

Administrative Steps to Improve California's Probate Conservatorship System

By Thomas F. Coleman
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This report addresses the two conservatorship systems set forth in the California Probate Code: limited and general. It does not focus on mental health conservatorships under the Lanterman-Petris-Short Act as delineated in the Welfare and Institutions Code.

The limited conservatorship system was enacted as an amendment to the Probate Code in 1980 in the wake of political movements for deinstitutionalization and disability rights. Petitions for limited conservatorships may only be filed to conserve adults with developmental disabilities.

The statutory scheme for general conservatorships dates back to 1957. Petitions for general conservatorship may be filed to conserve any adult who lacks the capacity to care for his or her basic needs. Lack of capacity may be based on cognitive or communication disabilities associated with mental decline due to aging, a medical illness, an accident, or a developmental disability.

The current Probate Code endows the Judicial Branch with exclusive control and administration of each system. No state agency of the Executive Branch oversees, monitors or is involved with these proceedings. While local government agencies will occasionally initiate proceedings, the vast majority of petitioners are private parties.

Oversight of these conservatorship systems by the Legislature has been rare. In 2015, the Senate Judiciary Committee held a brief oversight hearing. Spectrum Institute filed a [report](#) on limited conservatorships. More extensive hearings were held in 2006, in the wake of adverse media attention. My research has not discovered other legislative oversight hearings in recent decades.

In reality, the functional operation and administration of both conservatorship systems are exclusively within the realm of the Judicial Branch. Unsurprisingly, the nature and extent of the proposed conservatees' disabilities often prevents them from complaining to the court, either as individuals or as a disadvantaged class. Therefore, the Judicial Branch has the responsibility, on its own initiative, to detect and correct abuses and errors committed by participants in these proceedings, as well as systemic deficiencies that cause or contribute to the violation of constitutional and statutory rights of conservatees or proposed conservatees.

My [research](#) indicates that the Judicial Branch has failed to fulfill this responsibility. In fact, courts have been reluctant to acknowledge systemic problems and have been resistant to adopting or even considering proposals for reform.

Further, courts often appear to disregard their obligations under federal law. Under the Supremacy Clause of the United States Constitution, state statutes must be administered in a manner consistent with the requirements of the Due Process Clause and Equal Protection Clause of the Fourteenth

Amendment. They must also be administered in a way that complies with the mandates of Title II of the Americans with Disabilities Act. Since the Judicial Branch receives federal funding, the provisions of Section 504 of the Rehabilitation Act of 1973 also apply. My research indicates that judges and court administrators who process probate conservatorship cases do not appear to be cognizant of the fact that their actions must comply with these federal laws.

The general and limited conservatorship systems must also be administered in harmony with various other provisions of state law, including those sections of the California Constitution guaranteeing due process, equal protection, and uniform operation of law.

Both systems must also operate in a manner consistent with the “equal access” and nondiscrimination requirements of Government Code Section 11135 – California’s equivalent to the ADA. The limited conservatorship system should also comply with the requirements of Welfare and Institutions Code Section 4502 – the [statement of rights](#) enumerated in the Lanterman Developmental Disabilities Services Act.

My research suggests that the judges, administrators, and attorneys who process probate conservatorship cases are not administering these two systems in a manner that complies with these federal and state legal mandates.

There are no performance standards for attorneys representing proposed conservatees. Training of attorneys is minimal and the seminars that sometimes occur fail to address these constitutional and statutory requirements. [Appeals](#) by probate conservatees are rare or nonexistent. As a result, the appellate courts do not address deficiencies or abuses within these systems. As it stands now, the only avenue for oversight and correction is the administrative jurisdiction of the Judicial Branch.

My research further indicates that administrative oversight at the state level of the Judicial Branch is minimal. The Judicial Council is not aware of how the superior courts throughout the state are operating these two systems. The Chief Justice and the Supreme Court also lack such awareness. The State Bar has kept its distance. Therefore, there are 58 local superior courts throughout the state that are administering these proceedings without coordination or oversight.

Since there is no adjudicative or administrative oversight of local probate courts, the extent to which the rights of conservatees and proposed conservatees are being violated is unknown.

Currently, there may be 60,000 or more adults in California living under orders of probate conservatorship. Thousands of new cases are filed in the state’s probate courts each year. The rights of these vulnerable adults should not be left to the financial or administrative considerations of local judges. They should not yield to bureaucratic concerns of docket control or budget management.

By implementing the proposals described herein, the judiciary can gain the information needed to both ensure these litigants access to justice and initiate the systemic reforms that will bring probate conservatorship proceedings into conformity with the Fourteenth Amendment, Americans with Disabilities Act, Lanterman Act, and the disability rights provisions of the Government Code. Such administrative oversight and remedial actions by the Judicial Branch are long overdue.

Task Force on Alternatives to Conservatorship

In January 2006, Chief Justice Ronald George convened a [Probate Conservatorship Task Force](#). The study group was formed in response to a series of articles published by the Los Angeles Times calling public attention to major deficiencies in California's probate conservatorship system.

The Task Force issued a [report](#) in September 2007. Among its many recommendations were proposals focused on alternatives to conservatorship. On this topic, the report recommended that "proceedings for the establishment of temporary and general conservatorships include declarations of why a conservatorship is the least restrictive alternative and why the specific powers granted to the conservator are not overly restrictive. This will ensure that the court investigator, attorney, and conservator have explored all alternatives and have requested the least restrictive means necessary to protect the conservatee while preserving his or her liberty when possible."

Recommendation: Least restrictive alternative finding. The Task Force proposed that "Legislation should be sought to require in every case a finding stated on the record by the judge that the conservatorship is the least restrictive alternative and that the conservatee lacks capacity. A clear statement of required findings that must be made on the record, in open court, in order to establish a conservatorship should be delineated. The requirements for findings, on the record, should also be addressed in judicial education programs for probate judges and commissioners."

Response: Probate Code Section 1800.3 was amended, effective January 1, 2008, to specify that "No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee." Form GC-340 – order appointing probate conservator – includes a preprinted statement that "Granting the conservatorship is the least restrictive alternative needed for the protection of the conservatee." Information on this subject is supposed to be provided to the court by the petitioner in form GC-312 – confidential supplemental information – under the heading "alternatives to conservatorship."

Recommendation: Least restrictive alternative process. The Task Force proposed that: "Courts should implement processes to ensure that the least restrictive alternative is addressed in every conservatorship case. The issue of least restrictive alternative should be discussed thoroughly by court-appointed counsel in their reports and should be the subject of a separate section in court investigators' reports."

Response: No legislation was enacted to make the exploration of alternatives to guardianship or a section on such alternatives mandatory in the reports of court investigators. Nor have any statutes been enacted or court rules adopted to require court-appointed attorneys to thoroughly explore less restrictive alternatives to conservatorship.

Anecdotal reports and audits of conservatorship case records in the past few years suggest that petitioners, court investigators, court-appointed attorneys, and judges are not taking seriously the requirement that a conservatorship shall not be ordered unless it is the least restrictive alternative needed for the protection of the conservatee. Proper investigations are not being done and available

resources are not being utilized to thoroughly explore alternatives to conservatorship.

For regional center clients who are the subject of a conservatorship proceeding, court-appointed attorneys could be requesting an [Individual Program Plan](#) (IPP) hearing for their clients, specifically to address the possibility of less restrictive alternatives to conservatorship. That is not happening.

For all proposed conservatees – whether in a general or a limited conservatorship proceeding – court-appointed attorneys generally are not requesting the appointment of experts under Evidence Code Section 730 to assist them in exploring less restrictive alternatives.

It appears that the mandate of a conservatorship being the least restrictive alternative is a theoretical requirement that is not being implemented. Participants in these proceedings seem to be making conclusory statements and checking boxes in court forms but are not really giving proposed conservatees any meaningful benefit of the least restrictive alternative requirement.

When investigators and appointed attorneys do not fully explore such options, a proposed conservatee is deprived of due process of law and is denied access to justice. When judges do not require an evidentiary showing that alternatives have been explored in a purposeful manner and are not feasible, an order granting a conservatorship is arbitrary and irrational.

Spectrum Institute has issued many reports focusing on deficiencies in the conservatorship system in California and the need for better oversight and monitoring of the performance of judges, court investigators, and court-appointed attorneys. Its first report, titled [Justice Denied](#), was cited as a reference in a 2014 report issued by the Coalition for Compassionate Care of California.

The coalition is a statewide collaborative of organizations and individuals representing healthcare providers, assisted living facilities, nursing homes, hospices, consumers, and state agencies. Its report, titled [Thinking Ahead Matters](#), documented major deficiencies in legal and judicial practices involving limited conservatorship proceedings. The report made several recommendations on the topic of alternatives to conservatorship, especially the need to develop and implement policies and practices on supported decision-making.

The *Thinking Ahead Matters* report expressed great concern that the policies and practices involving conservatorship and alternatives to conservatorship vary significantly among the state's 58 counties. It recommended further study of this variability and how it impacts the rights of conservatees.

The Supreme Court, Judicial Council, and State Bar currently do not have sufficient information on how judges, court investigators, and appointed attorneys are administering the least restrictive alternative requirement. A statewide analysis of local practices is needed. The creation of a Task Force on Alternatives to Conservatorship would help fill this informational void.

The Chief Justice should seek nominations for appointments to such a task force from the Governor, Speaker of the Assembly, President Pro Tem of the Senate, State Bar, State Council on Developmental Disabilities, Coalition for Compassionate Care, and a variety of nonprofit organizations whose missions involve disability rights and elder care.

Performance Standards for Court-Appointed Attorneys

Representatives of Spectrum Institute attended a meeting of the Probate and Mental Health Advisory Committee of the Judicial Council in [November 2014](#). We explained to the committee several areas in which the limited conservatorship system is deficient and needs to be improved. A major focus of our presentation was on deficiencies in the performance of attorneys who are appointed to represent proposed conservatees. In [May 2015](#), we followed up by submitting a report and recommendations to the committee.

In that report we asked the Judicial Council to adopt a new court rule on qualifications, continuing education requirements, and performance standards for court-appointed attorneys in limited conservatorship cases. The report emphasized the need for performance standards since training without standards is little more than a polite suggestion to attorneys as to what they should do. Standards are the key to effective legal representation.

In response to our proposal, the advisory committee asked for and obtained authorization for a two-year project to review the matter and develop formal recommendations for the Judicial Council to consider. Somewhere along the way, the goal of developing performance standards was dropped. The project moved forward with a narrower focus on qualifications and training, but with an expanded attorney base which includes attorneys representing clients in all probate conservatorship cases, whether general or limited, and all guardianship cases.

A report (Invitation to Comment - [SPR18-33](#)) released by the committee in April 2018 explained why performance standards were removed from the scope of the committee's work. According to the report, the issuance of performance standards for attorneys is not within the purview of the Judicial Council. The report stated that such standards may only be adopted by the State Bar, the Legislature, or public entities that fund legal services programs in which such court-appointed attorneys participate.

Anecdotal reports to and audits conducted by Spectrum Institute indicate that performance standards are clearly needed. Deficient performance by court-appointed attorneys in Los Angeles was so serious that it formed the basis of an [ADA complaint](#) to the United States Department of Justice. A [report](#) from a regional center indicates that appointed attorneys in Sacramento and surrounding counties are poorly trained and are not providing effective advocacy and defense services to their clients. A recent report suggests that in places like Sonoma County, where the public defender provides legal defense services to proposed conservatees, performance is also extremely deficient.

The State Bar is an arm of the California Supreme Court. Rules governing the performance of attorneys is definitely within the purview of the State Bar. The Court can and should direct the State Bar to [review the practices of court-appointed attorneys](#) in probate conservatorship cases and develop performance standards designed to ensure access to effective advocacy services for people with disabilities who are represented by such attorneys. The standards should conform to the requirements of due process, [Title II of the Americans with Disabilities Act](#), and California Government Code [section 11135](#). Performance standards adopted in [Massachusetts](#) and [Maryland](#) can serve as models to be emulated in California.

Modify the Code Of Judicial Ethics

On September 21, 2018, Spectrum Institute sent a [request](#) to the Supreme Court asking the Court to use its constitutional authority to modify the Code of Judicial Ethics. The purpose of such modification would be to clarify that judges may not control or manage legal services programs involving attorneys who appear before them or their courts in individual cases.

The request stated: “Our research shows that judges of the Los Angeles Superior Court have been managing a court-appointed attorney program in the probate court. Instead of adjudicating cases in an impartial manner, the superior court has been deciding which attorneys get appointed to cases, how much they get paid, and whether they are appointed to future cases and if so, how many. This financial control has a tendency to influence the conduct of the affected attorneys. We believe that such judicial practices are not limited to the Los Angeles area but are occurring in other counties as well. Many superior courts operate legal services programs involving court-appointed attorneys.”

In support of the request to the Court, Spectrum Institute submitted a report titled “The Domino Effect: Judicial Control of Legal Services.” The document contains three reports: A Trilogy on Legal Services. The report was titled *The Domino Effect* because the violations of ethics by judges who run legal services programs have an adverse effect on the legal ethics of and performance by the attorneys, which in turn has an adverse effect on the quality of services being received by clients.

The report advised the Court: “There is a growing national consensus that judges should have no more control over court-appointed lawyers than they do over privately-retained attorneys. Judges should be able to adjudicate issues that arise in individual cases, but they should not be coaching attorneys on how to advocate or defend cases and they should not be controlling the income stream of attorneys who appear in their courtrooms.”

The report further advised the Court that national legal and judicial organizations “uniformly are opposed to judges operating and directing legal services programs. They favor legal services programs being managed by an independent entity – one in which judges who adjudicate cases are not involved. Ethical reasons are cited as to why judges should stay in their own lane – adjudicating cases – and leave it to others to manage and direct the advocacy services of attorneys.”

On September 25, 2018, the Executive Officer of the Supreme Court wrote a [letter](#) to Spectrum Institute acknowledging that the Court had received the request and that it was referred to the Advisory Committee on the Code of Judicial Ethics.

When the evaluation by that Committee has been completed, the Chief Justice should ask the Court to make appropriate modifications to the Code of Judicial Ethics to clarify that judges may not control or manage legal services programs or coach attorneys on what actions to take or not take as they advocate for or defend their clients. Giving such direction to attorneys should be a function of appellate review in individual cases, disciplinary action of individual attorneys by the State Bar, or the creation and implementation of performance standards for court-appointed conservatorship attorneys by the State Bar, the Legislature, or the public entities that fund such legal services.

Modify Rule 1.100 of the California Rules of Court

Title II of the Americans with Disabilities Act requires public entities to ensure effective communication and meaningful access to services for people with known disabilities. Section 504 of the Rehabilitation Act of 1973 contains similar requirements for public entities that receive federal funds. These laws apply to state courts and require them to ensure effective communication and meaningful participation in the administration of justice, including court proceedings and ancillary investigative and legal services associated with such proceedings. California Government Code Section 11135 applies the ADA to government services that are funded by the State of California.

These obligations are triggered when a public entity, such as a court, knows or reasonably should know that a service recipient has a disability that may interfere with effective communication and meaningful participation in a court proceeding or ancillary service associated with the administration of justice. A court may acquire such knowledge by a request for accommodation made by a litigant or a third party on his or her behalf, or the knowledge may be obtained from court records or other sources of information provided to the court. A request is not necessary for these “reasonable accommodation” or “reasonable modification” rules to apply.

A recent [ADA complaint](#) filed with the Sacramento Superior Court cited in considerable detail the statutes, regulations, guidance materials, and court cases underscoring that it is *knowledge*, with or without a request, that creates the duty to provide necessary accommodations or modifications. As a Department of Justice [guidance memorandum](#) states: “The reasonable modification obligation applies when an agency employee knows or reasonably should know that the person has a disability and needs a modification, even where the individual has not requested a modification. . .”

[Rule 1.100](#) of the California Rules of Court is intended to instruct judges of their duties, and advise participants in court proceedings of their rights, under the ADA. Unfortunately, the rule is misleading. It only tells part of the story. The rule focuses exclusively on requests for ADA accommodations. It is silent as to the *sua sponte* duties of judges and court personnel to provide accommodations and make modifications for known disabilities even without a request.

The research of Spectrum Institute indicates that all other brochures, educational materials, and website pages published by the Judicial Branch have a similar flaw. They are partially correct when they focus on the duty to provide accommodations upon request. They are also misleading by failing to explain the other side of the story: the duty to accommodate for known disabilities even without request.

This omission from Rule 1.100 and other educational materials published by the Judicial Branch is itself a violation of the ADA. Participants in court proceedings need to know the full story about their rights, just as judges and court personnel need to be made fully aware of their obligations. This omission from Rule 1.100 has a disparate impact on respondents in probate conservatorship proceedings. Virtually every respondent has a significant disability adversely affecting access to justice in the proceeding.

The Chief Justice should initiate a Judicial Council proceeding to amend Rule 1.100 to specify that the court’s duties under the ADA are triggered by knowledge of a disability, with or without a request. As rules for court and administrative proceedings in Washington State explain, an appropriate or necessary accommodation may involve the appointment of counsel to represent persons with cognitive disabilities.

Survey of Probate Conservatorship Practices in All Counties

Probate conservatorship proceedings are processed through the superior courts in each of California's 58 counties. Although statewide judicial oversight is theoretically possible through litigation in the Court of Appeal and Supreme Court, appeals by probate conservatees are rare and therefore review of the conservatorship system through appellate review does not actually occur.

Since the Chief Justice, Supreme Court, Judicial Council, and State Bar have never engaged in any significant administrative oversight of conservatorship proceedings at the state level, each of the 58 superior courts has been allowed to administer these cases as they see fit. Officials in leadership positions in the Judicial Branch have no way of knowing whether laws that apply to probate conservatorship proceedings – whether statutory or constitutional, federal or state – are being applied uniformly throughout the state. The general conservatorship system and the limited conservatorship system are being operated on a “don't ask, don't tell” basis.

The last time the Judicial Branch took more than a surface look at these conservatorship systems was when the Chief Justice convened the Probate Conservatorship Task Force in response to the scathing articles published by the Los Angeles Times. That was 10 years ago, and even then it was not as thorough as it should have been. Only some suggested reforms were eventually implemented.

As the [presentations](#) at the recent World Congress on Adult Guardianship have demonstrated, many nations are moving forward with pro-active reforms that are both comprehensive and progressive. While the rest of the world advances, California and most other states in the United States are clinging to outdated systems that are inconsistent with the principles embodied in the United Nations Convention on the Rights of Persons with Disabilities. Similarly, California and most other states have not given serious thought to their obligations under the ADA to ensure access to justice for people with cognitive disabilities in conservatorship and guardianship proceedings.

The first step toward reform is getting beyond the current state of denial. That can only occur when there is a decision to take a close and hard look at how the general and limited conservatorship systems are currently being operated by the superior courts throughout the state. That requires research, which in turn requires a commitment of resources to gather the necessary information.

Several years ago, Spectrum Institute approached the Judicial Council with a [request](#) for a task force to collect this information. That did not happen. Then we suggested the formation of a smaller workgroup. That request received a negative reply. Then we recommended a survey of the practices in the superior courts throughout the state. That suggestion also received a negative response.

Perhaps for budgetary reasons, it appears that officials in key leadership positions within the Judicial Branch have become reflexive administrators of the status quo. That can and should change.

The [constitution](#) specifically authorizes the Judicial Council to conduct surveys of the practices of local courts. If ever there were a time to exercise this authority, that time is now. The Chief Justice should ask the Judicial Council to initiate such a project and to make it a priority. ◇◇◇

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This report and cover letter to the Chief Justice are online at: www.spectruminstitute.org/steps.*