

With Liberty and Justice for All

The Sexual Rights of Adults with Developmental Disabilities

A Focus on California



Thomas F. Coleman
Legal Director
Disability and Abuse Project
Spectrum Institute

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www.disabilityandabuse.org/sexual-rights

Preface

This essay on the sexual rights of adults with developmental disabilities was inspired by the work of my friend and colleague, Dr. Nora J. Baladerian.

Nora has been the primary source of information and inspiration on this subject for several decades. She has tried, sometimes successfully, to enlist others into this cause – the cause of promoting social networks and legal institutions acknowledging that adults with developmental disabilities are people with a full range of social and sexual needs and desires – just like the rest of us.

It is not us versus them – with us having rewarding lives, with intimate relationships and sexual fulfillment, and them being restricted and protected and left wanting and needing.

Nora has taught me, and many others, to understand that people with developmental disabilities have the same wants and needs as the rest of us, and have the ability to lead satisfying and fulfilling lives.

Knowledge is power. What people with developmental disabilities need is more knowledge about their sexual rights. With such knowledge they will have the power to exercise those rights in everyday life.

While many advances have been made in the areas of education and jobs for people with developmental disabilities, the frontier presenting the greatest challenge today is the area of sexuality and intimate relationships.

I am pleased to be able to draw upon my vast experience in sexual civil liberties advocacy and to connect and use that experience to advance the rights of adults with developmental disabilities – to help them experience the same levels of sexual fulfillment and rewarding intimate relationships as everyone else.

Thanks to Dr. Baladerian for leading the way and pointing us in the right direction – toward liberty and freedom.

A handwritten signature in blue ink that reads "Thomas F. Coleman". The signature is written in a cursive style with a large initial 'T' and 'C'.

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With Liberty and Justice for All: The Sexual Rights of Adults with Developmental Disabilities in California

Oh my! Look what's been swept under the rug.

by Thomas F. Coleman

Dr. Nora Baladerian was recently invited by the Westside and Lanterman Regional Centers to make presentations on the sexual rights of adults with intellectual and developmental disabilities.

Both of these Regional Centers deserve praise for sponsoring a workshop on this topic. Although the issue of sexuality has great interest to adults with developmental disabilities, it is one that makes parents and service providers very uncomfortable. As a result, the subject is seldom discussed.

These Regional Centers also deserve credit for having someone with Dr. Baladerian's credentials make these presentations. There are no psychologists who are as well versed in sexuality and developmental disability as Dr. Baladerian.

In addition to her clinical experience and her speaking skills, she has written about the sexual rights of people with developmental disabilities. ([The Rules of Sex for Those Who Have Never Been Told](#), published by Spectrum Institute.)

Knowing that I am an attorney with expertise in sexual civil liberties, Dr. Baladerian invited me to participate in the presentation at Westside. Unfortunately, I was not available to be there, so I am doing the next best thing. I am writing an essay which can be given to those who attend that workshop. It can also be shared with clients, parents, and staff at other Regional Centers throughout California.

Since the essay includes a section on the sexual rights of limited conservatees, perhaps it will find its way into the hands of those who participate in the Limited Conservatorship System – judges, court investigators, court-appointed attorneys, and conservators.

The essay will also have some benefit to Regional Center clients who become limited conservatees. Dr. Baladerian's book on the Rules of Sex and this essay on sexual rights give Regional Centers some tools they can use to educate their clients, and staff too.

The Lanterman Act

In California, any analysis of the rights of people with developmental disabilities begins with the Lanterman Developmental Disabilities Services Act.

A precursor to the Lanterman Act which created the Regional Center system was enacted in the 1960s, with the current and expanded law taking effect in 1977. The Lanterman Act declares that people with developmental disabilities have "the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California." (Welfare and Institutions Code Section 4502)

Any discussion of the sexual rights of people with developmental disabilities (not in a conservatorship) would therefore be the same as a discussion one would have regarding the sexual rights "of all other individuals" without disabilities. Those sexual rights are the same regardless of disability status.

Statutory rights created by the Lanterman Act include the right to be treated "in the least restrictive environment" and a "right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their own personal future, and program planning and implementation." (Welfare and Institu-

tions Code Section 4502)

The Lanterman Act rights specified in Section 4502 must be added to the mix when we discuss the sexual rights of adults with developmental disabilities. Each of these rights has implications when it is applied to an aspect of sexual activity, whether that aspect involves solo sexual conduct, conduct with another adult, or various forms of sexual recreation.

The Constitution Protects Liberty

At the core of our freedom is the principle that a person can do anything unless it is prohibited by law. If there is not a federal, state, or local law outlawing conduct or restricting it, then the conduct is within the zone of freedom of an individual.

Even when a government attempts to prohibit or regulate conduct, those attempts are not always legal. That is because laws can only be enacted with “due process.” If a law violates due process, then it is unconstitutional and therefore invalid.

So the principles of liberty and due process are at the core of our freedom as Americans and Californians. Those concepts are firmly embedded in our state and federal constitutions.

The Fourteenth Amendment to the United States Constitution declares that a state may not deprive any person of “life, liberty, or property, without due process of law.” This provision puts limits on what the State of California can do to restrict the sexual conduct of its residents.

The California Constitution has a similar provision. Article I, Section 1 of the state Constitution states “All people are by nature born free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

Section 7 of the state Constitution says that a person “may not be deprived of life, liberty, or property without due process of law.”

The recurring themes of liberty and due process are what protect the sexual civil liberties of adults.

Because of these core principles, people are free to do and say what they want in the realm of human sexuality unless the government has enacted a law that prohibits or regulates the conduct or speech – and on condition that such a law complies with constitutional protections of liberty, due process, freedoms of speech and association, and privacy.

Sex: What We Can and Cannot Do

To summarize the basic principle of liberty, there is a presumption of freedom. You can do something, unless there is a law that says you can’t.

All adults, including those with developmental disabilities, have the right to engage in sexual conduct or speech unless there is a law that specifically prohibits it.

Therefore, in order to understand the sexual rights of adults in California, we must know what types of sexual conduct and speech the State of California has prohibited.

The following sections of this essay pertain to adults with developmental disabilities who have not been placed in a conservatorship. The sexual rights of conservatees will be discussed in a separate section at the end of the essay.

Before we get into a discussion of specific types of sexual conduct, it bears repeating that if something is not illegal, adults with developmental disabilities must be allowed to “make choices in their own lives” which includes “their relationships,” and “how they spend their time,” including leisure time.

The Lanterman Act specifies that people with developmental disabilities should be empowered “to make choices in all areas of life.” (Welfare and Institutions Code Section 4501) Sexuality is not only an aspect of life, it is an important aspect, perhaps one of the most important aspects for an adult.

Touching One's Own Body

As long as it is done in private, the law does not prohibit a person from touching himself or herself for sexual pleasure. Sometimes this is called solitary masturbation.

People have the right to touch themselves for sexual pleasure when they are alone in a private place and where no one else can see them. This could be a bedroom in a home or hotel or in a private bathroom. A public restroom is another matter.

Adults with developmental disabilities have the right to touch themselves for sexual pleasure, if it is done in private. No one, including a parent or service provider, has the right to take this freedom away from them. Their privacy must be respected.

The Lanterman Act states: "Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age."

Adults without disabilities are afforded time in private where they can perform personal and intimate acts without interference from others. Therefore, adults with developmental disabilities are entitled to a reasonable amount of time in private each day where they too can engage in intimate activities without interference. Those who help them deal with their physical environment must help them find such private places and use their private time as they wish, including for sexual activity that is legal.

Masturbation in a public place, or in a private place that can be viewed by others, is regulated by the law and may be a crime under certain circumstances. More will be said about that in the section on "Sex in Public Places."

Sex Videos

The First Amendment protects the right of adults to possess and view sexually explicit videos, pictures,

and magazines – so long as they do not depict or involve minors. There is no law in California prohibiting an adult from viewing sexually explicit material, unless the material depicts children.

Since adults with developmental disabilities have a right to approximate the pattern of everyday living available to people without disabilities, they have the right to possess and view sexually oriented materials. However, just like sexual conduct, the viewing of such materials should be in private and out of the view of others who may be offended by seeing such content.

Sex Toys

The possession of devices or materials that are used to enhance sexual pleasure is legal in California. The legality of using such devices depends on the time, place, and manner of such use.

Adults with developmental disabilities have the right to purchase sex toys online or to shop at a retail establishment that sells such devices. Since the devices are legal, they should have the right to spend their own money to purchase them.

The use of sex toys for solo sexual activity would be governed by the same rules as solitary masturbation described above. Adults have the right to use the toys in a private place that is not visible to others who may be offended by viewing such activity.

The use of sex toys in sexual activities with other consenting adults will be discussed in the section on consenting adult activity.

Group Homes

Community care facilities, which include group homes, are not exempt from the Lanterman Act. They must respect the rights of residents.

The California Community Care Facilities Act declares that the state should develop policies and programs assuring that residents receive habilitative services tailored to their needs and which protect

their legal and human rights. (Health and Safety Code Section 1501)

Any agency that receives any type of federal funding must provide habilitative services in a manner least restrictive to personal liberty. (42 U.S.C. 6010)

Sexual expression is a need of any adult, regardless of disability status. Personal privacy is a legal right. The statement of personal rights distributed to residents of community care facilities states, right at the top of the list, “A right to be treated with dignity, to have privacy, and to be given humane care.” (Form PIC 613B, pursuant to Title 22 of the California Code of Regulations)

The right of privacy has three facets. All three are manifestations of the “right to be let alone” by the government and by others.

One aspect is about having personal space away from prying eyes. That is sometimes called “territorial or physical privacy.” Another is about freedom to receive information, without interference or censorship. That is called “informational privacy.” The third aspect of privacy protects the right to make choices in personal matters pertaining to areas such as marriage, family, sex, and relationships.

With these principles in mind, adult residents of community care facilities including group homes, have the right to sexual privacy. They have the right to engage in solitary sexual activity with or without sex toys and to view sexually explicit videos or printed material outside of the view of others, and to be afforded private space for such enjoyment.

Group home operators and owners should instruct staff not to interfere with residents who exercise their sexual rights. Client’s rights advocates at state agencies that license group homes should back up the owners and staff who resist pressure from parents who want them to suppress the sexual activity of their adult children.

Unless they are conservators with specific authority over the sexual lives of their adult children, parents

have no right to make such demands of group home owner and staff.

The right of residents of group homes to engage in sex with another consenting adult, will be discussed in the section on Consenting Adult Activity.

Sex in Public Places

There are criminal laws prohibiting “indecent exposure” and “lewd conduct” in a public place or a place open to public view. However, these laws have been interpreted by the California Supreme Court so that sexually-motivated exposure of the genitals or sexual touching or other sexual conduct in a public place is not automatically a crime.

In order for such conduct to be criminal, the prosecution must prove, beyond a reasonable doubt, that the person engaging in such conduct knew or should have known that other persons were present who may be offended by such conduct.

So, for example, if someone is in a closed toilet stall in a public restroom, with the door closed and locked, masturbation would not be a crime so long as the door and side walls shielded the conduct from the view of others in the restroom.

Also, if two consenting adults were in a public park, but were shielded by bushes from the view of people passing by, there would be no reason for them to know that their conduct was likely to be seen by others who may be offended.

The test for criminality for sexual conduct or sexually-motivated exposure of the genitals is rather sophisticated – whether the person knew or should have known that others were present who may be offended by viewing such conduct. It may be too sophisticated for someone with a developmental disability to understand. As a result, it would be wise to advise such adults that they take a risk of arrest and prosecution if they engage in sex or expose their genitals in a public place. It is safer for them to wait until they are in a private place to touch themselves or to have sex with a consenting adult.

Consenting Adult Activity

The right of adults with developmental disabilities to engage in solitary sexual conduct or to view sexually explicit books or movies is the easy part of the conversation about sexual rights. More difficult is the discussion of sexual activity that requires consent by two or more adults.

If an adult has not been conserved, the law presumes that he or she has the capacity to consent. Therefore if two unconserved adults say they want to have sex with each other, that should be sufficient. They just have to do it in private or in a place outside of the view of others who may be offended.

If they want to have sex in a place where no one is allowed to have sex, regardless of disability status, then they may not do so. For example, if a library or restaurant or other public establishment does not allow two people in a public restroom at the same time, for sex or other purposes, then two people with a disability must obey that rule too.

Two unconserved adults of the same-sex must be allowed the same rights and privileges as two adults of the opposite sex. Homosexual activity of consenting adults may not be prohibited.

If two unconserved adults consent to have sex with each other, the types of sexual activity they engage in are up to them. They may choose to engage in oral sex, anal sex, or sexual intercourse.

The right to engage in consenting adult sex, whether homosexual or heterosexual, does not exist merely because the California Legislature repealed criminal laws against such conduct in 1975.

Freedom of choice to engage in consenting adult sex was solidified by the United States Supreme Court in 2003 as a matter of “liberty” protected by the Fourteenth Amendment to the United States Constitution. (*Lawrence v. Texas* (2003) 539 U.S. 558) Government agencies and officials may not interfere with the sexual privacy rights of Americans no matter where they live in the country.

An adult also has the right to ask another adult, even in public, if the other adult would like to go somewhere private to engage in consenting sexual conduct. The state may not interfere with this right to ask. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238)

It bears repeating that unconserved adults in assisted living residences or group homes must be afforded a reasonable amount of time to engage in consenting adult sexual activity in a private place. They also must be allowed to communicate with other consenting adults about sexual matters. Objections from parents are not grounds for home operators or staff to deny residents their sexual rights.

Sex Education and Counseling

There are complications associated with sexual activity between consenting adults that will require sex education and counseling. Indeed, there is a legal duty to engage in such counseling in order to minimize risks such as pregnancy and sexually transmitted diseases, including HIV.

Failure to provide such counseling may give rise to legal liability if any of such consequences should occur because the adults were never informed of the risks of sexual activity and how to minimize them.

The leading case on this subject is [Foy v. Greenblott](#) (1983) 141 Cal.App.3d 1. In that case a young woman who was a mental health (LPS) conservatee was residing in a locked facility. Staff and medical personnel knew that she was sexually active.

Despite having such knowledge, the young woman was never given contraceptive counseling or devices. She became pregnant and eventually gave birth to a baby boy.

With help from someone, she sued the facility and the doctors for failing to give her proper counseling and not giving her access to birth control methods. She also argued that the facility violated its duty to watch residents more closely to prevent them from engaging in sexual activity.

The Court of Appeal rejected the second argument, citing the Lanterman Act and the many rights that people with developmental disabilities are afforded by it. The court concluded that the facility would be violating the Lanterman Act if it constantly watched residents and took aggressive measures to prevent intimate relations.

The court observed that institutions providing care for people with developmental disabilities must use the least restrictive means of caring for them, which means that interference with their autonomy, privacy, and social interaction should be minimized.

As to the allegation that the facility, and especially its medical personnel, had a duty to provide contraceptive counseling and devices, the court agreed. If the young woman could show that had such information and devices been provided she would not have become pregnant, the defendants would be liable for the harm she suffered because of their failure to educate her and provide her methods to prevent pregnancy.

Although the Foy case involved the consequence of unintended pregnancy, the theory of liability would apply to other unintended consequences for failure to provide sex education and counseling, such as the uneducated person contracting a sexually transmitted disease.

In general terms, Foy stands for the principle that agencies charged with caring for a person with a developmental disability have a duty to provide education and counseling about the consequences of sexual activity and how to reduce the risk of such consequences. Failure to perform that duty may give rise to liability.

Duties of Regional Centers

There is no reason for the rationale of Foy to be limited to mental health institutions treating adults with developmental disabilities. The rights cited by the court in Foy apply to such adults in all settings since they are grounded in the Lanterman Act.

For example, the rationale of Foy could be applied to Regional Centers, imposing a duty on them to educate and counsel their clients about “the rules of sex” – what is permissible and what is not – and how to reduce the risk of unintended consequences, such as unwanted pregnancy or catching a sexually transmitted disease.

Such counseling, of course, could not focus solely on abstinence since abstinence is the most restrictive method, not the least restrictive alternative to prevent unwanted risks. The counseling would have to affirm the client’s right to have solo sex, and for those who are not conserved, their right to consenting adult sexual activity that includes various forms of birth control, including the use of condoms.

The duty of Regional Centers to arrange for sex education and counseling for clients, through qualified vendors, arises from legal sources other than the Foy decision. Various statutory mandates can be interpreted as requiring such counseling as an affirmative duty.

For example, the Legislature has declared that Regional Centers have a duty to “assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.” (Welfare and Institutions Code Section 4640.7) Consenting adult sexual activity is certainly a highly valued form of recreation.

The habilitative services coordinated by Regional Centers and provided by Regional Center vendors must be delivered in a manner that guarantees the rights described in Section 4502 of the Lanterman Act. (Welfare and Institutions Code Section 4850 (b)) Such habilitative services must enable persons with developmental disabilities “to approximate the patterns of everyday living available to nondisabled people of the same age.” (Welfare and Institutions Code Section 4850 (a))

For nondisabled adults, sexual activity, whether solo or with another consenting adult, is part of everyday

living. It is also a form of recreation.

Most adults without disabilities are aware of the various forms of sexual conduct available to them, of the risks associated with such activity (such as pregnancy or STDs), have a general idea of how to minimize such risks (such as by using various forms of contraceptives or engaging in safe sex), and have the ability to purchase risk-reducing devices or medical prescriptions.

Therefore, in order to carry out their statutory duties, Regional Centers have an affirmative duty to directly provide or secure from approved vendors adaptive skills training or sexuality counseling that helps adults with developmental disabilities to acquire the same knowledge and find the same devices as nondisabled adults of the same age.

The duties of a Regional Center are guided by an Individual Program Plan (IPP) that is developed for each client. (Welfare and Institutions Code Section 4646) Person-centered planning that is tailored to the needs of each client is required.

The IPP must take into account the needs of clients and help them to live an independent and normal life in a stable and healthy environment. (Section 4646)

Not only do adults with developmental disabilities have sexual urges and a desire to act on those urges – just as any other adult has – they are also at a high risk of being a victim of sexual abuse. The risk of abuse is increased when they have not received proper sexuality education and counseling. The risk of them violating a criminal statute due to lack of knowledge of the “rules of sex” is also increased when they have not received proper sexuality education and counseling.

The rationale of the Foy decision, coupled with the statutory mandates described above, could easily translate into civil liability for Regional Centers if a client becomes pregnant, contracts a sexually transmitted disease, or becomes a victim or perpetrator of a sex crime due to lack of knowledge of the “rules of sex” or how to reduce the risk of becoming a victim

of abuse.

Therefore, Regional Centers should provide sex educational and counseling in each IPP as a matter of fulfilling their statutory obligations, but also for the self-serving purpose of reducing their own risk of civil liability if a client suffers unwanted consequences due to a lack of knowledge about sexual matters.

Materials developed by the Department of Developmental Services (DDS) reinforce the existence of the duty to provide sexuality education and counseling.

“Individuals with developmental disabilities have the right to develop relationships, marry, be a part of a family, and be a parent if they choose. Support may be needed to help people start and keep relationships with friends and fellow community members or to develop intimate relationships. This support may include services such as transportation, family counseling, or training in human development and sexuality.” (Training Manual, Year 1, Session 1: The Direct Support Professional, [“Student Resource Guide,”](#) p. 12.)

Although DDS may not be requiring Regional Centers to include sexuality counseling and abuse risk reduction in the IPP of each adult they serve, some Regional Centers do provide general sex education. This is not sufficient to fulfill statutory mandates and avoid liability, but it is a step in the right direction.

San Andreas Regional Center, for example, initiated a project in 2002 on “Sexuality Training and Counseling of Families and Consumers.” This project was designed to educate clients and their parents about sexuality and social sexual issues.

In 2010, the same Regional Center offered a one to nine month course on sexuality for women with developmental disabilities. That same year, North Los Angeles Regional Center offered a "Healthy Relationships/Boundaries/Sexuality" class to adult consumers, family members, and service providers. The class included information about the different

types of abuse and ways to prevent and report abuse. Again, these efforts are laudable, but not sufficient to meet statutory mandates to meet the needs of each adult client on an ongoing basis, especially in IPP planning and implementation.

A "[Consumers Guide to the Lanterman Act](#)" which is published by DDS recognizes the right of a Regional Center client to include sexuality education, services, and supports, in the IPP. However, it seems to place the burden on the client to request inclusion of this important issue in the IPP. Since sexuality is a part of the life of every adult, and since all adults with developmental disabilities are at risk for sexual abuse, these issues should be an automatic part of the discussion in every IPP, regardless of whether the client requests it or not.

Rights of Conservatees

The law presumes that a proposed limited conservatee has the capacity to consent to sexual activity. Unless a court orders otherwise, an adult who has a developmental disability retains the right to make social and sexual decisions even when a limited conservator is appointed.

An analysis of the sexual rights of conservatees begins with a discussion of the California Supreme Court decision in [Conservatorship of Valerie N.](#) (1985) 40 Cal.3d 143. That case focused specifically on the reproductive choices of adult women with developmental disabilities, but the overall reasoning of the decision and general principles cited in it apply to the sexual rights of men and women with such disabilities.

The case discusses the history of the Lanterman Act and the philosophy encompassed in it, as well as the growing societal recognition that adults with developmental disabilities have the same sexual rights as everyone else.

Valerie N observes that the 1977 Lanterman Act built on a federal Developmental Disabilities and Services Act passed in 1975 which recognized that a right to "treatment, services, and habilitation for a

person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." (42 U.S.C. § 6010(1) & (2).) fn. 19)

The court observed that the Lanterman Act incorporated these principles when the Legislature declared its intent that Regional Centers should provide services to clients ensuring "an unbroken chain of experience, maximum personal growth and liberty," under "conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." (Welfare and Institutions Code Section 4830; see also Section 4501.)

The court stated that the Legislature envisioned Regional Center services to be provided as "part of a continuum ... sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life."

With this legislative background in mind, the court concluded that adults with developmental disabilities have a constitutional right to all reproductive and contraceptive choices. This freedom of choice in sexual matters is based on their "privacy and liberty interests protected by the Fourteenth Amendment to the United States Constitution, and article I, section 1 of the California Constitution."

Finally, the court noted that the "habilitative" services mentioned in the Lanterman Act have roots in the constitution. Such habilitation, the court said, "is the right of every citizen to have the personal liberty to develop, whether by education, training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level."

No doubt this is why the Legislature incorporated the rights afforded by the Lanterman Act into the Limited Conservatorship System.

Probate Code Section 1801 declares that conservatees with developmental disabilities should receive services resulting in more independent,

productive, and normal lives.

Section 1800 states that limited conservatorships shall be administered in a manner that meets the psycho-social needs of conservatees. Sexual desires and their expression are a psycho-social need of any adult, regardless of disability status.

When a conservatorship proceeding is initiated, the proposed conservatee is presumed to have capacity to make decisions in all areas. The petitioner has the burden of proving, by clear and convincing evidence, that the proposed conservatee lacks such capacity in one or more areas.

According to the California Supreme Court, the “clear and convincing evidence” test requires a finding of high probability, based on evidence “so clear as to leave no substantial doubt” and “sufficiently strong to command the unhesitating assent of every reasonable mind.” (Conservatorship of Wendland (2001) 26 Cal.4th 519, 552)

Absent such a showing, a limited conservatee retains the right to make decisions regarding his or her sexual conduct.

But even if a court were to find that a proposed conservatee lacked the ability to consent to sexual conduct with another adult, such a finding should not condemn an adult with a developmental disability to a life without any sexual pleasure or release at all. Everyone has the capacity to decide whether to touch himself or herself for sexual pleasure. Everyone has the capacity to engage in an act of solitary masturbation.

Even if a court were to transfer sexual decision-making authority to a conservator, that authority must be administered in a manner that is the least restrictive to the rights of a limited conservatee. The conservator should never be allowed to restrict the right of a conservatee to engage in solitary sexual activity in a private setting.

If the court-appointed attorney for a proposed conservatee becomes aware that the sexual rights of

his or her client will be restricted by court order, the attorney should have the court clarify, on the record, that the right of the client to solitary sexual activity in private is not being affected by the order. Even though many people don't like discussing the details of sex in a public setting such as a courtroom, these sensitivities must be overcome. The rights of the client are too important to leave the right to solitary sexual activity unspoken or unspecified.

Once a conservator is appointed, if the authority over sexual rights has been transferred to him or her, the conservator must exercise that authority in a reasonable manner. Restrictions on the sexual activities of a limited conservatee cannot be arbitrary. This authority must be exercised in the least restrictive manner.

It would be arbitrary and unreasonable for a conservator to prohibit a limited conservatee from solitary masturbation or viewing sexually explicit materials in a private setting. The risk to the conservatee from such behavior in private is nonexistent or minimal.

Considering that sexual activity is an important part of the life of an adult, it is disappointing that the “Conservator’s Handbook” published by the Judicial Council is silent on this topic. It should be updated to include a section on the duty of conservators to respect the sexual rights of conservatees.

If a conservator has a doubt about how to respect the sexual rights of a conservatee or about what type of sexual conduct should be allowed, the conservator can seek clarification from the Probate Court.

It should be remembered, even if a conservator is a parent of a limited conservatee, the authority of the conservator is conferred by the state. As a result, all decisions are a form of “state action” which must comply with the Fourteenth Amendment and the provisions of the California Constitution protecting individual liberty and privacy.

Arbitrary and unreasonable restrictions on the sexual rights of a limited conservatee could subject the conservator to a civil lawsuit for invasion of privacy.

It could also trigger remedial action under federal civil rights statutes. Every person who, under color of state law, deprives an individual of any rights secured by the constitution is liable to the victim under federal law. ([42 U.S.C. § 1983](#))

Finally, it should be mentioned that participants in a conservatorship proceeding have a duty to take reasonable steps to protect a conservatee or proposed conservatee from the risk of sexual abuse.

An attorney appointed by the court to protect the rights of a proposed conservatee has a duty to provide effective representation. This includes a duty to investigate to make sure the proposed conservator is not currently abusing the proposed conservatee and has not done so in the past. The attorney should include the risk of abuse when interviewing the client, the proposed conservator, and the grandparents and siblings of the proposed conservator. Failure to investigate these issues and these people may cause liability to the attorney if it is discovered that the person selected as conservator is someone who was abusing the client and that a proper investigation would have discovered this fact.

A conservator also has a duty to protect the conservatee from the risk of abuse. This duty would require the conservator to be aware that adults with developmental disabilities are at high risk of abuse, who likely perpetrators may be, and what steps can be taken to reduce the risk of abuse.

It is also noteworthy that the Conservator's Handbook is silent on the issue of abuse, saying nothing about the fiduciary duty of a conservator to educate a conservatee about the risks of abuse and for the conservator and conservatee to acquire knowledge about reducing such risks. This is something the Judicial Council needs to address. It is also something that Regional Centers should include in the IPP process and agreement.

Conclusion

Sexuality is a part of the life of every adult, regardless of disability status. The Lanterman Act and the

state and federal constitutions give adults with developmental disabilities the right to express their sexuality and impose an affirmative duty on Regional Centers and agents of the state – such as Probate Court judges, attorneys, and conservators – to respect the sexual rights of such adults, whether they are conserved or not.

Among these obligations are duties to provide sex education and counseling and abuse-risk reduction counseling to each adult Regional Center client and to each limited conservatee. Privacy must be afforded to these adults so they have an opportunity to engage in solo sex or, if they have capacity to consent (either presumed capacity or actual capacity), to have sex with another consenting adult.

These organizations and these state agents have not been fulfilling the duties mentioned in this essay.

The Department of Developmental Services needs to take a close look at what Regional Centers have and have not been doing in terms of counseling their clients about their sexual rights and in terms of risk reduction education, especially in the IPP process.

It is time for the Judicial Council to revise its Conservatorship Manual to include a section on the sexual rights of conservatees and the duties of conservators to respect those rights.

It is also time for the Probate Courts in each county to take a close look at how the various participants in limited conservatorship proceedings are, or are not, addressing the sexual rights of adults with developmental disabilities.

Judges who hear these cases, and attorneys who are appointed to represent conservatees, need to be educated about their responsibilities in connection with the sexual rights of these adults.

The issues of sexual rights and reducing the risk of abuse have been neglected for too long. They have been swept under the rug and placed out of mind. It is time to give them the attention they deserve, the attention that the law has mandated for many years.

Sexual Behavior of Adults with Developmental Disabilities

Rights of Individuals / Responsibilities of Agencies

Unconserved Adult	Constitutional Protections	Criminal Laws
In Private		
Solo touching	Privacy and liberty protect solo touching	No crime if solo and done in private
Videos/Internet	First Amendment protects sexual viewing	Material depicting minors is a crime
Using sex toys	Privacy and liberty protect use of sex toys	No crime if solo and used in private
Consenting adults	Privacy and liberty protect consenting sex	Minors or lack of consent are crimes
In Public		
Asking for sex	First Amendment protects the right to ask	Minors or money make it a crime
Showing genitals	Indecent exposure is a crime if motivated by sex or a desire to offend others	
Lewd conduct	Is a crime if you know that others are present who may be offended by seeing it	
Conserved Adult	Constitutional Protections	Criminal Laws
With Sexual Rights	Same as unconserved adults	Same as unconserved adults
Sex rights removed	Court can transfer authority for decisions over sexual conduct to a conservator	
Solo touching	It is unconstitutional for a conservator to prohibit solo touching in private	
Videos/Internet	Only reasonable restrictions to protect from predators or involvement with minors	
Consenting adults	Conservator can impose reasonable measures to ensure mutual consent	
Agency/Professional	Responsibilities	
Regional Center	Duty to include sex education and risk reduction in IPP of each adult client	
Medical doctor	Duty to make sure patient receives medical info on contraception and risks of sex	
Appointed Attorney	Duty to protect client's sexual rights, investigate proposed conservators for risk	



Thomas F. Coleman is an attorney with decades of experience advocating for sexual civil liberties.

During an era (1974-1980) when heated battles over the rights of consenting adults took place in courtrooms and legislatures everywhere, Coleman served as co-chair of the National Committee for Sexual Civil Liberties. In addition to his role as advocate, Coleman assumed the role of researcher and educator by publishing a legal periodical known as the *Sexual Law Reporter* (1975-1979) which was read by attorneys, judges, and activists in the United States.

He and others lobbied the California Legislature for several years to obtain sexual privacy rights for consenting adults (1972-1975). These efforts paid off when such conduct was decriminalized in 1975.

In 1977, Coleman spoke at a forum sponsored by the Constitutional Rights Foundation in Los Angeles. The topic was "The Sexual Rights and Responsibilities of Teens." The following year, he spoke at a training session for hotline counselors at the Los Angeles Free Clinic. The topic was "Giving Accurate Information on Sexual Laws."

During an era that undercover vice officers entrapped and harassed gay men who engaged in consenting sexual conduct, Coleman was at the forefront of challenging discriminatory enforcement methods as well as the laws themselves. He won a landmark decision in the California Supreme Court which invalidated the sexual solicitation statute and established new guidelines for the "lewd conduct" law that all but put a halt to the entrapment tactics. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238)

Following the victory in the *Pryor* case, Coleman filed briefs in appeals in Oregon and Oklahoma challenging similar laws in those states in 1981.

A few years later, Coleman and his co-counsel William Gardner won a case in the United States Supreme Court when they convinced the high court to dismiss a challenge to a New York ruling that protected the privacy rights of consenting adults.

(*People v. Uplinger* (1984) 467 U.S. 264)

Coleman filed legal challenges to California's prostitution laws. In 1980, he and his co-counsel Jay Kohorn won an appeal in which the court ruled that posing in the nude for money or engaging in solo sexual conduct for money (no touching between the performer and the customer) was not a crime. (*People v. Hill* (1980) 103 Cal.App.3d 525) That same year he made a presentation at a training of public defenders in Los Angeles. The topic was "Recent Developments in Prostitution Litigation."

He served as Executive Director of the Governor's Commission on Personal Privacy (1980-1982) and wrote the Commission's final report which recommended ways in which the state should protect the sexual privacy rights of Californians. Among its many recommendations, the Commission advocated for the sexual privacy rights of people with developmental disabilities in licensed facilities.

Through public speaking and educational forums, Coleman has advocated for the sexual civil liberties of people with disabilities.

For example, at the Western Center for Independent Living, Coleman made a presentation in 1980 on "Sexual Privacy and Equality for Disabled People."

In 1985, Coleman did a lecture on "Law, Sex, and Disability," at a conference at California State University in Northridge where he emphasized the implications of a landmark Court of Appeal decision recognizing the sexual privacy rights of conservatees with developmental disabilities. (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1)

For many years (1990-2002), Coleman advocated for the right of heterosexual couples not to be subject to discrimination by state agencies or businesses because the couples lived together as unmarried partners. His advocacy for opposite-sex domestic partners occurred in California, Alaska, Illinois, Georgia, New York, and Virginia, in the contexts of housing, employee benefits, and professional licensing.

Throughout these decades, Coleman has always advocated that the sexual civil liberties should be protected and respected, regardless of sexual orientation.