

THE JUSTICE GAP

The Judicial Branch Has a Duty
to Appoint, Train, and Supervise
Attorneys to Effectively Represent
Respondents in Guardianship Cases

A Special Report to the
Washington Supreme Court

Thomas F. Coleman
Legal Director
Spectrum Institute
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Overview

By enacting the Americans with Disabilities Act, Congress established a national policy requiring state and local courts to provide access to justice to litigants with disabilities. The United States Supreme Court has ruled that Congress had the authority to impose such a mandate to advance the goals of the Due Process Clause of the Fourteenth Amendment. The Washington Legislature has established a state policy for guardianship proceedings consistent with the ADA. A statute (RCW 11.88.045) affirms the right of guardianship respondents to have an attorney at all stages of the proceedings and directs the courts to appoint an attorney at public expense for those who cannot afford one. The appointed attorney must provide effective representation. The right to *competent* advocacy services is required by state law as well as the Due Process Clause of the United States Constitution.

The legislative policy of requiring attorneys for all guardianship respondents is consistent with the ADA since an attorney is the only effective accommodation to ensure that a litigant with known cognitive and communication disabilities has meaningful access to justice. An attorney not only defends the constitutional and civil rights of respondents from unjust infringement, but also monitors the performance of the guardian ad litem and the court to ensure that a respondent receives due process of law and that statutory requirements are followed – something a litigant with cognitive and communication disabilities cannot do for himself or herself.

Appointment of a guardian ad litem is not sufficient to comply with due process, the ADA, and RCW 11.88.045. The Legislature has explicitly stated that an advocacy attorney has a completely different function from a guardian ad litem. One cannot assume the role of the other.

Research shows that the Judicial Branch in Washington is not complying with the requirements of due process, the ADA, and RCW 11.88.045 in guardianship cases. In many cases – probably most – attorneys are not being appointed

to provide advocacy services for guardianship respondents. Litigants without attorneys are not receiving access to justice. The courts are not using their supervisory role over attorneys to ensure that respondents are receiving competent advocacy services as required by due process and RCW 11.88.045. The Judicial Branch has not adopted performance standards for appointed attorneys nor has it required such attorneys to attend appropriate training programs to develop the advocacy skills ensuring competent services for clients with special needs. The courts know that, unlike clients without disabilities who can identify deficient attorney performance and complain about it, guardianship respondents lack the ability to do so. Despite knowing this, the courts have not taken steps to minimize the potential for deficient performance in these cases or to devise methods to provide relief when it occurs.

Corrective measures should be taken. Courts have a duty to appoint attorneys for respondents in *all* guardianship cases. The Judicial Branch should adopt training and performance standards for these attorneys and implement procedures to ensure that guardianship respondents receive access to justice, including access to effective advocacy services. In other words, the Washington judiciary should follow state and federal policy directives. Judicial practices should conform to legislative mandates.

A thorough review of the system for appointing attorneys in guardianship cases is needed. The Supreme Court has the authority to supervise the practices of the judges and attorneys who process guardianship cases. It should do so in order to bring the administration of justice into conformity with state and federal law. The justice gap should be addressed by the Supreme Court.



Disability and Guardianship Project

9240 Reseda Blvd. #240

Northridge, CA 91324

(818) 230-5156

www.spectruminstitute.org/gap

tomcoleman@spectruminstitute.org

Introduction

This special report is the most recent release of many publications issued by Spectrum Institute to improve access to justice for adults who are respondents in adult guardianship proceedings. (<http://spectruminstitute.org/publications/>) These publications are based on the research and activities of our Disability and Guardianship Project. (<http://spectruminstitute.org/guardianship/>)

Our research originally focused on the limited conservatorship system in California – a system involving guardianship proceedings for adults with intellectual and developmental disabilities who are unable to care for themselves and who may need the court to authorize another person to make major life decisions on their behalf. Based on our interactions with the California judiciary, the Judicial Council of California recently approved a two-year project to develop new court rules on qualifications, training, and performance standards for court-appointed attorneys who represent respondents in limited conservatorship proceedings. (<http://spectruminstitute.org/attorney-proposals/>)

Our work eventually broadened to view the issue of access to justice for guardianship respondents from a national perspective – whether they are seniors with cognitive disabilities or younger adults with developmental disabilities. We submitted a White Paper to the United States Department of Justice, proposing national standards under the Americans with Disabilities Act (ADA) to guide state and local courts in fulfilling their duties under Title II of the ADA in connection with guardianship proceedings. (<http://spectruminstitute.org/white-paper/>)

We recently launched an Access to Advocacy Outreach Project in which we are contacting the supreme court and state bar association in each state. We are asking these public entities to review the guardianship system in their jurisdictions to ensure that litigants with cognitive and communication disabilities are truly receiving access to justice in these proceedings. We consider access to effective advocacy services as being an essential component of the larger issue of access to justice for involuntary litigants who lack the ability to defend their rights or to advocate for themselves. (<http://spectruminstitute.org/outreach/>)

The release of this special report is part of our outreach activities in the state of Washington – a jurisdiction where more than 20,000 adults are currently under an order of guardianship. (<http://spectruminstitute.org/guardianship/washington>) *The Justice Gap* builds on our previous research and incorporates the principles, precedents, and best practices recommendations referenced in our prior publications.

For the sake of brevity, this report does not repeat those legal citations here. If the reader wants detailed references, he or she can review the publications mentioned in this Preface or the articles, cases, and other authorities listed in the Bibliography.

The findings and recommendations in this report are the result of research, interviews, meetings, and conferences conducted by the Disability and Guardianship Project in Washington over the past year. This work was not done in a vacuum. Rather, it is an outgrowth of, and builds upon, years of legal research on a national level and prior intensive investigations of the limited conservatorship system in the state of California. It is a function of our Access to Advocacy Outreach Project.

Our attention was initially drawn to Washington by a complaint regarding the infringement of the First Amendment rights of an adult whose communication and visitation with a close relative was restricted by a guardian. Prompted by this case, we decided to examine the guardianship laws and procedures in Washington, especially as they pertain to people with intellectual and developmental disabilities.

Since the time the Washington Supreme Court created an advisory body known as WINGS – Working Interdisciplinary Network of Guardianship Stakeholders – we have been working closely with one of its members, Tina Baldwin, to bring the issue of access to advocacy services to the attention of WINGS. We believe that meaningful guardianship reform should include a review of the current system of court-appointed attorneys for guardianship respondents. We think that WINGS should advise the Supreme Court about the need for attorneys to advocate for and defend litigants with cognitive and communication disabilities from potential abuses and overreach in guardianship proceedings. We also want WINGS to promote the development of training and performance standards for such attorneys. We have been monitoring the activities of WINGS over the past year.

We have also been consulting people with professional and academic involvements with the guardianship system in Washington. We interviewed attorneys who have represented respondents as well as petitioners. We spoke with a scholar who has written professional publications about guardianship proceedings. Administrators who handle guardianship logistics as well as guardianship financial operations in three counties provided valuable information to us from those perspectives.

Court records were reviewed for dozens of guardianship cases in order to gain a better understanding of how many guardianship respondents do and do not have an attorney appointed to represent them in such proceedings. From these records, we also learned more about how attorneys are selected and what services they perform.

The information we have gathered, and are sharing with the court and with the public in this report, is more than sufficient to cause concern that litigants with cognitive and communication disabilities are not receiving access to justice – in part because they are not receiving access to effective advocacy services.

The Justice Gap

A Guardianship Petition Places Fundamental Rights in Jeopardy

To understand the seriousness of a guardianship proceeding, and the reason why it is necessary for a respondent to be represented by an attorney, it is important to understand that fundamental rights are placed in jeopardy when a petition for guardianship is filed. Rights that are vested when a person becomes an adult may be partially restricted or completely removed by an order granting a petition for guardianship.

A child's legal rights are limited due to his or her age. A parent or guardian makes major life decisions for a child. Choices as to finances, educational opportunities, place of residence, and medical procedures are made for the child by a parent or guardian. Sexual relations are taboo. The law assumes that a child has limited or no capacity to make major life decisions.

When a person reaches the age of 18, however, an entirely different set of legal principles apply. At 18, a person becomes an adult – with all of the constitutional rights and statutory privileges associated with adulthood. Consenting adult sex and freedom to marry are personal choices for an adult that are protected by the Constitution. Adults have the right to enter into contracts. There is the right to travel. Freedom of speech and association are protected too. Decisions about medical care, residence, occupation, and education are made by the adult. In terms of age, the transition from minority to majority status has profound significance.

The filing of a petition for guardianship places all of the rights and privileges of adulthood at risk. The motives of the petitioner may be benevolent, and the rationale of the government for authorizing guardianship proceedings may be paternalistic and protective, but the impact of a guardianship order on an individual can be devastating. That is why guardianship has sometimes been called the equivalent of “civil death.” Some legal commentators have observed that guardianship respondents often have fewer rights than convicted felons – sometimes even fewer rights than convicts who are still serving time in prison.

Certainly there may be an upside to a guardianship. If it is truly necessary for the protection of an adult, and if less restrictive alternatives have been explored but are not feasible, and if the restrictions are limited so as to maximize the independence of the adult, and if the best person is selected to serve as the guardian – someone to the liking of the adult in question – then a guardianship may be a good outcome. But those are a lot of “ifs” to consider.

Whether justice has been served in a guardianship proceeding is not merely a matter of whether a just result has occurred. Justice focuses on the process as well as the result. A guardianship respondent has not received access to justice if he or she has not received due process – adherence by all participants in the proceedings to the statutory procedures and constitutional protections specified by law. A guardianship respondent with cognitive and communication disabilities needs representation by counsel in order to ensure that he or she has truly received access to justice.

Guardianship Proceedings Affect Various Adults at Different Stages in Life

Many people think of guardianships in terms of seniors who have Alzheimer's disease or dementia, but seniors with those conditions are only a segment of the population affected by guardianship proceedings. Adults of all ages may be placed in a guardianship for a variety of reasons.

A significant percentage of guardianship proceedings involve young, middle aged, and older adults with intellectual and developmental disabilities. Some parents file a petition for guardianship when an adult with a developmental disability turns 18. The ability of these adults to make decisions varies from person to person, depending on a wide range of circumstances. Factors include the type of disability involved and whether there is a system of supports and a network of supporters who can help the adult make his or her own decisions. Many, if not most guardianship respondents with intellectual or developmental disabilities, would lack the capacity to understand the legal proceedings and the skills necessary to question the sufficiency of the petition and evidence, or to produce witnesses and documents to support the retention of rights. They need an attorney to perform these functions.

The large majority of guardianship respondents, however, probably are seniors. Some have marginal cognitive abilities. Others may be seriously impaired. Some may have abilities that vary from day to day or week to week. But whatever their condition, these seniors have been accustomed to a life – several decades of independence – in which they have made their own decisions. They may not want to surrender their rights without putting up a fight. That is understandable. They may believe, perhaps justifiably, that a child or other relative is trying to wrest control from them for financial reasons. Senior members of society deserve to have an attorney appointed by the court to ensure that they have access to justice. Whether the legal fees are paid by their own assets or by county funds is another matter.

A smaller segment of guardianship respondents involve young and middle aged adults who, due to injury or illness, are experiencing cognitive impairments, perhaps temporary. Others, due to substance abuse or emotional trauma, may need temporary judicial intervention. They too would benefit from an attorney, if only to ensure they have an advocate who will make sure the guardianship is tailored to their needs and is limited in duration.

Guardianship Systems Have a Tainted History

Guardianship proceedings occur in state courts and are a function of state law. Each state has a guardianship system. Some states refer to the process as a conservatorship proceeding, although most use the term guardianship.

The concept of guardianship is a part of the fabric of American jurisprudence. It is premised on benevolent paternalism – proceedings in which someone calls upon the state to intervene to protect a person who cannot protect themselves. But however idealistic the process is in theory, guardianship systems are rife with examples of people who utilize the process for selfish reasons. The process has been abused by so many for so long that guardianship reform movements have emerged from time to time over the past few decades. We are in the midst of a guardianship reform era right now, spurred by a coalition of advocates for seniors and people with disabilities.

Guardianship Respondents Have Rights Protected by Federal Law

Although guardianship proceedings occur in state courts, prior to an order granting a guardianship, respondents have procedural and substantive rights protected by federal law. Some of these rights continue to apply even after a petition for guardianship is granted.

As a matter of substantive law, respondents have a federal constitutional right of “liberty” protected by the Fourteenth Amendment. The First Amendment guarantees freedom of speech and freedom of association. The Constitution also protects the right to make highly personal decisions pertaining to marriage, family, procreation, contraception, and sexual relations. Substantive due process prohibits arbitrary and irrational decisions by government officials, including state court judges.

Respondents also have a right to procedural due process. Legal proceedings must be fundamentally fair. Fundamental fairness entitles a litigant to be represented by an attorney in all court proceedings, regardless of whether they are criminal or civil. When a person’s physical liberty or fundamental constitutional rights are jeopardized by a legal proceeding, even one labeled as civil, due process entitles an indigent litigant to have an attorney appointed at public expense.

Litigants with disabilities have federal civil rights protected by the Americans with Disabilities Act. Title II of the ADA requires state and local courts to provide such litigants access to justice. To accomplish this, courts may have to modify policies or provide accommodations so that litigants can have meaningful participation in their cases.

While most people think of architectural modifications for wheelchair access or sign language interpreters for people who are Deaf as necessary accommodations by courts, the ADA also applies to litigants with cognitive and communication disabilities. Especially when they are required to participate in guardianship proceedings as involuntary litigants, respondents with intellectual, developmental, or other cognitive disabilities are entitled to accommodations sufficient to enable them to have access to justice. In many guardianship cases, the only accommodation that will achieve this goal is the appointment of an attorney to represent the respondent.

Guardianship Respondents Have a Right to Counsel Under State Law

Article I, Section 3 of the Washington Constitution declares: “No person shall be deprived of life, liberty, or property, without due process of law.” The filing of a guardianship petition places property, physical liberty, and fundamental civil rights of the respondent at risk. A respondent is therefore entitled to due process during a guardianship proceeding.

A respondent is denied due process if he or she is not provided an opportunity for meaningful participation in the case. Because of serious cognitive or communication disabilities, most respondents will not be able to participate in the proceedings in a meaningful manner. They most likely will not understand the complexities of the proceedings, and they probably will lack the ability to challenge the sufficiency of the allegations in the petition or the evidence supporting them. They also will lack the ability to advocate for the retention of their rights by developing evidence and witnesses in favor of retention. Therefore, without an attorney to represent them, most respondents are denied due process of law.

Article I, Section 12 of the Washington Constitution declares that privileges given to one class of citizens shall be given equally to all citizens. This applies to the right of litigants to have counsel in civil cases. Fundamental fairness entitles a litigant to be represented by an attorney in court proceedings. Litigants without cognitive disabilities, who have the financial and mental ability to retain counsel, have an unequivocal right to counsel to represent them during a civil court proceeding. As explained below, guardianship respondents with funds are placed at a disadvantage and are usually unable to access the right to counsel. Also due to their disability, they lack the capacity to waive the right to counsel. Many guardianship respondents are caught in legal limbo. They can't retain an attorney and they can't waive one. The only way to remedy this situation and to comply with the privileges and immunities clause of the state constitution is for the court to appoint counsel to represent them.

RCW 49.60, known as the Washington Law Against Discrimination (WLAD), prohibits discrimination on the basis of disability and requires reasonable accommodations of persons with disabilities. Washington courts are places of public accommodation fully subject to the WLAD. Failure to appoint an attorney to represent a guardianship respondent with serious cognitive and communication disabilities deprives the person of access to justice in the proceeding.

Consistent with the provisions of federal and state law mentioned above, RCW 11.88.045 clearly and specifically entitles guardianship respondents to be represented by counsel *at all stages* of the proceedings. Subsection 1(a) of the statute declares: "Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings." This sentence appears to apply to guardianship respondents who have the funds to hire counsel and the capacity to choose their own attorney. As discussed below, because of their disabilities, most guardianship respondents lack the ability to make a financial and legal choice of this magnitude. This sentence, therefore, would likely apply to very few respondents.

However, other provisions of RCW 11.88.045 affirm the right to counsel and place a duty on the court to appoint an attorney for a respondent who lacks funds, or has funds but cannot access them, or who would experience a financial hardship by hiring an attorney.

The statute states: "The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order."

When these various provisions of the state constitution and state statutes are considered together, Washington public policy is clear. Guardianship respondents are entitled to have the court appoint an attorney to represent them during all stages of the proceedings. As a matter of access to justice, whether as an attribute of the due process clause, the privileges and immunities clause, the anti-discrimination provisions of state and federal law, or the directives of RCW 11.88.045, all guardianship respondents should have an attorney appointed to represent them. The only exception, which would rarely apply, would be when a respondent, who has the capacity to do so, knowingly, intelligently, and voluntarily waives the right to counsel.

All Attorneys for Guardianship Respondents are Appointed by the Court

When a guardianship respondent who cannot afford an attorney is represented by counsel, the attorney has been appointed by the court pursuant to RCW 11.88.045. When an attorney appears in a guardianship proceeding and says that he or she has been privately retained by the respondent, subdivision 1(d) of RCW 11.88.045 requires the attorney to petition the court to be appointed to represent the respondent. Therefore, all attorneys who represent respondents in guardianship proceedings are appointed by the court. The fees of these attorneys must be approved by the court.

RCW 11.88.045 places a tremendous responsibility on the court. The court has a duty to select and appoint attorneys for guardianship respondents who do not have counsel, and to appoint attorneys (or not) when an attorney appears in court and claims to have been privately retained. Whether the right to counsel is based on a statutory provision or a constitutional mandate, the right implies that counsel will provide effective assistance. The court that appoints attorneys for guardianship respondents therefore has a duty to provide an attorney who will perform in a competent manner. Especially since a litigant with known or probable cognitive and communication disabilities cannot identify deficient performance by an attorney or complain about such, the court has a responsibility to take reasonable measures to ensure that appointed attorneys are qualified to represent clients with special needs in a guardianship proceeding. The court must also take steps to maximize the likelihood of effective representation in a specific case. This is explained in greater detail below.

Guardianship Respondents May Lack the Capacity to Retain Counsel

The mere filing of a petition for guardianship places the capacity of a respondent in serious doubt. If a respondent in fact lacks the capacity to contract or to manage his or her finances, the validity of retainer agreement for legal services would be questionable. For fear of financial or professional repercussions, an attorney may be extremely reluctant to accept a client whose capacity is under a cloud. An attorney who performs services only to be declined an appointment by the court may have to refund monies previously received from the client. The attorney may also find himself or herself the target of a complaint with the state bar by a relative of the client who claims the attorney used undue influence over the client to obtain the retainer. Perhaps the avoidance of this dilemma is why the Legislature adopted a provision requiring all attorneys, even those purporting to have been privately retained, to be appointed by the court and to have their fee claims approved by the court.

Guardianship Respondents May Lack the Ability to Request Counsel

Judicial and administrative practices of the superior courts in Washington seem to rest on an assumption that when a guardianship respondent does not appear with counsel, that a court need not appoint an attorney unless one is requested. Such an assumption is both illogical and illegal.

Most guardianship respondents have serious cognitive and communication disabilities. These disabilities may preclude them from understanding their right to an attorney, the role of an attorney, or the need for one. Due to their disabilities, they are unlikely to request an attorney or may be easily dissuaded from doing so. Not having an attorney adversely affects their ability to have access to justice. By conditioning their right to counsel on a request, while knowing they may be unable to do so, a court violates Title II of the ADA and deprives a respondent of due process of law.

A Valid Waiver of the Right to Counsel Would be Rare

Statutes and court rules address the right to appointed counsel in a variety of proceedings in which fundamental liberties are in jeopardy. These include criminal cases and juvenile delinquency cases, both of which may result in physical restraint or regulation of freedom of movement or freedom of choice. They also include juvenile dependency cases in which a parent may lose custody of a child or have significant regulations placed on his or her parenting rights.

In all of these situations, these statutes and rules contemplate a potential waiver of the right to counsel and such is explicitly mentioned in the relevant provisions of law. In contrast, the issue of waiver is not mentioned in RCW 11.88.045. The failure of the Legislature to mention a waiver of counsel by guardianship respondents may very well be the result of an awareness that such respondents would likely lack the ability to make a valid waiver. To be legally valid, a waiver requires the understanding and voluntary relinquishment of a known right. The key words, of course, are “understanding,” “voluntary,” and “known.”

Even though a guardian ad litem may verbally try to explain to a respondent that he or she has the right to an attorney, it stretches credulity to suggest that most respondents would “understand” the significance of the right to counsel. To satisfy the requirement that a respondent waived a “known” right, there would have to be proof that someone explained, and the respondent realized, the nature of the services that an attorney would perform and the importance of those services. Finally, because of their disabilities, many guardianship respondents are susceptible to being influenced in their perceived or actual decisions by a person in a position of authority. The words and body language of d by a guardian ad litem as he or she explains the right to counsel may influence whether the respondent’s decision not to have counsel is “voluntary” or not.

Furthermore, in the context of a criminal, juvenile delinquency, or juvenile dependency case, the court may not proceed without counsel unless the validity of the waiver is explored in open court. In contrast, the common practice in guardianship cases appears to assume there has been a waiver based on an off-the-record conversation between a GAL and a respondent. The exact wording of the conversation, whether the respondent understood what was being said, and the circumstances (the respondent’s mood, medication, or other environmental influences) are not known to the court unless the respondent is in court and the judge explores the validity of the waiver on the record.

Appointment of Counsel Should Not Depend on a Recommendation from a GAL

Chapter IX from the 2012 Edition of the Guardian Ad Litem Handbook suggests that the practice in guardianship cases in Washington is to place the burden on the respondent to request counsel in order to access the statutory right to counsel. This practices runs contrary to legislative directives.

The statute says that the AIP has a right to be represented by counsel at any stage of the proceedings. It does not say “upon request, an API has the right . . .” The statutory right is unconditional. Yet, the practice suggested by the GAL handbook is to place the burden on the respondent to request an attorney.

True, the practice is for the GAL to advise the respondent of the right to counsel and to ask if he or

she wants one. But there are problems with this practice, both from the perspective of due process, the state statute, professional rules of ethics, and the ADA.

From the perspective of the state statute, the right to counsel is not conditional upon a request. Thus the practice and the court rule conflict with the unconditional statutory right to counsel.

From the perspective of due process, case law is developing that the appointment of counsel for guardianship respondents is a matter of fundamental fairness. Many national legal and judicial organizations have viewed the right to counsel in this manner. Furthermore, it would seem to violate due process to assume that a guardianship respondent (who has been alleged to lack capacity to make major decisions) has the capacity to waive the right to counsel by verbally saying he or she does not want one or by remaining silent. The statute makes the appointment of counsel a right, not conditioned upon request. For a GAL or a court to assume or even find a valid waiver of counsel by a guardianship respondent, due process would require evidence of a free, knowing, and voluntary waiver – all facts which would be highly doubtful when a respondent has serious cognitive and communication disabilities. These are issues which the handbook and the courts are glossing over.

From an ethical perspective, conditioning the right to counsel on a recommendation by a GAL has serious problems. The statute says a GAL may not be an advocate for a respondent. Therefore a GAL may not advocate for appointment of counsel. For the GAL to suggest that counsel is not necessary may also be tainted by a conflict of interest. Counsel who is providing competent advocacy services may make life more difficult for a GAL. Counsel may find flaws in the services performed by the GAL and, if there are any, will challenge the findings of the GAL. The work of a GAL is immensely easier if there is no attorney to scrutinize his or her activities. Thus, the GAL has a practical interest in the respondent not having an attorney.

From the perspective of Title II of the ADA, the court has a duty, on its own motion and without the need for request, to ensure access to justice for guardianship respondents. The statute does not conflict with this affirmative duty because it does not condition the right to counsel on a request from the litigant or anyone else. It is the court rules or the practices required or allowed by the courts that may cause a violation of Title II.

The court knows, by virtue of the petition, that the respondent allegedly has serious cognitive and communication disabilities that interfere with the respondent's ability to make decisions. Asking for counsel is a major decision. By its previous experiences with dozens or even hundreds of respondents who have been processed through the court in the past in such cases, the court knows that a large majority of them actually do lack such capacity. Therefore, the allegations in the case at hand, coupled with a pattern of experiences from prior cases, puts the court on notice that a particular respondent likely lacks the capacity to make major decisions. This is especially so for respondents with intellectual or developmental disabilities or seniors with dementia or other cognitive disabilities. Therefore, it is a violation of Title II for the court to condition access to advocacy services (a statutory and due process right) on a request from the respondent. It is also a violation of the ADA to assume that silence or even a verbal statement that counsel is not necessary, is a valid waiver of the right to counsel. Local court rules and the current practices of guardians ad litem and judges are in violation of the ADA.

Guardianship Respondents Must Receive Effective Representation of Counsel

Whether counsel is provided in compliance with statutory directives or constitutional mandates, due process requires that an attorney must provide the respondent legal services in a competent and effective manner. A litigant with an appointed attorney is constitutionally entitled to effective assistance of counsel. A failure on this score strikes at the fundamental fairness of a proceeding.

As part of its duty under the ADA to provide respondents access to justice, courts that appoint attorneys to represent such litigants must affirmatively take steps to ensure the attorneys provide respondents *effective* advocacy services. Attorneys must be properly trained and engage in services that ensure statutory procedures are followed by the petitioner, GAL, and judge. They must examine the sufficiency of evidence and investigate potential defenses and alternatives to guardianship.

The Guardian Ad Litem Handbook describes the role and activities of an appointed attorney for a respondent in considerable detail. On the issue of an attorney's role, it minces no words. On page 87 it states: "The attorney for the AIP must advocate the expressed preferences of the AIP, regardless of whether the attorney believes those preferences are in the AIP's best interest. RCW 11.88.045(1)(b). The AIP's attorney has the ethical duty to provide competent counsel to the AIP and must not substitute his or her own judgment for that of the AIP. The role of the attorney for the AIP is distinguished from the GAL's role in that the GAL makes recommendations based upon the perceived best interests of the AIP, and not on the basis of the AIP's expressed preferences."

The handbook also underscores the duty of counsel to ensure that all statutory requirements are met by the petitioner, guardian ad litem, and any experts who render an opinion on the capacities of the respondent. This includes an examination of the sufficiency of the allegations in the petition and whether there is clear and convincing evidence to support them. It also includes scrutiny as to whether less restrictive alternatives to guardianship are viable. The handbook acknowledges that an attorney for the respondent must explore the qualifications of any experts and the reliability of their opinions on the issue of capacity. It also highlights the role of an attorney to examine the basis for the findings and the appropriateness of the recommendations of the GAL.

Who would perform these vital advocacy functions if an attorney was not appointed for a respondent? The plain and simple answer is: no one would. Even in a protective proceeding, justice requires a system of checks and balances. The system is out of balance and tilts toward a particular result when only one party is advocating.

Petitioners are advocates. They believe, usually sincerely, that a guardianship petition should be granted and an order be issued placing a respondent under the protection of the court and appointing someone to make decisions for the respondent. Petitioners make allegations to support such a result. They often produce evidence to back up their allegations. Whether represented by an attorney or not, a petitioner is advocating for the creation of a guardianship.

The GAL and the court are supposed to be objective and neutral. That is how it should be. But without an attorney representing the respondent – advocating and defending, examining and testing allegations and evidence – the scales of justice are tilted toward the goal of the petitioner. Such a process is fundamentally unfair, especially when basic liberties are at risk of being taken away.

The Majority of Guardianship Respondents Are Not Represented by Counsel

Statewide data is not available for the number or percent of cases where attorneys are appointed to represent guardianship respondents. However, based on reliable information from some counties, it appears that the vast majority of respondents are not represented by counsel during guardianship proceedings. All cases have a guardian ad litem, but few cases have an attorney for the respondent.

One attorney who has represented clients in guardianship proceedings for five years estimated that 30 percent of respondents are represented by counsel. Another attorney with decades of experience in guardianship proceedings felt that 30 percent was too high. A review of court records proved that the doubt of the second attorney was justified.

A large sample of guardianship cases in Spokane County for 2010 through 2013 was reviewed. While the percentages varied from year to year, during this four year period as a whole, attorneys were appointed for respondents in only 25 percent of the cases. A review of a sample of court records in Pierce County yielded the same result – respondents had counsel 25 percent of the time.

The Method of Selecting Attorneys Varies from County to County

Attempts to obtain information about the system for selecting, appointing, and compensating court-appointed attorneys for guardianship respondents were not always successful. Some attorneys and administrators seemed reluctant to answer questions about how the system operates. However, despite this difficulty, some information was obtained. It appears that the method of selecting attorneys varies by county.

While every county maintains a list of persons eligible to be appointed as a guardian ad litem, some counties do not have a list for attorneys who are available to be appointed to represent guardianship respondents. Pierce County is one of those jurisdictions without such a list.

Pierce County supplied conflicting information. One source said there is no list of attorneys for court appointments while other said there is such a list. Assuming there is a list, it is unclear who does the selecting or if it is done in an impartial way such as by a blind rotational method.

In Spokane County, one former government attorney initially said that the attorney for a petitioner selects the attorney to be appointed for a respondent. When questioned about the propriety of such a procedure, the statement was modified to indicate that the GAL and the attorney for the petitioner jointly selected the respondent's attorney when one is appointed.

The Method and Amount of Payment of Attorneys Varies by Location and Situation

Based on interviews with several informants, it appears that some attorneys are paid from the assets of a respondent while others are paid from public funds. The court decides the source of the funds depending on the financial condition of the respondent. The court also decides the amount of money an appointed attorney will receive for his or her services.

In Spokane County, attorneys receive \$175 per hour or more when the respondent has assets from

which the fees are paid. When public funds are used to pay legal fees, Spokane County limits the hourly fee to \$60. There appear to be rules limiting the number of hours that can be charged without obtaining court approval for additional hours. In Pierce County, there are seven attorneys who are willing to accept appointments at the rate of \$75 per hour when fees are paid by public funds.

There Are No Performance Standards for Court-Appointed Guardianship Attorneys

When quality assurance is a priority or a concern to the government, performance standards are adopted. Performance standards exist for guardians and for certified professional guardians. Not so for court-appointed attorneys for guardianship respondents.

In contrast, there are performance standards for attorneys who represent indigent defendants in criminal and quasi-criminal cases. The Washington State Bar Association has issued standards for indigent defense services. The Washington Supreme Court has adopted standards for indigent defense in criminal and juvenile proceedings.

The lack of performance standards for attorneys who represent guardianship respondents underscores the lack of concern on the part of the judiciary and the legal profession for the due process rights of guardianship respondents. Ensuring access to effective advocacy services is not a priority.

Training Programs for Court-Appointed Attorneys Have Not Been Identified

Our investigation has not identified any training programs for attorneys who represent guardianship respondents. There are training programs for guardians ad litem, for certified professional guardians, and even for lay guardians – but not for court-appointed attorneys who provide advocacy and defense services to guardianship respondents. The bench and bar have failed to take the first essential step to ensure effective assistance of counsel as required by due process – a training program.

Counties and Courts Have No Quality Assurance Monitoring of the Attorneys

Considering the lack of basic quality assurance mechanisms for court appointed attorneys – such as performance standards and training programs – it is no surprise that mechanisms to monitor the quality of legal services are also lacking.

Like all states, Washington has two procedural methods by which deficient legal services are identified and remedied – appeals to the Court of Appeal and Supreme Court, and administrative complaints to the State Bar Association. Unfortunately, neither of these procedures is accessible to guardianship respondents who have cognitive and communication disabilities. These litigants lack the ability and understanding necessary to identify a deficient performance by their attorney.

Guardianship respondents don't know how to voice an objection, file a motion, or lodge an appeal to challenge ineffective assistance of counsel. As a result, appellate courts are unable to remedy the violation of the right to effective representation in a specific case or to give guidance to the bench and bar in a published opinion that identifies unacceptable errors and omissions by guardianship attorneys. Thus, an entire class of litigants is denied access to appellate justice. As a consequence, the guardianship system is deprived of the prophylactic benefit of appellate jurisprudence.

The State Bar Association has a complaint system that can be used by aggrieved clients who are the victims of legal malpractice. This system is used by litigants in all types of cases – family law, criminal law, civil law, juvenile dependency law, and probate law. No doubt it is sometimes used by *petitioners* in guardianship cases who believe their attorneys have not provided minimally adequate representation. However, because of the nature of their disabilities, guardianship *respondents* generally are unable to use this administrative method to complain about any legal malpractice by their lawyers.

Just as the appellate process has a remedial effect for a specific appellant as well as preventive effects beneficial to a class of litigants in the future, so does the complaint system of the state bar. In addition to an individual attorney who is disciplined having to refund money to a client, other lawyers in a given speciality who learn about an instance of discipline may modify their behavior in future cases to avoid trouble with the bar association. But guardianship attorneys who represent respondents on an ongoing basis never face individual discipline or instructional guidance because their clients are unable to complain. This is another area where guardianship respondents are denied access to justice because of the nature of their disabilities.

To remove these blind spots in the legal and judicial systems, the bench and bar should devise some ways to rectify these systemic deficiencies. The Supreme Court and the State Bar Association need to take a long and hard look at the ways in which litigants with cognitive and communication disabilities are being denied access to justice. They need to identify ways to avoid these problems. While setting qualifications, conducting trainings, and adopting performance standards for attorneys who represent guardianship respondents are part of the solution, more needs to be done. There should also be methods to monitor completed cases to examine the quality of legal services.

Speaking of monitoring, the counties have a role – indeed a duty – to ensure that legal services paid by public funds are complying with the Americans with Disabilities Act. Counties are public entities with responsibilities under Title II of the ADA. Although courts have Title II responsibilities to ensure that the services of court-appointed attorneys are providing clients with access to justice, the funding source of a legal services program also has a Title II responsibility for ADA compliance by the recipient of the public funds.

Under Title II of the ADA, as well as Section 504 of the Rehabilitation Act of 1973, a public entity that funds legal services for litigants with cognitive and communication disabilities cannot just cut a check to the attorney and wash its institutional hands of ADA-compliance responsibility. There are ways for the county to fulfill its Title II and Section 504 duties. It can require attorneys who receive county funds to attend training programs designed to assist them in providing access to justice for guardianship respondents. The county could contract with the bar association to develop and conduct such a program. The county could also contract with the bar association to do random audits of a specified number of guardianship cases per year to ensure the performance of the attorneys for respondents satisfies performance standards adopted by the bar association or court.

The status quo should not continue. Allowing the quality of legal services to be left to chance – which is what is occurring now – ignores the *right* of litigants with cognitive and communication disabilities to have access to justice. With the release of this report – creating an awareness that was previously lacking – the failure to take remedial action would constitute willful indifference.

An Advisory Body Should Focus on the System of Appointing Attorneys

The Washington Supreme Court has a variety of advisory bodies to assist it in identifying ways to improve the administration of justice. One of those advisory groups, albeit temporary, is the Working Interdisciplinary Network of Guardianship Stakeholders, otherwise known as WINGS.

The Supreme Court created WINGS after it applied for and received a \$7,000 grant in March 2015 from the National Guardianship Network. The National Guardianship Network consists of 11 national organizations dedicated to improving adult guardianship law and practice. Members include the AARP, the American Bar Association Commission on Law and Aging, the ABA Section of Real Property, Trust and Estate Law, the Alzheimer's Association, the American College of Trust and Estate Counsel, the Center for Guardianship Certification, the National Academy of Elder Law Attorneys, the National Center for State Courts, the National College of Probate Judges, the National Disability Rights Network, and the National Guardianship Association.

Among the first activities of WINGS in Washington was an online survey of 454 persons, including judicial officers, court staff, professional guardians, lay guardians, persons with developmental disabilities, family members of persons in a guardianship, social workers, guardians ad litem, attorneys, advocates, mental health professionals, seniors, and legislators.

The Steering Committee of WINGS prioritized the recommendations and created three temporary subcommittees: support for families and friends of persons in guardianship, improving assessment of persons needing decisional support, and improving guardianship standards and practice.

A WINGS conference was conducted in August 2015. Out of this gathering, some 23 recommendations were prioritized. Four workgroups were then formed to review these recommendations: Legislative; Long Range/Long Term Planning; Standards and Best Practices; and Training.

Tina Baldwin, an advisor to the Disability and Guardianship Project and a co-lay guardian of the estate, was appointed to serve as a member of WINGS. She attended the conference in August 2015, subsequently became a member of the Standards and Best Practices Committee and then the Long Range Planning's subcommittee looking at mandatory appointment and training of court-appointed attorneys. She brought the attention of the White Paper – *Due Process Plus* – to the attention of these committees and the Steering Committee.

The position of the White Paper – that all respondents should have court-appointed attorneys – is consistent with a White Paper that Shirley Bondon help to draft in 2010 for the Conference of State Court Administrators (COSCA), an association of high level court managers from all 50 states. Ms. Bondon is the manager of the Office of Guardianship and Elder Services of the Administrative Office of the Courts and a coordinator of WINGS.

Noting that appointment of counsel was not required in many states, the COSCA White Paper asked: “[G]iven that a guardianship restricts control by the person with diminished capacity over liberty and property, should not a constitutional right to counsel exist?” Before answering the question, the report noted: “Because representation is key to providing procedural due process, without adequate

representation or the cognitive ability for self representation, a guardianship proceeding could be viewed as unfair and could result in the unjust loss of fundamental rights. A person subject to a guardianship can lose his or her right to vote, marry, contract, make healthcare decisions and decide how to manage his or her assets. In 1987, a congressional committee opined that guardianship could be the most severe form of civil deprivation which can be imposed on a citizen in the United States.” The White Paper, endorsed by the Conference, gave an emphatic and unequivocal answer: “In states where right to counsel has not been addressed, courts should take a leadership role in requiring the appointment of counsel to protect the rights of persons with diminished capacity.”

Perhaps the Steering Committee of WINGS was unaware of this recommendation or the role of Ms. Bondin in formulating it. Perhaps what caught the attention of the leadership of WINGS more than anything else were the survey results that played a major part in the process of setting priorities. Of all of the issues that were identified as possible priorities, the appointment of attorneys for guardianship respondents was at the bottom on the list. Education, training, and monitoring of such attorneys did not make the list at all.

Tina Baldwin made a presentation to the Steering Committee on November 5, 2015 during which she emphasized the need for WINGS to address the appointment, training, and monitoring of attorneys representing guardianship respondents with developmental disabilities. Two weeks later, the issue of appointed attorneys appeared on the agenda of the Long Range Planning Committee, a decision that seems to be consistent with the desires of other committees.

When Ms. Baldwin had raised the issues of appointment and training of attorneys with the Standards and Best Practices Committee, she was told that the Steering Committee had assigned it to the Long Range Planning Committee and therefore, to avoid duplication of time and effort, the Standards and Best Practices Committee would not review these issues.

Since this was an issue she was championing, Ms. Baldwin became a member of the Long Range Planning Committee. She immediately joined a sub-committee on appointed attorneys, and started to work with the other members who were charged with a responsibility to develop recommendations on this issue. That subcommittee is considering several policy options regarding court-appointed attorneys. As of this date, it has not yet issued a report or recommendations.

At the meeting of the Long Range Planning Committee in February 2016, it was reported that the issue of appointed attorneys will also be reviewed by the Standards and Best Practices Committee. It is now our impression that the issue of court appointed attorneys and their training is now also being discussed by the Training Committee whose mandate is "to develop and recommend development of educational resources and training materials for all entities involved in determining the need for, selecting, or delivering decision-support."

The grant for WINGS ends next month. It is unknown whether it will continue to function as an advisory body to the Judicial Branch. It is also unknown whether WINGS will issue a report and recommendations on the issues of appointment, training, and monitoring of court-appointed attorneys for guardianship respondents. However, regardless of what WINGS may or may not do, the Washington Supreme Court has a duty under Title II of the ADA and Section 504 of the Rehabilitation Act to ensure that respondents have access to effective advocacy services.

Alternatives to Guardianship Have Their Own Risks and Challenges

During a guardianship proceeding, the petitioner, guardian ad litem, attorney for the respondent, and the judge are all supposed to consider whether less restrictive alternatives would be better for the respondent than a full guardianship or limited guardianship. However, because some of these alternatives could be costly, and a full assessment of necessary supports and services could be quite time consuming, these options may not be fully explored during a guardianship proceeding. Therefore, some proponents of guardianship reform are promoting a thorough review of such options before a guardianship petition is ever filed.

A political movement promoting “supported decision making” as an alternative to guardianship has been gaining momentum in the United States and internationally. Some activists have even gone so far as to call for the outright abolition of guardianship laws. They want what they call “a paradigm shift” in which the law would assume that, with sufficient supports and services, every person has the capacity to make every decision all of the time.

Spectrum Institute has done a thorough review of political and legal literature on supported decision making. The SDM movement has much to offer in terms of rethinking the overuse of guardianship and the overreach of some guardianship orders. However, it fails to take into account the potential risk of abuse and exploitation in what may amount to the privatization of guardianship if some SDM advocates had their way.

When advocacy becomes overzealous, potential risks and flaws in a position can be overlooked. Sometimes the observations of outsiders can help proponents of a cause make refinements that are beneficial to everyone. This occurred on two specific occasions with respect to supported decision making when Spectrum Institute raised concerns about SDM in a legal and a political context. As a result, adjustments were made that improved the situation to the satisfaction of everyone involved. The same thoughtful process can occur in Washington with respect to the consideration of alternatives to guardianship, whether prior to or during a guardianship proceeding.

One example is the development of model legislation on supported decision making. We worked with the Autistic Self Advocacy Network and a legal organization known as Quality Trust to adjust and refine a model bill so as to minimize the risks of exploitation or abuse to people with intellectual and developmental disabilities. A better product resulted from conversations arising out of a critical analysis of the initial version of the bill.

Another example involved medical power of attorney legislation in Nevada. A network of SDM proponents and supporters lined up behind a bill to create a special power of attorney form just for people with intellectual disabilities. The bill had no formal opposition and was destined for passage. Then Spectrum Institute offered a thoughtful analysis and pointed out some serious problems with the bill, explaining how these flaws could harm the intended beneficiaries. The political process was slowed down as a result of this criticism. Revisions occurred. More critical analysis was offered. More revisions occurred. The twice-revised bill eventually passed. The outcome was a power of attorney option that had many fewer risks to the beneficiaries.

Alternatives to guardianship, such as supported decision making, has been a priority area of focus

for WINGS in Washington. Proponents of SDM have made presentations at meetings and conferences. It does not appear that these presentations have been balanced with the views and publications of those who point out the potential risks of SDM and who call for a cautious approach to the unquestioning use of SDM as an alternative to guardianship. SDM should be examined carefully by legislators and judges before wholesale changes in the law are made that adopt SDM as a private sector substitute for guardianship.

The issue of conflict of interest is one area that needs to be addressed in terms of having people with cognitive and communication disabilities sign powers of attorney or financial directives or use other types of SDM supports and services.

For example, consider the situation where family members bring an adult with intellectual disabilities to a lawyer to set up SDM documents so as to avoid the need for a guardianship. The lawyer may propose a financial power of attorney and a medical power of attorney. If validly executed, such documents would empower someone to act on behalf of the adult in question in financial transactions or medical decisions. The key concept in the previous sentence is “validly executed.”

Two major issues need to be addressed in this scenario – issues that may be glossed over by those who are *unquestioning* supporters of SDM or who may intensely want to avoid a guardianship. One is the capacity of the adult in question to enter into a contract – which is what a power of attorney is. The other is the conflict of interest inherent in a situation where a lawyer represents both parties to a legal transaction – especially where one of the parties is susceptible to undue influence by the other. Having the adult in question sign a waiver of conflict of interest does not eliminate the problem. The question would remain as to whether the adult understood the significance of the waiver and freely and knowingly signed the document. These are issues that should not be ignored or minimized in discussions about SDM and its viability as an alternative to guardianship.

Trauma Informed Justice Needs Attorneys Trained About Abuse Issues

Those who respond to guardianship petitions – guardians ad litem, judges, and court-appointed attorneys – must always be mindful that these are *protective* proceedings. It is the duty of the court and those appointed by the court to make sure the respondent is protected from harm. The duty to protect applies during the guardianship proceeding. If an order granting a guardianship is issued, then the duty to protect post adjudication rests primarily with the guardian and the court.

As mentioned previously, there are generally three classes of people who need guardianship protection: adults of any age who have intellectual and developmental disabilities; adults of any age who have cognitive disabilities due to illness or accident; and adults who need protection because of mental and other disabilities associated with advanced age.

The comments here about trauma informed justice apply primarily to adults with intellectual and developmental disabilities. Studies have shown that such adults experience abuse at a much higher rate than the general population, perhaps 3 to 4 times more often. By the time they turn 18, it is likely that a majority of such adults have been victims of abuse.

Perpetrators of abuse against people with intellectual and developmental disabilities are not likely to be strangers. Usually, they are people in the close circle of support to the victim – relatives, household members, and service providers.

Because of the nature of their disabilities, the victims are unable to complain about an incident or pattern of abuse. It therefore becomes the duty of those who are processing a guardianship case to examine the details of the case very carefully so as to avoid appointing an abuser to be a guardian and reduce the risk of placing a vulnerable adult in a potentially abusive household.

While it would be unfair to automatically assume that all petitioners or proposed guardians are perpetrators of abuse, it would also be unfair to conclusively presume they are not. At least with respect to guardianship respondents with intellectual and developmental disabilities, judges, guardians ad litem, and attorneys for respondents need to be mindful of their obligation scrutinize potential guardians so as to weed out any abusers. The same duty would apply to respondents who are seniors or adults with cognitive impairments caused by medical conditions.

Guardianship respondents with cognitive and communication disabilities – regardless of which of the three categories they may fall under – cannot be expected to defend themselves against the appointment of someone as a guardian who may be abusive. That duty rests with the GAL, the court, and respondent’s attorney. However, an attorney cannot fulfill this role if he or she is not appointed to the case. Likewise, an attorney cannot *effectively* defend a client from having an abuser appointed as a guardian if the attorney is not properly trained about abuse, including how to minimize the risk.

Even in situations where it is a foregone conclusion that a respondent needs a guardian and one should be appointed, an attorney should be appointed to help insure that the proper person is given this role. Not having an attorney appointed to represent a respondent increases the risk that the wrong person will become the guardian. If only for this reason, attorneys should be appointed to represent guardianship respondents all cases.

Juvenile Justice Reform Offers a Model to Improve Guardianship Advocacy

In 2003, the American Bar Association published a report assessing the quality of legal representation in juvenile offender cases in Washington. The findings of the report were troubling: (1) most counties had not adopted public defense standards; (2) high caseloads reduced the quality of representation; (3) most jurisdictions lacked comprehensive and regular training or supervision of attorneys; and (4) many children were permitted to waive their right to counsel.

TeamChild is a nonprofit organization with offices in five of Washington’s most populated counties. The organization provides juvenile defense services in these areas, but it does much more – on a statewide basis. TeamChild develops and provides training program for attorneys who represent clients in the juvenile offender system. It offers mentoring services for young attorneys who are just starting their careers as juvenile defenders. It also engages in public policy advocacy activities to improve the juvenile offender system through systemic change.

In 2008, TeamChild received a multi-year grant from the MacArthur Foundation as part of its Models for Change Initiative. With this funding, TeamChild created a Special Counsel position to

coordinate statewide efforts to enhance juvenile defense. TeamChild was selected to host the Special Counsel project because of the unique role the organization plays in juvenile justice reform.

The website of TeamChild explains the problems that the Special Counsel project was designed to address. “Washington State has a county rather than state-based delivery system for juvenile indigent defense services. It has historically lacked uniform caseload standards and training expectations, consistent supervision, and adequate funding. Yet, defense attorneys are critical players in the juvenile justice system. They not only provide an essential check and balance to the workings of the court, but most importantly play a singular role in their relationship with youth and as advocates for their legal and stated interests.”

The website also explains the goals of this Special Counsel project. “Juvenile defense attorneys need training, support and leadership in order to be effective in their role. Improving the quality of defense practice impacts the juvenile justice system at all levels. The Special Counsel’s goals include: improving juvenile defenders access to training, mentoring and technical assistance, coordinating and building models of high quality holistic defense practices, and increasing juvenile defender’s leadership and meaningful participation in system reform efforts.”

The activities of Special Counsel addressed all of these problems and sought to achieve all of these goals. The activities included: (1) coordinating state and national partners to deliver continuing legal education programs for juvenile defense attorneys throughout the state; (2) developing an outline for a comprehensive training curriculum and skill assessment tool; (3) providing a high-quality, accessible, centralized resource for short-term, case-related technical assistance; (4) convening a series of Juvenile Defense Leadership Summits, which developed into a permanent Washington Juvenile Defender Leadership Network – a network of defenders working to advance defense-initiated solutions to systemic problems in the juvenile justice system; (5) advocating for the Washington Supreme Court’s adoption of revisions to court rules regulating waiver of counsel and adoption of standards for indigent representation.

A model such as this could be adapted to improve legal advocacy services for respondents in guardianship cases. Existing systems and networks involved with the guardianship system have not been addressing the issue of the right to effective representation of counsel as a matter of due process or as a function of access to justice under the ADA. Waiver of counsel is implicit in a system where the overwhelming majority of respondents are not represented by counsel during a guardianship proceeding. There are no performance standards for attorneys when they are appointed in these cases. No training programs have been identified for court-appointed attorneys for respondents. There is no mentoring program or supervision and monitoring of such attorneys.

Washington’s guardianship system is today where the juvenile offender system was before the Models for Change grant created the Special Counsel project at TeamChild. A similar project is needed to stimulate improvements in the guardianship system, especially to promote effective legal advocacy services.

In addition to increasing the likelihood of access to justice for guardianship respondents in individual cases, the guardianship system as a whole would be improved by having a Special Counsel project that exists outside of the bureaucracy of the Judicial Branch.

Findings and Recommendations

Factual Findings

Demographics

1. There are currently more than 20,000 adults under an order of guardianship in Washington state. Hundreds of new petitions for guardianship are filed each year.
2. While most of the persons under guardianship are seniors, a significant percent of guardianship respondents are adults with intellectual and developmental disabilities. Another segment of the guardianship population are adults with cognitive impairments due to accident or illness.

Guardianship Proceedings

3. A guardianship proceeding is initiated with the filing of a petition. Some petitions are filed by relatives of the respondent, while others are filed by a public agency such as the Department of Social and Health Services.
4. A guardian ad litem is appointed by the court in each case. The role of the guardian ad litem (GAL) is to investigate the basis of the petition, the qualifications of the proposed guardian, and to determine what is in the best interests of the respondent. The GAL does not advocate for the respondent. The GAL makes recommendations to the court about whether to grant the petition and, if so, who should be appointed to serve as guardian and what terms and conditions to attach to the guardianship. The services of the GAL are paid for from the assets of the respondent or, if unable to pay, from public funds.

Court-Appointed Attorneys

5. A state statute (RCW 11.88.045) provides that respondents have a right to an attorney during all stages of a guardianship proceeding. If an attorney appears in the proceeding, the attorney must petition to have the court appoint him or her to represent the respondent. If the respondent cannot afford an attorney, the court shall appoint an attorney to represent the respondent and the attorney is paid with public funds. The court must approve the fees of all attorneys.
6. Most respondents are not represented by counsel in guardianship proceedings. The practice of the courts seems to be that if the GAL does not recommend an attorney then the court does not appoint an attorney. In effect, the courts are implying a waiver of counsel when respondents do not request an attorney.
7. Because of the nature of their disabilities, most guardianship respondents would not understand the right to counsel, the role of counsel, the value of being represented by counsel, or the disadvantages of not having counsel. They are often not able to request counsel, and in most cases would not be able to knowingly and voluntarily waive the right to counsel.

Qualifications

8. It appears that the only qualification required by statute or court rule for an attorney to be appointed to represent a guardianship respondent is a license to practice law in Washington.

Performance Standards

9. While Washington has performance standards for guardians and guardians as litem, there do not appear to be specific standards for attorneys appointed to represent guardianship respondents.

Training

10. Training programs have not been identified for attorneys who represent guardianship respondents. There are special training programs for lay guardians, certified professional guardians, and guardians ad litem. Not so for court-appointed attorneys.

Monitoring

11. The performance of attorneys is normally monitored by their clients. If a client feels his or her attorney is not performing adequately, the client can lodge an objection, file a motion, or initiate an appeal to seek relief. The client may also file a complaint against the attorney with the state bar association. A civil lawsuit may also be filed for legal malpractice. Due to their cognitive and communication disabilities, guardianship respondents are not able to access these remedies.

12. The courts and the state bar association know that, because of their disabilities, guardianship respondents are not able to identify deficient performance by their attorneys, or to file judicial appeals or administrative complaints about ineffective assistance of counsel. Despite this knowledge, these public entities have not engaged in modifications or accommodations to ensure effective monitoring of court-appointed attorneys through other methods.

Selection of Attorneys

13. There is no uniform method of selecting attorneys to represent guardianship respondents under state law. The method varies from county to county. In some locations, the petitioner or the GAL play a role in selecting an attorney for the respondent.

Payment of Attorneys

14. The method and amount of paying attorneys varies by county and depends on whether a client has assets. Attorneys representing clients with assets are paid more than those representing indigents. The amount paid to attorneys with public funds varies from county to county.

15. Counties pay for these legal services without regard to the quality of the services rendered. Counties do not have any quality assurance mechanisms in place nor do they require the courts to do so as a condition of the county paying for these legal services. County governments appear to be indifferent as to whether guardianship respondents receive adequate legal services.

Legal Findings

Due Process of Law

1. Since guardianship proceedings jeopardize significant liberty interests, and since guardianship respondents have considerable cognitive and communication disabilities, the Judicial Branch has a duty to provide an attorney to these involuntary litigants as a matter of due process of law under the state and federal constitutions.

Americans with Disabilities Act

2. Washington courts are public entities within the meaning of Title II of the Americans with Disabilities Act. When courts know that litigants have cognitive and communication disabilities that impair their ability to understand and participate in legal proceedings, they have an affirmative duty to modify policies and provide accommodations to ensure these involuntary litigants have access to justice. Fulfilling this duty requires the appointment of attorneys to provide advocacy services for guardianship respondents in all proceedings that involve significant liberty interests. It also requires taking steps to ensure that such attorneys are providing effective advocacy services. This includes requiring such attorneys to be properly trained, adopting performance standards, and implementing effective monitoring mechanisms to ensure that such training and performance actually occur.

Section 504 of the Rehabilitation Act

3. State courts and county governments are public entities that receive federal funding for various activities and programs. As a result, they are obligated under Section 504 of the Rehabilitation Act of 1973 to ensure that litigants with cognitive and communication disabilities receive access to justice. Fulfilling this duty requires courts to adopt the same policies and engage in the same practices as are required by the Americans with Disabilities Act. As the funding source for legal services, county governments have a duty to ensure that legal services meet ADA standards.

Washington Law Against Discrimination

4. Washington courts are public accommodations within the meaning of the Washington Law Against Discrimination. This statute prohibits discrimination on the basis of disability against persons who use the services of Washington courts. Guardianship respondents with cognitive and communication disabilities are a protected class under this statute. To fulfill their duties under the WLAD, courts must appoint attorneys to represent guardianship respondents. They must also take the same steps to that are required to comply with the Americans with Disabilities Act.

Privileges and Immunities

5. Guardianship respondents in one county are entitled to the same privileges as are respondents in all counties. This includes the appointment of an attorney and effective legal advocacy services. Funding, training, performance, and monitoring of court-appointed attorneys must be essentially similar in all counties in order to ensure that guardianship respondents receive equal protection of the law regardless of the geographic location of the court where their legal proceedings occur.

Recommendations

Appointment of Attorneys

1. To comply with RCW 11.88.045 and other state and federal laws, courts should appoint an attorney to represent guardianship respondents in all cases. The only exception would be those rare cases in which a respondent gives a knowing, intelligent, and voluntary waiver of counsel on the record. Attorneys should be routinely appointed in all initial proceedings, as well as post-adjudication proceedings in which a modification is being sought that would affect the liberty interests of the respondent.

Performance Standards

2. In order to ensure that court-appointed attorneys provide effective advocacy services to guardianship respondents, the Judicial Branch has a responsibility to adopt performance standards that meet the requirements of due process, the ADA, Section 504, the WLAD, and state laws establishing procedures for guardianship cases.

Training Programs

3. In order to ensure that court appointed attorneys provide effective advocacy services, the Judicial Branch has a responsibility to require attorneys to attend certified training programs to ensure they provide services that comply with the requirements of due process, the ADA, Section 504, the WLAD, and state laws establishing procedures for guardianship cases. Training programs should be periodically monitored by the Judicial Branch to ensure they comply with these requirements.

Monitoring Activities

4. The Judicial Branch should modify existing monitoring mechanisms – appeals and administrative complaints – to maximize the potential for guardianship respondents to have meaningful access to these procedures. Knowing that access by people with cognitive and communication disabilities may not be feasible, modifications should be made to provide for monitoring the quality of legal services by other methods. Periodic auditing of a sample of guardianship cases annually in each county would help identify deficient performance. This information could be used for discipline of attorneys as well as for the improvement of training programs.

Funding Sources

5. Public entities that provide funding for legal services in guardianship cases should take some responsibility for assuring the quality of the services they are funding. Through contracts or other methods, county governments should require the courts who receive or distribute the funds, and the attorneys who are paid with the funds, to provide access to justice for guardianship respondents. Entities that fund a legal services program can delegate the monitoring of such services, but they cannot avoid responsibility for ensuring that such services are compliant with the ADA and Section 504. Counties, therefore, may contract with a bar association to audit the quality of legal services, but doing so would not absolve them of their ADA and 504 responsibilities as the funding source.

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4.	Letter of Spectrum Institute to the Washington Supreme Court (Feb. 11, 2016)	E-09
5.	“Mandatory Attorneys for Guardianship Respondents: A Historical Moment in the Disability Rights Movement,” essay by Thomas F. Coleman (Feb. 8, 2016)	E-10
6.	“Current Law Mandates the Appointment of Counsel: Courts in Washington Just Need to Implement It,” essay by Thomas F. Coleman (Feb. 11, 2016)	E-12
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DUE PROCESS *PLUS*

ADA Advocacy and
Training Standards for
Appointed Attorneys in
Adult Guardianship Cases



Legal Benchmarks are Informed
by Due Process Precedents
and Best Practices Guidelines

White Paper to the U.S.
Department of Justice

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

9240 Reseda Blvd. #240 • Los Angeles, CA 91324
(818) 230-5156 • www.spectruminstitute.org

Online at: www.spectruminstitute.org/white-paper
ADA refers to the Americans with Disabilities Act

About the White Paper

The White Paper offers a comprehensive set of standards for the training and performance of attorneys who represent people with intellectual and developmental disabilities in guardianship cases. The report was submitted to the U.S. Department of Justice as a tool it can use during investigations of courts whose practices may be in violation of Title II of the ADA. Courts have a responsibility to adopt policies and have monitoring procedures in place to ensure that court-appointed attorneys are providing their clients access to justice. They must also ensure that such attorneys are properly trained. Courts will find the report to be a valuable resource in formulating training and advocacy standards to fulfill their ADA access-to-justice responsibilities. Attorneys who represent guardianship respondents will also find the report helpful as they seek to become effective advocates for clients who have disabilities.

About the Author

Attorney Thomas F. Coleman has been advocating for the rights of people with disabilities for 35 years. The focus of his work has included personal privacy, family diversity, criminal justice, and victims rights. For the last few years, his attention has been devoted to adult guardianships and the need for systemic reform. He has conducted extensive studies of the California limited conservatorship system and has filed complaints with the U.S. Department of Justice for voting rights violations and for violations of the ADA by court-appointed attorneys. The White Paper is only one of several major reports he has published. His approach to reform involves conducting investigations, identifying problems, and proposing viable solutions.



About Spectrum Institute

Spectrum Institute is a nonprofit organization that does research, education, and advocacy involving the rights of people with intellectual and developmental disabilities. With the assistance and advice of consultants throughout the nation, the Executive Committee operates in two program areas. The mission of the Disability and Abuse Project, headed by Dr. Nora J. Baladerian, is to reduce the risk of abuse, to promote healing for victims, and to seek justice for those who have been victimized. The mission of the Disability and Guardianship Project, headed by attorney Thomas F. Coleman, is to ensure that people with developmental disabilities have access to justice in guardianship proceedings, and that less restrictive alternatives are used, such as supported decision making, when feasible. Education and advocacy for reform of state guardianship systems are primary functions of the Disability and Guardianship Project.

Bibliography

The following list includes reports and reference materials reviewed and used in developing this report. To assist the reader, each item on the list has a link to the webpage where the item can be accessed online.

1. “Due Process *Plus*: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases” (White Paper to the United States Department of Justice, October 1, 2015)
Key Words: ADA, 504, due process, effective assistance, training, qualifications, access to justice
Online at: <http://spectruminstitute.org/white-paper/>
User’s Guide to White Paper: <http://spectruminstitute.org/white-paper/users-guide.pdf>
Exhibits to White Paper: <http://spectruminstitute.org/white-paper/reference-contents.pdf>
2. “Proposals to Modify the California Rules of Court: Qualifications, Continuing Education Requirements, and Performance Standards for Court-Appointed Attorneys in Limited Conservatorship Cases” (Spectrum Institute, May 1, 2015)
Key Words: ADA, 504, due process, effective assistance, training, qualifications, access to justice
Online at: <http://spectruminstitute.org/attorney-proposals/>
Exhibits: <http://spectruminstitute.org/attorney-exhibits.pdf>
3. “Sitting Ducks: 20 States Violate the ADA by Not Appointing Attorneys to Represent Guardianship Respondents” (Spectrum Institute, October 23, 2015)
Key Words: ADA, 504, access to justice
Online at: <http://spectruminstitute.org/guardianship/sitting-ducks.pdf>
4. “Duty of Court-Appointed Counsel: Remarks from the Bench” (Transcript of Seminar, Remarks of Presiding Judge of the Los Angeles County Superior Court, May 18, 2015)
Online at: <http://disabilityandabuse.org/judge-stratton-remarks.pdf>
5. “A Critical Analysis of Supported Decision Making” (Spectrum Institute, January 2, 2015)
Online at: <http://disabilityandabuse.org/sdm/sdm-report.pdf>
6. “Our Position on Supported Decision Making: Guardianship Laws Should be Reformed, Not Repealed” (Spectrum Institute, Website)
Online at: <http://disabilityandabuse.org/supported-decision-making.htm>
7. “A Strategic Guide for Court-Appointed Attorneys in Limited Conservatorship Cases” (Spectrum Institute, September 1, 2014)
Online at: <http://disabilityandabuse.org/pvp/index.htm>
8. “Trauma Informed Justice: A Necessary Paradigm Shift for the Limited Conservatorship System” (Spectrum Institute, May 2, 2014)
Online at: <http://disabilityandabuse.org/conferences/trauma-informed-justice.pdf>
9. “2012 Survey on Abuse of People with Disabilities” (Spectrum Institute, September 5, 2013)
Online at: <http://disabilityandabuse.org/survey/index.htm>