organization advocating for conservatorship and guardianship reform nationwide. Email him at: [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org).

*(Correction:* After this op-ed was published, the author realized that local courts do retain authority under the proposal to require additional training. An email was sent to the editor correcting the error. A letter was sent to the committee with an apology for the error. It also asks that the issue of disability and sexuality be included in the mandatory training.)