



*A Bill to Amend Section 1471  
of the California Probate Code*

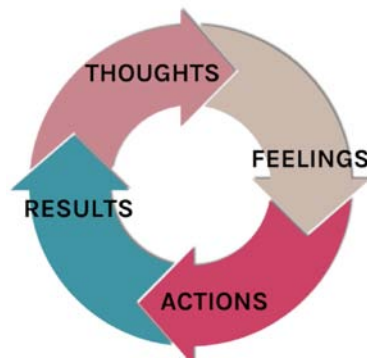
Materials in Support of  
Legislative Proposal

Spectrum Institute  
November 25, 2019

[www.spectruminstitute.org/counsel.pdf](http://www.spectruminstitute.org/counsel.pdf)

### **If You Believe . . .**

That seniors and other adults with disabilities are entitled to due process and access to justice in probate conservatorship proceedings and that it is fundamentally unfair to expect them to represent themselves or to be given an attorney who is not properly trained or is unaccountable for breaches of ethics or violations of the rules of professional conduct.



### **Then You Should . . .**

Join with organizations advocating for the rights of seniors and people with disabilities by sending a letter supporting the attached right-to-counsel bill to Spectrum Institute at:

[tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)

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# **Amending the Probate Code to Protect the Right to Counsel in Conservatorship Proceedings**

## **Summary**

The attached bill (p. 12) was drafted by the Office of Legislative Counsel of the California Legislature. It would amend Probate Code Section 1471 to achieve the following objectives: (1) affirm the right of conservatees and proposed conservatees to retain counsel of their choice; (2) require the appointment of counsel for those litigants who have not retained counsel; (3) clarify that the role of counsel is to act as a zealous advocate for the client; (4) direct the State Bar to develop performance standards for such attorneys; and (5) require that counsel be appointed in appellate proceedings for conservatees who are not already represented by counsel.

## **Support**

The bill is supported by Spectrum Institute, the Arc of California, Autistic Self Advocacy Network, California Advocates for Nursing Home Reform, TASH, Valley Mountain Regional Center, and the National Coalition for a Civil Rights to Counsel. The principles advanced by the bill have been endorsed by the following organizations: Coalition for Compassionate Care of California, American Bar Association, National Council on Disability, Arc of the United States, American Association on Intellectual and Developmental Disabilities, Conference of Chief Justices, Conference of State Court Administrators, National Academy of Elder Law Attorneys, and Wingspan (The Second National Guardianship Conference).

# **Amending the Probate Code to Protect the Right to Counsel in Conservatorship Proceedings**

## **References**

### **ADA Access to Justice**

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

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

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

A public entity shall not deny the benefit of its services to someone on the basis of his or her disability. (Section 35.130(a)) The opportunity to benefit from services shall be provided on an equal basis as provided to participants without a disability. (Section 35.130(b)) A public entity shall make reasonable modifications to policies, practices or procedures in order to avoid discrimination on the basis of disability. (Section 35.130(b)(7)) A public entity shall take appropriate steps to ensure that communications with service recipients with disabilities are as effective as communications with others. (Section 35.160) The prohibitions against discrimination on the basis of disability apply to all services, programs, and activities of a public entity. (Section 35.102(a)) (United States Department of Justice, Title II ADA Regulations)

Some people with disabilities are not able to make an ADA accommodation request. A public entity's duty to look into and provide accommodations may be triggered when the need for accommodation is obvious. (*Updike v. Multnomah County* (9th Cir 2017) 930 F.3d 939)

Title II of the ADA applies to the services and programs of state courts. "A state must afford to all individuals a meaningful opportunity to be heard in its courts . . . Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end." (*Tennessee v. Lane* (2004) 541 U.S. 509)

The ADA requires more than physical access; it requires public entities to provide *meaningful access* to their programs and services." (*Robertson v. Las Animas* (10th Cir. 2007) 500 F.3d 1185)

"I have read the article titled "Meaningful Participation and Effective Communication by a *Pro Per*

Respondent in a Conservatorship Case.” I have also read the letter sent by Alta California Regional Center to Spectrum Institute regarding the high percent of clients who are drawn into conservatorship proceedings who are not provided an attorney to represent them. . . It is my professional opinion that: (a) the overwhelming majority of conservatorship respondents with intellectual and developmental disabilities would not be able to effectively perform any of the nine tasks listed in the “pro per” article; and (b) without the assistance of competent counsel, the disabilities of these individuals would prevent them from having meaningful participation and effective communication in these legal proceedings.” (2018 [Declaration of Nora J. Baladerian, Ph.D.](#) (clinical psychologist) in support of ADA complaint to the Sacramento Superior Court)

“I have read the article titled ‘Meaningful Participation and Effective Communication by a Pro Per Respondent in a Conservatorship Case.’ Based on my years of experience in evaluating, assessing and working directly with people with disabilities for the provision of auxiliary aids and services to allow them to participate in, and have equal access to government services, and based on my knowledge about the complexities of conservatorship proceedings, and based on the list of activities that self represented respondents would need to perform in order to have meaningful participation in and effective communication during these proceedings, it is my opinion that the overwhelming majority of such litigants would not have such participation and communication without the appointment of competent counsel and the provision of other accommodations that may be needed by the litigant. In my professional opinion, each litigant in these complex court proceedings should be provided competent counsel (one who has had training in working and communicating with persons with disabilities) and have a communication assessment to ensure that the appropriate auxiliary aids and services are provided in order for the litigant to be able to communicate effectively with counsel and other participants in the proceedings, and to understand what is happening in their case. Additionally, an individualized assessment of each proposed conservatee would need to be conducted to determine their ability to self-represent.” (2018 [Declaration of Angela Kaufman](#), ADA specialist for the City of Los Angeles in support of ADA complaint to Sacramento Superior Court)

“I have read the document titled "Participants and Issues in Conservatorship Proceedings" and the document titled "Meaningful Participation and Effective Communication by a *Pro Per* Respondent in a Conservatorship Case" - both of which are part of the declarations packet submitted to the superior court in connection with the ADA complaints filed by Spectrum Institute. Based on my knowledge of what meaningful participation in a conservatorship proceeding would entail, and on my experience in evaluating regional center clients involved in such proceedings, it is my opinion that most proposed conservatees with developmental disabilities would not be able to effectively represent themselves in such proceedings. Furthermore, based on my experience in dealing with proposed conservatees who have developmental disabilities, it is my professional opinion that most proposed conservatees with developmental disabilities would not have meaningful participation and effective communication in their cases without the assistance of a competent attorney.” (2018 [Declaration of Barbara Imle](#), former regional center case worker in support of Sacramento complaint)

“For the last twelve years, I have worked as a staff attorney for California Advocates for Nursing Home Reform (CANHR). My primary roles at CANHR include counseling and representing long term care consumers and advocating for statutory and regulatory policy improvements. My areas of expertise include nursing home residents rights, dementia care, capacity and decision making, and conservatorships. Prior to working at CANHR, I was a rights attorney for older residents of San

Diego and Imperial Counties at Elder Law & Advocacy, a legal services organization. I saw over 1,000 clients annually regarding a wide variety of legal subjects, including conservatorship. Representing proposed conservatees in conservatorship cases was part of my practice. I consider myself an expert in the areas of decision making capacity and competency, both the legal standards and assessing clients. I am very familiar with conservatorship proceedings and the cognitive resources required to meaningfully participate in a conservatorship case as a conservatee. Based on my experience, it is my professional opinion that most proposed conservatees in general conservatorship proceedings suffer from a significant cognitive disability and would not be able to effectively perform any of the tasks listed in the “pro per” article. Without the assistance of competent counsel, the disabilities of these individuals would prevent them from having meaningful participation and effective communication in these legal proceedings.” (2018 [Declaration of Anthony Chicotel](#), staff attorney at CANHR in support of Sacramento ADA complaint)

“Whereas Spectrum Institute has advocated for the right of every adult guardianship respondent to have a court-appointed attorney to ensure that he or she is provided access to justice in these proceedings as required by the Americans with Disabilities Act (ADA) and by the federal constitution . . . Now, therefore, be it resolved that the Board of Directors of TASH . . . expressed support for the organization’s activities promoting guardianship reform, including the mandatory appointment of counsel for respondents in these proceedings and the use of less restrictive alternatives such as supported decision-making whenever possible.” ([Commendation issued by TASH](#) in 2017 to Spectrum Institute)

### **Right to Retain Counsel**

“Although the right to be represented by retained counsel in civil actions is not expressly enumerated in the federal or state Constitution, our cases have long recognized that the constitutional due process guarantee does embrace such a right.” (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925.)

“The proposed conservatee has the right to choose and be represented by legal counsel and has the right to have legal counsel appointed by the court if unable to retain legal counsel.” (Probate Code Section 1823(b)(iv)(6))

“The proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.” (Probate Code Section 1828(a)(6))

“The committee has not, however, found any support in statute, rule of court, or judicial decision for the court’s position that a proposed conservatee necessarily lacks the ability to select an attorney or to initiate an attorney-client relationship or that lack of either of those abilities is a condition of appointing counsel for a proposed conservatee under section 1470 or 1471. Indeed, the extent of a proposed conservatee’s ability to manage personal affairs would seem, under sections 1800.3 and 1801, to be the ultimate issue of fact for the court’s or jury’s determination in a proceeding for appointment of a conservator.” ([Report W19-08](#): Probate and Mental Health Advisory Committee of the California Judicial Council)

## **Mandatory Appointment of Counsel**

“[T]his court and the Courts of Appeal have afforded indigent civil litigants the ability to obtain meaningful access to the judicial process in a great variety of contexts . . . (Payne v. Superior Court (1976) 17 Cal.3d 908 [right of indigent prisoner who is a defendant in a civil case to be provided meaningful access to judicial process, including representation by counsel if necessary. . . . The policy of affording indigent litigants meaningful access to the judicial process establishes restrictions not only on potential barriers created by *legislatively* created fees or procedures, but also upon *court*-devised policies or practices that have the effect of denying qualified indigent litigants the equal access to justice . . . ([Jameson v. Desta](#) (2018) 5 Cal.5th 594)

“Guardianship involves such a significant loss of liberty that we now hold that the ward is entitled to the full panoply of procedural due process rights comparable to those present in involuntary civil commitment proceedings. We think that the stigma of incompetence provides further justification for invoking procedural due process guarantees in favor of the ward.” (*Guardianship of Hedin* (Iowa 1995) 528 N.W.2d 567)

In light of the severe deprivation of individual liberty to the respondent that will result from granting the relief of plenary guardianship, and the inability of the respondent to afford counsel, the court determines that the assignment of counsel pursuant to SCPA 407 is constitutionally mandated for the reasons set forth below. . . . It is a cornerstone of our constitutional jurisprudence that no person shall be "deprived of life, liberty, or property, without due process of law," under the Fifth and Fourteenth Amendments of the United States Constitution, and under Article 1, Section 6, of the New York State Constitution. "At its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Consequently, when the State acts to remove an adult person's decision-making power, thus depriving such persons of control over decisions affecting their life, liberty and property, the constitutional guarantee of due process requires notice, access, and a meaningful opportunity to be heard. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). Individuals living with disabilities are no less entitled to these constitutional guarantees of due process than persons who are not alleged to be under disability. (*Guardianship of Leon* (N.Y. Surrogate Ct. (2016) 43 N.Y.S. 3<sup>rd</sup> 769)

“The respondent's due process rights should be afforded full recognition in the course of the hearing. For example, a complete record will protect the respondent should an appeal be necessary. Similarly, the respondent should be able to obtain an independent evaluation prior to the hearing, present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor, and have the right to be represented by counsel.” ([National Probate Court Standards](#))

“Courts should ensure that the person with alleged diminished capacity has counsel appointed in every case to advocate on his or her behalf and safeguard the individual’s rights.” (The Demographic Imperative: Guardianships and Conservatorships, a [Report by the Conference of State Court Administrators](#))

“Counsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers.” (Adopted by the [ABA House of Delegates](#),

at its 1987 Annual Meeting)

“Counsel always be appointed for the respondent and act as an advocate rather than as a guardian ad litem.” ([Adopted in 2001 by Wingspan](#), the second national guardianship conference.)

“Guardianship proceedings should ensure adequate procedural protections including: . . . © mandatory court appointment of counsel at or before notice to act as zealous advocate for the individual, and court payment of fees for indigent respondents.” ([National Academy of Elder Law Attorneys](#))

“Since guardianship represents a transfer of rights and the responsibility for exercising them, adequate safeguards must be in place to protect those rights. These safeguards include procedural due process (including without limitation the right to counsel representing the interests of the individual, impartial hearing, appeal, and burden and quantity of proof) must protect the individual’s autonomy.” ([Joint Policy Statement](#): The Arc of the United States and American Association on Intellectual and Developmental Disabilities)

“To ensure that due process requirements are met, it is especially important that alleged incapacitated individuals facing guardianship have qualified independent legal representation . . . “ ([Beyond Guardianship](#): 2018 Report of the National Council on Disability)

“I write to express our support in concept for the legislative proposal Spectrum Institute has put forth to ensure that people with intellectual and developmental disabilities have access to effective representation in conservatorship proceedings.” (2019 letter from Teresa Anderson, Policy Director, Arc of California)

“Real due process requires all proposed conservatees be represented by counsel who advocate zealously. The California conservatorship system has many pronounced defects. The appointment of counsel charged with zealous advocacy for all proposed conservatees would resolve many of those defects.” (2019 letter from Anthony Chicotel, staff attorney for California Advocates for Nursing Home Reform)

“At present, Cal. Health & Safety Code § 416.95 guarantees the automatic appointment of counsel for an adult developmentally disabled person for whom guardianship or conservatorship is sought. However, for guardianship and conservatorship proceedings for people other than developmentally disabled adults, appointment of counsel requires either a request for appointed counsel or a discretionary decision by the judge that “appointment would be helpful to the resolution of the matter or is necessary to protect the [person’s] interests.” Cal. Prob. Code §§ 1471(a), 1470(b). It is our position that with respect to the right to appointed counsel, California law should not treat these two types of guardianships differently: the proposed wards in both scenarios are equally vulnerable and often incapable of understanding the need for appointed counsel. Moreover, more than half the states currently require the automatic appointment of counsel for all wards for all types of guardianship proceedings without requiring a request, demonstrating that this is the accepted best practice. The proposed bill would implement this best practice in California, and we urge you to support it.” (2019 letter from John Pollock, coordinator of the National Coalition for a Civil Right to Counsel)

## **Role of Counsel**

An attorney has duties “as a zealous advocate and as protector of his client’s confidences.” (*California State Auto Association v. Bales* (1990) 221 Cal.App.3d 227).

The term “zealous advocacy” is associated with the California rules of professional conduct. See *In re Zamer G* (2007) 153 Cal.App.4th 1253, 1267 where the Court of Appeal speaks of “an attorney’s duties of loyalty, confidentiality, and zealous advocacy.” Also see *People v. Wade* (1988) 44 Cal.3d 975, 1000-1 where the court stated: “The state and federal constitutional guarantees of the right to counsel require counsel ‘to represent his client zealously within the bounds of the law and to refrain from arguing against [him].’”

“Traditionally, an attorney is appointed to zealously advocate for a protected person’s wishes, regardless of whether those wishes are in that person’s best interests. A court representative [or guardian ad litem], on the other hand, is appointed to act in a protected person’s best interests.” (*Guardianship of Stevenson* (S.D. 2013) 825 N.W.2d 911)

“The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client.... It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client’s best interests and then act according to the wishes of that client within the limits of the law.” (*Orr. V. Knowles* (Neb. 1983) 337 N.W.2d 699)

“The governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences. This is true even if the Probate Court has appointed a conservator for the client” (*Gross v. Rell* (Conn. 2012) 40 A.3d 240)

“*Zealous Advocacy* - In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as practical and legal consequences of those options and the probability of success in pursuing anyone of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.” ([Wingspan](#): The Second National Guardianship Conference)

“Guardianship proceedings should ensure adequate procedural protections including: mandatory court appointment of counsel at or before notice to act as zealous advocate for the individual. (National Academy of Elder Law Attorneys [Public Policy Guidelines on Guardianship](#))

Guardianship attorneys “must zealously advocate for preserving the substantive and procedural rights of all individuals with I/DD.” ([2016 Joint Policy Statement](#) of the Arc of the United States and American Association on Intellectual and Developmental Disabilities.)

“The role of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights. . . . “During the hearing the attorney shall act as a zealous advocate for the client, insuring that

proper procedures are followed and that the client's interests are well represented” ([Massachusetts Committee for Public Counsel Services](#))

“Alaska specifically requires attorneys ‘to represent the ward or respondent zealously’ and to follow the decisions of the defendant concerning the defendant's interests. The District of Columbia also requires the appointment of an attorney to ‘represent zealously the individual's legitimate interests.’ The distinction between the role of the attorney and the role of the guardian ad litem is clearest in Washington State. There a defendant has the right to be represented by counsel at any stage in a guardianship proceeding. Counsel is directed to act as an advocate for the client and not to substitute counsel's own judgment for that of the client concerning what may be in the client's best interests. The guardian ad litem, on the other hand, is directed to promote the defendant's best interest, rather than the defendant's expressed preferences.” (Excerpt from: “Zealous Advocacy for the Defendant in Adult Guardianship Cases” published in [Journal of Poverty Law](#) (1996))

“Role of the attorney. The attorney appointed to represent the ADP [allegedly disabled person] is key to solving the guardianship puzzle. Depending on the role that attorney plays, the ADP may not receive substantial due process in the proceeding which deprives her of her rights as an adult citizen. Under the present system, due process is a hit or miss affair. Both of our studies confirm that confusion reigns regarding what role the appointed attorney is to play. The study of case files shows that attorneys generally do not take an advocate's role, though the words of the statute and the legislative history indicate that is what the legislature intended. The survey of judges shows that those who responded are divided about or are unsure of the attorney's proper role. . . . The evolution of the dual role of the attorney in guardianship cases creates significant questions about the adequate representation of the ADP and due process. The legislature clearly intended that the proceeding would be adversarial, by providing for a hearing, an optional jury trial, and court-appointed counsel. In such a setting, the usual role of the attorney, and the one dictated by the Rules of Professional Conduct, would be to see that a defense, if one is available, is raised; that the client's views are advocated in court; and that the petitioner meets the burden of proof. In short, the attorney would insure that the ADP had his or her day in court. But instead, the role of the ADP's attorney has become that of a court investigator, who provides the court with facts and information that normally would be presented and proven by the petitioner. Why the petitioner has been relieved of the duty to prove his case without assistance from opposing counsel is one of the more puzzling questions surrounding guardianship. . . . Clarifying the proper role of the attorney for the ADP is the first and most important step in solving the due process puzzle, because that attorney can effect better, more equitable results in all aspects of the guardianship proceeding.” (Excerpts from “The Guardianship Puzzle: What Ever Happened to Due Process,” [Maryland Journal of Contemporary Legal Issues](#) (1995-96))

## **Performance Standards**

“The committee considered whether to directly specify the standards of professional conduct applicable to attorneys appointed by the court to represent (proposed) conservatees and wards. The committee determined, however, that standards of professional conduct fall in the first instance within the province of the Legislature and, to the extent that the Legislature has left gaps in the statutory scheme, of the State Bar. The State Bar Act (Bus. & Prof. Code, §§ 6000–6243) and the Rules of Professional Conduct govern the attorney-client relationship. The Judicial Council and the

lower courts are not free to depart from this statutory and regulatory framework; any rule of court must be consistent with statute.” ([SPR18-33](#), Report of the Probate and Mental Health Advisory Committee of the Judicial Council)

“The committee appreciates CANHR’s comment and agrees that clear specification of the role and duties of counsel retained or appointed to represent a (proposed) ward or conservatee is desirable. The committee does not, however, recommend that the rules provide that specification directly. Generally speaking, it is the province of the Legislature (see, e.g., Bus. & Prof. Code, § 6068) and the Supreme Court (see, e.g., Rules Prof. Conduct, rules 1.2–1.4 (eff. Nov. 1, 2018)) to specify the role and duties of an attorney and to authorize any exceptions.” ([W19-08](#), Report of the Probate and Mental Health Committee of the Judicial Council)

*California Rules of Professional Conduct Relevant to Performance in Conservatorship Cases:*

**Rule 1.1.** This rule affirms the duty of attorneys to only accept those cases if they are competent in that field of law. / **Rule 1.2.** This rule affirms that a lawyer must abide by the client’s decisions regarding the objectives of the representation and shall abide by the client’s decisions. There is no exception for this requirement when the lawyer is representing a client with diminished capacity. / **Rule 1.3.** This rule affirms that a lawyer must act with reasonable diligence in representing a client. This requires the lawyer to act with commitment and dedication to the interests of the client and not to neglect or disregard any matter entrusted to the lawyer. / **Rule 1.4.** This rule affirms that a lawyer must reasonably consult with the client about the means by which to accomplish the client’s objectives. The rule clarifies that it is the client’s objectives that must be advanced, not the lawyer’s own view of what is best or what anyone else thinks is best for the client. / **Rule 1.6.** This rule affirms that a lawyer may not reveal information about or from a client without express informed consent from the client. This rule encompasses all information acquired by the lawyer as a result of representation of the client. Again, there is no exception for clients with diminished capacity. Comments to Rule 1.6 refer to a lawyer’s duties of loyalty and competence. / **Rule 1.7.** This rule prohibits conflicts of interest. The comment to the rule speaks of the duty of a lawyer to have “undivided loyalty” to the client.

**Comment:** The right-to-counsel bill would clarify that an attorney representing a conservatee or proposed conservatee must act as a zealous advocate for the client. It also would direct the state bar to go beyond these generic professional standards and to develop specific performance standards for clients in probate conservatorship proceedings. Such standards are necessary because, due to their cognitive disabilities, these clients will not recognize ineffective assistance of counsel when it is occurring. Therefore, specific standards are needed as a safeguard against incompetent representation or advocacy which violates rules of ethics. As a point of reference, the State Bar can consider standards adopted in [Massachusetts](#) and guidelines in [Maryland](#), as well as ADA-compliant standards submitted by Spectrum Institute to the [United States Department of Justice](#). Admonitions of the [Missouri Supreme Court](#) are also instructive (see below). Performance standards adopted by the [nonprofit advocacy organization](#) representing guardianship respondents in Clark County, Nevada is also an excellent reference for the California State Bar (see below). A manual published by [California Advocates for Nursing Home Reform](#) is also instructive (see below).

This article notes that generally there are no national guidelines for performance standards for counsel in civil cases, except for attorney representing children in abuse cases and attorneys representing adults in civil commitment cases. The ABA has developed standards for child abuse cases. The National Center for State Courts has standards for attorneys in civil commitment cases. National standards do not exist for counsel in adult guardianship cases. “For a right-to-counsel system to be effective, the guidelines require, among others, that: • appointed counsel must have adequate experience and training, • appointed counsel must fulfill particular duties, • appointed counsel must be assigned only as many cases as they can competently handle, • appointed counsel must be independent of the appointing authority, • counsel must be adequately compensated, • counsel must be appointed early enough in a particular proceeding, and • the appointment system must be uniform throughout a particular state.” (“State Statutes Providing for a Right to Counsel in Civil Cases,” [Journal of Law and Poverty Policy](#) (July-August 2006))

“[T]he purpose of the statutory and due process requirement of the appointment of counsel is to protect the rights and interests of the alleged incompetent. To accomplish this task it is essential that appointed counsel act as an advocate for the individual. . . . The right to counsel becomes a mere formality, and does not meet the constitutional and statutory guarantee absent affirmative efforts to protect the individual's fundamental rights through investigation and submission of all relevant defenses or arguments.” (*In re Link* (Mo. 1986) 713 S.W.2d 487)

“Counsel for the respondent should make a thorough and informed investigation of the situation. . . . The respondent, or the court on its own motion, has the right to ask for an independent evaluation by a physician or other mental health or social service professional.” ([Policy Statement](#), American Bar Association House of Delegates (1987))

To provide effective assistance to a conservatee or proposed conservatee, an appointed attorney should engage in the following activities. These include: (1) assessing whether the petitioner has supplied clear and convincing evidence on each issue involved in the proceeding; (2) evaluating the validity and strength of the medical capacity assessment produced by the petitioner and obtaining a second opinion regarding the client's functional ability to make decisions in each area the petitioner is seeking to take away the client's right to make decisions; (3) challenging the court investigator's report; (4) ruling out lesser restrictive alternatives; (5) assessing the suitability of where the client would live if the conservatorship is granted; (6) determining who the most suitable person is to be named as conservator should a conservatorship be granted; and (7) placing other limits on the role of the conservator, including limits on the authority to interfere with the client's freedom of association (visitation). (“[California Conservatorship Defense](#): A Guide for Advocates” CANHR (2010))

## **Counsel on Appeal**

“All courts in California, whether at the trial or appellate level, have a *sua sponte* duty to provide accommodations when they learn that a litigant has a disability that, without accommodation, will prevent effective communication or meaningful participation in court proceedings. It is the knowledge of such a disabling condition, with or without a request, that triggers the duty of courts to take pro-active measures to provide appropriate accommodations. . . . The failure of trial and appellate courts to provide counsel to assist litigants with cognitive disabilities is an issue of great

public importance that the Supreme Court should promptly resolve. . . . Appointing counsel as an ADA accommodation to ensure access to appellate justice for conservatees with cognitive disabilities is not unprecedented. On two occasions in the recent past the Second District Court of Appeal has done just that. In *Conservatorship of O.B.* (No. B290805), counsel was appointed for a conservatee who was an appellant. In *Conservatorship of A.E.* (B297092), counsel was appointed for a conservatee who was first designated as an overview party and then renamed as a respondent. In the former case, Spectrum Institute submitted a commentary to the California Appellate Project which then sent it to staff at the Second District. In the latter case, counsel was appointed after we wrote to the ADA coordinator regarding the court's duties under Title II of the ADA and Government Code Section 11135 which incorporates the ADA into state law. The failure of courts to appoint counsel for proposed conservatees was brought to the attention of the Supreme Court in an *amicus curiae* brief we recently filed. ([S254838](#)). Contributing to this problem is Rule 1.100 and materials published by the Judicial Council that incorrectly declare that ADA accommodations need not be provided without a request. This is contrary to federal law. California courts do have a duty to provide ADA accommodations, *sua sponte*, to litigants with known disabilities when those disabilities may impair effective communication or meaningful participation in legal proceedings. A written report on this subject was recently submitted to the Judicial Council. It can be found online at <http://spectruminstitute.org/ada-compliance.pdf> (Letter from Spectrum Institute to [Jorge Navarrete](#), ADA Coordinator for the California Supreme Court, dated November 19, 2019)

An addition letter was sent to [Jorge Navarrete](#), ADA Coordinator for the California Supreme Court, on December 7, 2019. The letter concerns the Conservatorship of Todd, a probate conservatorship proceeding in which the proposed conservatee did not appear in the trial court and was not represented by counsel in the trial court despite her serious disabilities. When the case was appealed by her parents, she was also not appointed counsel on appeal. As a result, the appeal was decided without her input. When the parents filed a petition for review in the Supreme Court, Spectrum Institute filed a notice with the ADA coordinator to inform the Supreme Court that a party to a proceeding before the court has disabilities that may require an accommodation in the form of the appointment of counsel to enable her to respond to the petition for review. This case is an example of how the legal system is failing to appoint counsel in trial court and appellate court proceedings despite the fact that such a litigant has serious disabilities that preclude her from representing herself.

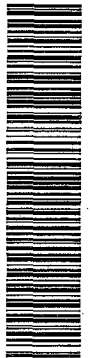
## LEGISLATIVE COUNSEL'S DIGEST

Bill No.  
as introduced, \_\_\_\_\_.  
General Subject: Probate conservatorship: legal counsel.

Existing law provides a procedure for the appointment of a conservator in a general conservatorship proceeding for a person who is unable to properly provide for their personal needs or is substantially unable to manage their finances. Existing law also provides a procedure for the appointment of a conservator in a limited conservatorship proceeding for a person with developmental disabilities. Existing law requires the court in a general conservatorship proceeding to appoint legal counsel, either the public defender or private counsel, if the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee. Existing law requires the court in a limited conservatorship proceeding to immediately appoint legal counsel, either the public defender or private counsel, to represent the interests of a conservatee or proposed conservatee if the conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel.

This bill would require the court to appoint legal counsel to represent the interests of every conservatee or proposed conservatee who has not planned to retain counsel in a general conservatorship proceeding. The bill would provide that a conservatee or proposed conservatee has the right to retain legal counsel of their choice, subject only to the court's determination that the attorney fees are reasonable. The bill would require, in an appeal or writ proceeding arising out of a general or limited conservatorship proceeding, the reviewing court to appoint legal counsel to represent a conservatee or proposed conservatee if they are not represented by legal counsel in the appeal or writ proceeding. The bill would require the State Bar of California to develop performance standards for attorneys appointed as legal counsel in conservatorship proceedings. The bill would provide that the role of legal counsel for a conservatee or proposed conservatee is that of a zealous advocate. By expanding the duties of the public defender, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.



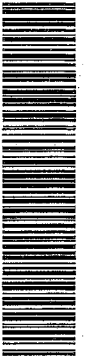
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This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.



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An act to amend Section 1471 of the Probate Code, relating to conservatorship.



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## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

## SECTION 1. The Legislature finds and declares all of the following:

(a) Tens of thousands of adults in California are living under an order of probate conservatorship. Thousands of new conservatorship petitions are filed each year. These cases involve seniors who may be experiencing cognitive decline, adults with developmental disabilities, or adults of any age who have cognitive or communication disabilities caused by medical illnesses or injuries.

(b) Probate conservatorship proceedings are initiated to protect the health and welfare of adults with significant disabilities — conditions that may impact their ability to make major life decisions regarding residence, education, medical care, marriage, social and sexual contacts, and finances.

(c) These proceedings implicate the liberty interests of such adults and may ultimately result in the loss of fundamental constitutional and statutory rights.

(d) Section 1471 of the Probate Code mandates the appointment of counsel in all limited conservatorship proceedings. In general conservatorship proceedings, the appointment of counsel is required only if requested or if the court determines that counsel “is necessary to protect the interests of the conservatee or proposed conservatee.” Some petitioners file for a general conservatorship in order to avoid the requirement that an attorney be appointed for all respondents in limited conservatorship proceedings.

(e) Individuals with cognitive disabilities may not request counsel because they do not have the ability to understand the role of, or need for, an attorney to protect their rights. When a request is not made, some judges allow the individual to represent themselves, without conducting an assessment of the person’s ability to have meaningful participation in the proceedings without legal representation.

(f) Litigants with disabilities have an interest in receiving access to justice in probate conservatorship proceedings. Components of access to justice include effective communication and meaningful participation in such litigation. Unless an attorney has been or will be retained by a conservatee or proposed conservatee, courts should appoint counsel in order to protect these interests.

(g) When a statutory right to counsel exists, due process entitles a person to effective assistance of counsel throughout the proceedings.

(h) The right to effective assistance of counsel is enhanced when an attorney receives appropriate education and training and adheres to objective performance standards.

(i) On September 24, 2019, the Judicial Council adopted new training and education requirements for attorneys representing conservatees and proposed conservatees in probate court. A report issued by the Judicial Council’s Probate and Mental Health Advisory Committee indicates that the authority to adopt performance standards for such attorneys is vested in the Legislature and the State Bar of California.

## SEC. 2. Section 1471 of the Probate Code is amended to read:

1471. (a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender



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or private counsel to represent the interest of that person in the following proceedings under this division:

- (1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator.
- (2) A proceeding to terminate the conservatorship.
- (3) A proceeding to remove the conservator.
- (4) A proceeding for a court order affecting the legal capacity of the conservatee.
- (5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

(b) ~~If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.~~ (a).

(c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if ~~he or she is able, able to pay.~~ This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

(d) In an appeal or writ proceeding arising out of a proceeding described in this section, if a conservatee or proposed conservatee is not represented by legal counsel in the appeal or writ proceeding the reviewing court shall appoint legal counsel to advocate for the rights, interests, and stated wishes of the conservatee or proposed conservatee before the court.

(e) A conservatee or proposed conservatee who seeks to retain counsel has the right to retain private legal counsel of their choice, subject only to the court's determination that the attorney fees are reasonable.

(f) The role of legal counsel for a conservatee or proposed conservatee is that of a zealous advocate. The State Bar of California shall develop and periodically update performance standards for attorneys who represent conservatees and proposed conservatees in probate conservatorship proceedings.

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.



# Conservatorship Reform: More Than Attorney Education is Needed

By Thomas F. Coleman  
Daily Journal / Dec. 19, 2018

The Judicial Council has just released for public comment a set of new educational requirements for court-appointed attorneys in probate conservatorship proceedings. The proposals have been under consideration by its Probate and Mental Health Advisory Committee for several years.

There may be as many as 60,000 adults living under an order of conservatorship in California. They include seniors with mental challenges, adults with developmental disabilities, and others who have cognitive disabilities due to medical illnesses or injuries. The Spectrum Institute, a nonprofit organization advocating for conservatorship reform, estimates that some 5,000 new probate conservatorship petitions are filed annually in California.

Spectrum Institute presented the advisory committee with a list of deficiencies in the conservatorship system in November 2014. At the top of the list was the failure of court-appointed attorneys to advocate effectively for conservatees and proposed conservatees. The advocacy group asked the Judicial Council to adopt new training requirements and performance standards for court-appointed attorneys in these cases. In May 2015, a detailed proposal for such requirements and standards was submitted to the advisory committee.

Later that year, the Judicial Council authorized a multi-year project for the advisory committee to develop new rules in this area. After months of review, the committee dropped the idea of performance standards because it believed only the Legislature and State Bar have authority to do so. The committee decided to limit its focus to new educational requirements.

The work product of the committee, proposing amendments to Rule 7.1101 of the California Rules of Court, was released by the Judicial Council on

Dec. 13. The subject matter on which attorneys would be required to receive training are quite extensive.

Topics include: (1) the rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities under state and federal law, including the Americans with Disabilities Act; (2) a lawyer's ethical duties to a client, including a client who has or may have diminished functional ability, under

the California Rules of Professional Conduct and other applicable law; and (3) techniques for communicating with an older client or a client with a disability, ascertaining the client's wishes, and advocating for those wishes in court.

In addition, attorneys would be required to have training on special considerations for representing older clients or those with disabilities, including: (1) risk factors that make a person vulnerable to undue influence, physical

and financial abuse, and neglect; (2) effects of physical, intellectual and developmental disabilities; (3) mental health disorders; (4) major neurocognitive disorders; (5) identification and collaboration with professionals with other professions; and (6) identification of less restrictive alternatives to conservatorship, including supported decision-making.

While these requirements, if adopted, are necessary to improve the quality of legal representation of clients in conservatorship proceedings, they are not sufficient to ensure they have access to justice. However, the authority to mandate more than new educational requirements may not be in the purview of the Judicial Council.

The California Advocates for Nursing Home Reform asked the advisory committee to propose a new rule clarifying the role of an appointed attorney for a

## A New Law Should

- Mandate appointment of counsel for all conservatees and proposed conservatees without an attorney
- Specify that the role of counsel is to act as a zealous advocate
- Direct the State Bar to adopt performance standards for lawyers assigned to represent such clients

conservatee or proposed conservatee as a “zealous advocate.” Both Spectrum Institute and the California Advocates for Nursing Home Reform suggested new rules on performance standards for such attorneys to ensure they provide effective advocacy and defense services. The advisory committee declined to follow these suggestions, arguing that only the Supreme Court or the Legislature has the authority to specify the role of an attorney and adopt performance standards.

Clarifying the role of appointed attorneys is crucial to litigants with disabilities receiving equal protection and access to justice. Some judges expect attorneys to be zealous advocates, while others want attorneys to override the stated wishes of clients if they believe a client’s best interests require such an approach. Attorneys representing non-disabled clients would never dream of advocating against their client’s wishes and promoting their own beliefs instead. If they did, attorneys could be the target of a malpractice lawsuit or a complaint to the State Bar. Clients with disabilities deserve the same type of advocacy as those without disabilities. New legislation should clarify this.

Legislation is also needed to clarify that all conservatees and proposed conservatees are entitled to an appointed attorney, even if they don’t request one. Under current law, even without a request, litigants with developmental disabilities *automatically* receive an attorney if a petitioner files for a *limited* conservatorship. However, if a petitioner files for a *general* conservatorship, a developmentally disabled litigant may be required to represent himself or herself. Giving a petitioner this type of control does not make sense.

Appointment of counsel for litigants in general conservatorship proceedings is not required under current law, unless they specifically request one. The problem is that many, if not most, of these litigants do not know the role or value of an attorney and so they will not ask for one. As a result, in some areas of the state, judges are not appointing attorneys even though they know these involuntary litigants have serious disabilities that make it impossible to effectively represent themselves. This “catch 22” – you must request even though you can’t request – needs to be eliminated. Probate Code Section 1471 should require appointment of counsel

regardless of whether a petitioner files for a general or a limited conservatorship.

A bill is currently being developed by a coalition of advocacy groups that will build upon, and move beyond, the new educational requirements likely to be adopted by the Judicial Council in 2019. The bill would: (1) guarantee appointed counsel for all conservatees and proposed conservatees; (2) specify that the role of counsel is that of a zealous advocate; and (3) direct the State Bar to develop performance standards for such attorneys. The State Bar can look for guidance to Maryland and Massachusetts where such standards already exist.

The Judicial Council should be applauded for developing these new educational requirements. But how will they help litigants with disabilities receive access to justice if they do not have an attorney, or if appointed attorneys advocate for what they think is best and ignore the stated wishes of a client? New legislation can and should fill this access-to-justice void in probate conservatorship proceedings.

Spectrum Institute, California Advocates for Nursing Home Reform, and The Arc of California recently filed a complaint with the Sacramento County Superior Court for failing to appoint attorneys in many general conservatorship proceedings. Spectrum Institute has also filed a complaint with the U.S. Department of Justice against the Los Angeles County Superior Court. The complaint cites deficient advocacy services of court-appointed attorneys there. These complaints allege that courts are violating their obligations under Title II of the Americans with Disabilities Act by failing to provide equal access to justice to persons with known disabilities.

Having an attorney – one that performs competently – is an essential component of access to justice under the ADA. New legislation entitling litigants in general conservatorship proceedings to effective representation by zealous advocates will bring California closer to compliance with the ADA.

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*Thomas F. Coleman is legal director of the Spectrum Institute. He may be contacted at: [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)*

# New Training Rules for California Conservatorship Attorneys

## *One Step on a Long Path to Reform*

By Thomas F. Coleman  
September 18, 2019

The California Judicial Council is scheduled to adopt new rules requiring conservatorship attorneys to receive education on a wide range of topics not mandated under current law. The changes will affect public defenders and private attorneys who are appointed to represent seniors and people with disabilities in probate conservatorship proceedings.

The matter is Item 19-220 on the consent agenda for the Judicial Council's meeting on Sept. 24.

The Probate and Mental Health Advisory Committee is including several crucial topics in the training requirements. For too long important issues have been ignored or misrepresented in seminars sponsored by some local bar associations. An investigation into faulty trainings is being considered by the Civil Rights Division of the United States Department of Justice.



Under the new rules, conservatorship attorneys will be required to gain knowledge about: (1) state and federal statutes including the ADA, rules of court, and case law governing probate conservatorship proceedings, capacity determinations, and the legal rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities; (2) ethical duties to a client under Rules of Professional Conduct and other applicable law; (3) special considerations for representing seniors and people with disabilities, including individualized communication methods; and (4) less restrictive alternatives to conservatorships, including the use

of non-judicial supported decision-making arrangements.

But this new training framework is just the first step in a much needed and multi-faceted process to reform the dysfunctional probate conservatorship system. Structural flaws in this system have been brought to the attention of the chief justice, Judicial Council, Supreme Court, State Bar, attorney general, governor, and other state and local officials on many occasions during the last 15 years. And yet, despite some minor tinkering around the edges, the failure of officials to institute fundamental changes has resulted in the

unnecessary victimization of thousands of seniors and people with disabilities who have been treated unfairly in these proceedings.

The next step leading to reform is to ensure that the training materials used in new educational programs are both accurate and complete. Quality education cannot be left to chance. There

is a crucial need for the State Bar to approve only those trainings that meet specific standards. Training providers should submit the content of seminars and qualifications of presenters to the State Bar for pre-approval. Providers should not be given carte blanche like they are now.

New educational standards sound good in theory, but without the adoption of performance standards, conservatorship attorneys are free to use or ignore what they learn. Attorneys are often not providing their clients with effective representation. The pattern of deficient advocacy is also

part of a pending ADA complaint with the Department of Justice (filed by my organization, Spectrum Institute). Adherence to performance standards should be mandatory, not optional.

The California Supreme Court has the authority to direct the State Bar to develop performance standards for attorneys appointed to represent clients in conservatorship proceedings. In developing such standards, the State Bar will not have to start from scratch. Excellent standards have been adopted in Massachusetts and Maryland. The State Bar can also consider the ADA-compliant performance standards submitted to the DOJ.

Once standards are developed by the State Bar and approved by the Supreme Court, then a method to monitor compliance will need to be developed. Due to the nature of cognitive disabilities, respondents in conservatorship proceedings generally lack the ability to complain about the deficient performance of their attorneys. As a result, they lack meaningful access to the complaint procedures of the State Bar.

To meet its ADA responsibilities to make its services accessible, the State Bar will need to find ways to address this problem. Perhaps performance audits of a representative sample of cases handled by these attorneys can help fill this access-to-justice gap. The State Bar could also require public defender offices to routinely conduct performance audits of staff attorneys who represent clients in probate conservatorship proceedings.

Each of these steps will help ensure that seniors and people with disabilities receive due process in legal proceedings in which their fundamental freedoms are placed at risk. But none of these measures will do anything to help litigants who do not receive an appointed attorney and are therefore required to represent themselves in complex legal proceedings.

As hard as it is to believe, some people with serious cognitive disabilities are not receiving

court-appointed counsel in these cases. An audit of cases in the Sacramento County Superior Court confirmed that judges there do not appoint attorneys in a significant number of cases.

Disability and seniors organizations filed a complaint with that court arguing that the failure to appoint counsel for probate conservatees violated the ADA. The court's response was a shameful denial that people with cognitive disabilities are entitled to an appointed attorney as an ADA accommodation. A state civil rights agency declined to open an investigation into the matter. As a result, it appears that the court's denial of access to justice for seniors and people with disabilities is a problem that will have to be addressed by the Legislature or by the DOJ.

It has been said that a journey of a thousand miles begins with a single step. The Judicial Council is about to take a step on a long journey toward comprehensive conservatorship reform.

This is an important step, to be sure, but one that may lead nowhere unless the Supreme Court, State Bar, and Legislature adopt additional reform measures. The question now is whether the justices, bar association officials, and state legislators have the will to do so.

*Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for guardianship and conservatorship reform.*

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This commentary was published in the Daily Journal – California's premier legal newspaper.

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# The Right to Counsel Needs a Legislative Fix

By Thomas F. Coleman

For several years I have been studying the probate conservatorship system in California. After extensive legal research, many interviews, and several audits of scores of cases, I have concluded that access to justice in these proceedings is illusory without a meaningful right to counsel.

The system looks good on paper. However, in actual practice it is terrible. The rights of seniors and other adults with disabilities are being routinely violated in probate conservatorship proceedings.

Less restrictive alternatives are not seriously considered. Professional capacity assessments are not being conducted in most areas of decision-making. Some proposed conservatees never appear in court. Many individuals are not provided with an attorney.

The biggest take away from my research is quite clear. If each conservatee and proposed conservatee had a well-trained and competent attorney who provided legal services as a zealous advocate, a new era of accountability would significantly reduce the systematic errors, omissions, and abuses that have been occurring on a routine basis.

What is keeping this era of accountability on the distant horizon? Why is access to justice out of the reach of the 5,000 or so vulnerable adults who are targeted by newly filed conservatorship petitions each year? Why are the other 60,000 or so of them who are living under an order of conservatorship doomed to accept their fate without the ability to challenge illegal court orders?

The answer is simple. They are not guaranteed the right to a competent attorney who will advocate for and defend them with the same care and vigor that attorneys do for non-disabled litigants who privately retain them in other types of civil cases.

The cause of this problem is easily identifiable. The probate code does not explicitly affirm the right of such litigants to retain an attorney of their choice, nor does it mandate the appointment of counsel if they can't retain one. The law currently does not specify that such attorneys must act as zealous advocates. There are not existing performance standards to guide the advocacy practices of these attorneys. The law does not expressly require the appointment of counsel for conservatees on appeal.

The failure of the conservatorship system to provide competent counsel to conservatees at each and every critical stage of the proceeding is not theoretical. It impacts real people in very significant ways.



When 34 year-old conservatee Michael P. was removed from the home of his parent-conservators in 2012, an attorney was appointed to represent him by the court in Lancaster. Due to a half-baked investigation by the lawyer, Michael was returned home. Just a few weeks later, he died under circumstances the coroner found concerning. Had there been performance standards for appointed attorneys, a more thorough investigation might have saved Michael from a premature death.

That same year, 26 year-old Gregory D. was in the midst of a visitation dispute initiated by his father in Los Angeles – a parent whom Gregory said he feared. His court-appointed attorney surrendered Gregory's constitutional right to freedom of association by agreeing, over Gregory's objection, to an order requiring Gregory to spend every third weekend with his father. During those visits, Gregory was forced to attend church services – something Gregory despised.

Gregory's mother appealed, arguing that the order should be reversed as a violation of her son's First Amendment rights. Of course, the attorney who

surrendered Gregory's rights did not file an appeal to challenge his own flawed advocacy. Instead of appointing an attorney to represent Gregory on appeal, the appellate court dismissed the appeal, ruling that Gregory's mother lacked standing to appeal for her son. Had Gregory been provided an attorney on appeal, the court would have reached the merits of the issues and Gregory could have been freed from this ongoing forced visitation.

The following year, 19 year-old Stephen L. was drawn into a conservatorship proceeding in Los Angeles. His court-appointed attorney made allegations to the court that would have resulted in Stephen losing the right to vote – a right that Stephen had indicated he wanted to keep. The only reason Stephen was not disenfranchised was because the attorney reluctantly withdrew his allegations after intervention by Spectrum Institute. The jeopardy to Stephen's right to vote would not have occurred had the law specified that appointed attorneys must advocate for the stated wishes of their clients.

About the same time, 59 year-old David R. was not as fortunate as Stephen. David, a former producer with National Public Radio, was stripped of his right to vote by a judge in San Diego. The appointed attorney did not seek to protect David from disenfranchisement. A few years later, when David asked the court to reinstate his right to vote, the court did not appoint an attorney for him. It was only through media exposure and persistent outside agitation that David regained his right to vote. Had attorney performance standards existed, David likely would never have lost his right to vote in the first place.

Consider 81 year-old Theresa J. When she was forced to participate in conservatorship proceedings in Los Angeles, Theresa hired an attorney. The court refused to acknowledge her chosen lawyer. Over Theresa's objection, another attorney was appointed to represent her. He ignored Theresa's opposition to a conservatorship and instead advocated for one. Had California law specifically affirmed the right of proposed conservatees to retain counsel, or had performance standards existed, these transgressions never would have happened.

The case of 80 year-old Katherine D. is instructive. About three years ago, the Alameda County Superior Court conducted probate conservatorship proceed-

ings without appointing an attorney to represent Katherine, despite the fact that her dementia precluded her from representing herself and defending her estate. Even though she had a pre-arranged trust, Katherine and her estate were placed under the control of a conservator.

Ashley E., a 26-year-old autistic woman, was ordered into a conservatorship earlier this year. Ashley did not appear in court and the public defender she was assigned never once met her. Ashley's case cries out for performance standards.

Violations of the right to counsel are widespread. Two years ago, a whistle-blower report revealed that in Sacramento and surrounding counties, proposed conservatees routinely are not being provided with an attorney. When attorneys are appointed, many of them perform incompetently.

The problem at the appellate level is a policy failure. No statute or court rule specifically directs the Court of Appeal to appoint counsel when it learns that a conservatee does not have a lawyer on appeal.

The right to counsel for conservatees, both in the trial court and on appeal, should be spelled out in statute. The role of such attorneys should be defined and performance standards should be developed. There can be no access to justice for conservatees without the assistance of competent counsel.

The Legislature should pass the right-to-counsel bill being developed by Spectrum Institute. It is endorsed by various seniors and disability rights organizations. The Judicial Council should support the bill and the governor should sign it into law.

The right of conservatees to competent counsel at every stage of conservatorship proceedings should be affirmed by all three branches of government. The time to fix this problem is now.

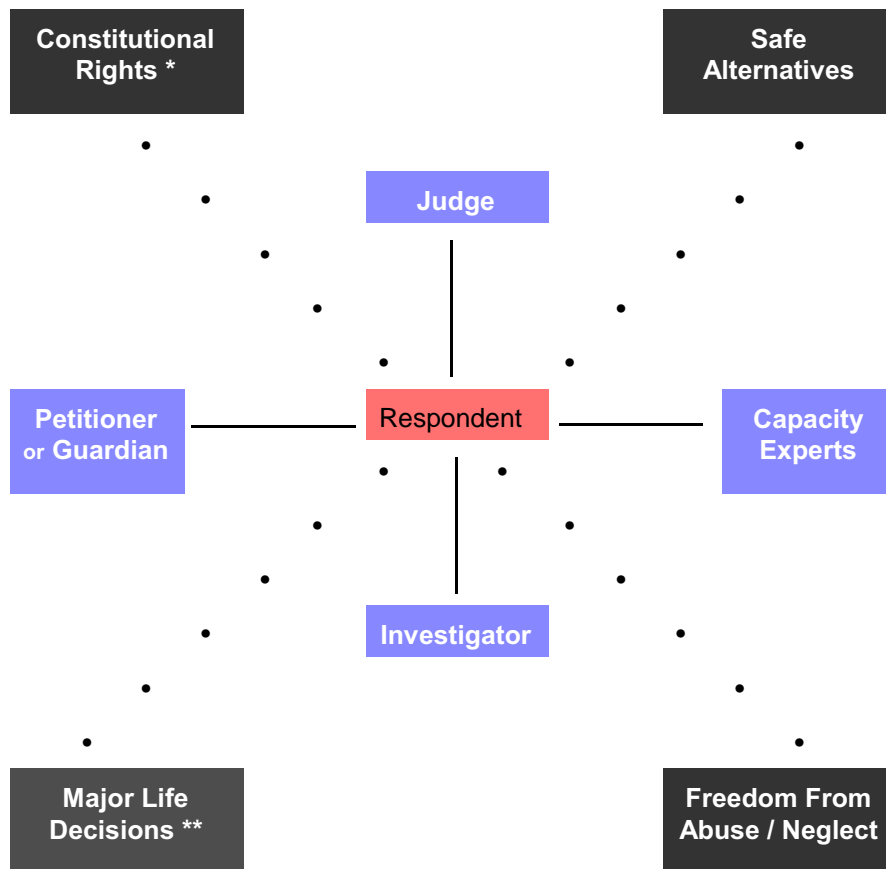
*Thomas F. Coleman is legal director of the Disability and Guardianship Project of Spectrum Institute. Email him at: [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)*

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# Participants and Issues in Conservatorship Proceedings

**Appointing an Attorney is Required by the ADA, Section 504, and Section 11135 to Ensure that Respondents with Cognitive Disabilities Have Access to Justice**



Respondents with cognitive disabilities lack the ability to represent themselves in conservatorship proceedings. Appointing an attorney is a necessary accommodation under the Americans with Disabilities Act to enable respondents to have meaningful participation their case. Once appointed, counsel must provide *effective* advocacy services. To ensure effective assistance of counsel, courts must adopt ADA-compliant performance standards, require proper training of attorneys, and create methods to monitor their actual performance. The duty of the courts regarding appointment, training, and monitoring of appointed attorneys stems from due process, the ADA, Section 504 of the Rehabilitation Act, and Gov. Code Section 11135.

Effective advocacy services include: reviewing the allegations of the petition and supporting documents, examining capacity assessments in all areas of decision making, determining whether less restrictive and safe alternatives are viable, vetting the proposed conservator, insisting on a care plan that provides safety and reduces the risk of abuse, and making sure that the judge, petitioner, court investigator, capacity experts, and conservator follow statutory directives. Most conservatorship respondents are unable to perform these essential functions without a court-appointed attorney. Many lack the capacity to request or waive an attorney.

*\* Constitutional rights include intimate association (sex), the rights to travel, marry, contract, and vote, and the freedom of choice in personal decisions. \*\* Major life decisions include choices regarding residence, occupation, education, medical care, social life, finances, etc.*

**Thomas F. Coleman, Legal Director, Spectrum Institute**  
**[www.spectruminstitute.org/outreach](http://www.spectruminstitute.org/outreach) • [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)**

January 18, 2019

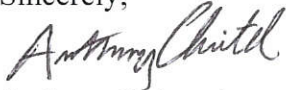
Thomas F. Coleman, Legal Director  
Spectrum Institute  
555 S. Sunrise Way, Suite 205  
Palm Springs, CA 92264

Sent via email to [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)

Dear Tom:

California Advocates for Nursing Home Reform (CANHR) would be happy to support the legislation proposed in the Spectrum Institute's "A Bill to Promote Access to Justice and Effective Assistance of Counsel in Probate Conservatorship Proceedings." Real due process requires all proposed conservatees be represented by counsel who advocate zealously. The California conservatorship system has many pronounced defects. The appointment of counsel charged with zealous advocacy for all proposed conservatees would resolve many of those defects.

Sincerely,



Anthony Chicotel  
Staff Attorney



January 22, 2019

Thomas F. Coleman  
Spectrum Institute  
555 S. Sunrise Way, Suite 205  
Palm Springs, CA 92264

Dear Mr. Coleman,

On behalf of The Arc of California, I write to express our support in concept for the legislative proposal Spectrum Institute has put forth to ensure that people with intellectual and developmental disabilities have access to effective representation in conservatorship proceedings.

Specifically, the Arc of California recognizes that conservatorships limit the proposed conservatee's civil rights and that all persons with intellectual and developmental disabilities should have representation in accordance with Probate Code Section 1471. We are also aware that some courts have been allowed the use of a general conservatorships and in some cases have not required that the proposed conservatee be represented by counsel or require a report from their regional center.

The Arc of California is among the largest and oldest community-based organization advocating for and serving people with intellectual and developmental disabilities and their families. We support advocacy efforts that promote and protect the human rights of people with IDD and actively supports their full inclusion and participation in the community throughout their lifetimes.

If you have any questions, please feel free to call me at 916-552-6619.

Respectfully,

A handwritten signature in black ink, appearing to read 'Teresa Anderson'. The signature is fluid and cursive, with a long, sweeping underline.

Teresa Anderson  
Public Policy Director

To Whom It May Concern:

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In Memoriam:  
Camilla Roberson  
2010-2017

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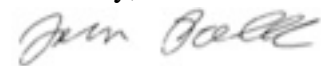
On behalf of The National Coalition for a Civil Right to Counsel (NCCRC), I write to express our support for the Spectrum Institute's proposed bill to provide effective assistance of counsel in probate conservatorship proceedings.

The NCCRC, organized and funded in part by the Public Justice Center, is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, our mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs such as shelter, safety, sustenance, health, and child custody. At present, the NCCRC has over 300 participants in 39 states, all of whom are committed to exploring how the right to counsel in civil cases can best be advanced in their particular jurisdiction.

At present, Cal. Health & Safety Code § 416.95 guarantees the automatic appointment of counsel for an adult developmentally disabled person for whom guardianship or conservatorship is sought. However, for guardianship and conservatorship proceedings for people other than developmentally disabled adults, appointment of counsel requires either a request for appointed counsel or a discretionary decision by the judge that "appointment would be helpful to the resolution of the matter or is necessary to protect the [person's] interests." Cal. Prob. Code §§ 1471(a), 1470(b). It is our position that with respect to the right to appointed counsel, California law should not treat these two types of guardianships differently: the proposed wards in both scenarios are equally vulnerable and often incapable of understanding the need for appointed counsel. Moreover, more than half the states currently require the automatic appointment of counsel for all wards for all types of guardianship proceedings without requiring a request, demonstrating that this is the accepted best practice. The proposed bill would implement this best practice in California, and we urge you to support it.

Thank you for your consideration in this matter.

Sincerely,



John Pollock

## Beyond Guardianship:

Toward Alternatives That  
Promote Greater  
Self-Determination



National Council on Disability  
March 22, 2018

## Federal Agency Speaks Out on the ADA, Due Process, and Right to Counsel in Guardianships

A new report by the National Council on Disability calls on the United States Department of Justice to issue guidance to state courts on their legal obligations under the Americans with Disabilities Act in guardianship cases.

The proposals are consistent with and advance similar recommendations made over the last few years by the Disability and Guardianship Project of Spectrum Institute.

For information on the Disability and Guardianship Project, go to: <http://pursuitofjusticefilm.com/>

### Recommendations:

- The DOJ, in collaboration with the HHS, should issue guidance to states (specifically Adult Protective Services [APS] agencies and probate courts) on their legal obligations pursuant to the ADA. Such guidance should address NCD's position that: 1) the ADA is applicable to guardianship proceedings; 2) the need for assistance with activities of daily living or even with making decisions does not give rise to a presumption of incapacity; and 3) guardianship should be a last resort that is imposed only after less restrictive alternatives have been determined to be inappropriate or ineffective.

### Recommendations:

- The Elder Abuse Prevention and Prosecution Act (P.L. 115-70) calls upon the Attorney General to publish best practices for improving guardianship proceedings and model legislation relating to guardianship proceedings for the purpose of preventing elder abuse. The Attorney General's model legislation should incorporate the UGCOPAA, including its provisions for preventing unnecessary guardianships.
- To ensure that due process requirements are met, it is especially important that alleged incapacitated individuals facing guardianship have qualified, independent legal representation that will advocate for the individual's desired outcome, especially if that person expresses a desire to avoid guardianship or objects to the proposed guardian. However, many courts lack sufficient resources to fund this type of representation and families often find that such representation is cost-prohibitive. Federal grant money should be made available to help promote the availability of counsel.
- The state court improvement program referenced throughout these recommendations should include improvements to the restoration process. DOJ should publish guidance regarding the right to restoration and best practices.

To access the NCD report online, go to:

<https://ncd.gov/newsroom/2018/federal-report-examines-guardianships>

# Autonomy, Decision-Making Supports, and Guardianship

## *Joint Position Statement of AAIDD and The Arc*

*(right to a state-paid trained attorney acting as a zealous advocate appears under “systems issues”)*

### **Statement**

All individuals with intellectual and/or developmental disabilities (I/DD)[1] have the right to recognition as persons before the law and to enjoy legal capacity on an equal basis with individuals who do not have disabilities in all aspects of life (United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), 2006). The personal autonomy, liberty, freedom, and dignity of each individual with I/DD must be respected and supported. Legally, each individual adult or emancipated minor is presumed competent to make decisions for himself or herself, and each individual with I/DD should receive the preparation, opportunities, and decision-making supports to develop as a decision-maker over the course of his or her lifetime.

### **Issue**

- Current trends presume the decision-making capacity of individuals with I/DD and the preservation of legal capacity as a priority for all people needing assistance with decision-making.
- Like their peers without disabilities, individuals with I/DD must be presumed competent; they must also be assisted to develop as decision-makers through education, supports, and life experience. Communication challenges should not be misinterpreted as lack of competency to make decisions.
- Individuals with I/DD should have access to supports and experiences to learn decision-making skills from an early age and throughout their lifetimes in educational and adult life service systems.
- Families should have access to information about all options for assisting their family member to make decisions over the life course.
- All people, with and without disabilities, have a variety of formal and informal processes available to enact their decisions and preferences, including healthcare proxies and advance directives.
- Less restrictive means of decision-making supports (e.g., health-care proxies, advance directives, supported decisionmaking, powers of attorney, notarized statements, representation agreements, etc.) should be tried and found to be ineffective in ensuring the individual's decision-making capacity before use of guardianship[2] as an option is considered.
- Where judges and lawyers lack knowledge about people with I/DD and their human rights, poor advocacy and tragic legal outcomes often result. Financial incentives frequently benefit professionals and guardianship corporations, often to the detriment of individuals with I/DD and their families.
- Serving in the dual roles of guardian and paid service provider or paid advocate creates a conflict of interest or the appearance of a conflict of interest. Such conflicts must be mitigated or avoided.
- Some statutory privacy measures have made it more difficult for those assisting other individuals to have access to their records, make decisions, or both. Thus, to obtain or modify needed medical care, services, and supports, an individual with I/DD may be adjudicated to be incompetent and subjected to guardianship. This result conflicts with the legal presumption of competence and with principles of autonomy, decision-making supports, presumption of competence, and the use of less restrictive alternatives.

The appointment of a guardian is a serious matter for three reasons: (1) It limits an individual's autonomy, that is, the individual's agency over how to live and from whom to receive supports to carry out that choice; (2) It transfers the individual's rights of autonomy to another individual or entity, a guardian; and (3) Many individuals with I/DD experience guardianship as stigmatizing and inconsistent with their exercise of adult roles and responsibilities.

## **Position**

The primary goals in assisting individuals with I/DD should be to assure and provide supports for their personal autonomy and ensure equality of opportunity, full participation, independent living, and economic self-sufficiency (Americans with Disabilities Act, 1990, section 12101 (a)(7); Individuals with Disabilities Education Act, 2004, section 1400 (c)(1)). Each individual adult and emancipated minor is legally presumed competent to make decisions for himself or herself and should receive the preparation, opportunities, and decision-making supports to develop as a decision-maker over the course of his or her lifetime. All people with I/DD can participate in their own affairs with supports, assistance, and guidance from others, such as family and friends. People with I/DD should be aware of and have access to decision-making supports for their preferred alternatives.

- If legal limitations on autonomy are necessary, then National Guardianship Association or equivalent standards that are consistent with the values expressed in this position statement should be followed. If any restrictions on autonomy are legally imposed, each individual has the right to the least restrictive alternative, due process protections, periodic review, ongoing training and supports to enhance autonomy and reduce reliance on approaches that restrict individual rights, and the right to ultimately seek to restore rights and terminate the restriction when possible.
- Information and training about less restrictive alternatives to guardianship should be available to people with I/DD, their family members, attorneys, judges, and other professionals.
- If the use of a guardianship becomes necessary, it should be limited to the fewest restrictions necessary for the shortest amount of time and tailored to the individual's specific capacities and needs.
- Strict monitoring must be in place to promote and protect the autonomy, liberty, freedom, dignity, and preferences of each individual even when placed under guardianship.
- Regardless of their guardianship status, all individuals with I/DD should be afforded opportunities to participate to the maximum extent possible in making and executing decisions about themselves. Guardians should engage individuals in the decision-making process, ensuring that their preferences and desires are known, considered, and achieved to the fullest extent possible.
- Regardless of their guardianship status, all individuals with I/DD retain their fundamental civil and human rights (such as the right to vote and the right to make decisions related to sexual activity, marriage and divorce, birth control, and sterilization) unless the specific right is explicitly limited by court order.

## **Systems Issues**

- States should provide systematic access to decision-making supports for all individuals with I/DD.
- An individual (other than a family member) should not serve in dual roles as guardian and as paid advocate or paid service provider for an individual.
- An organization should avoid serving in dual roles as guardian and as paid advocate or paid service provider for an individual.
- Organizations that serve in dual roles of guardian and paid advocate or paid service provider must have written policies and organizational separations in place to mitigate conflicts of interest. These organizations should support efforts to develop independent guardianship organizations.
- Financial incentives that benefit professionals or guardianship corporations should never drive guardianship policy or result in expensive and unnecessary costs to individuals or their families.
- Appointment of a guardian of the person, the person's finances, or both, should be made only to the extent necessary for the legal protection and welfare of the individual and not for the convenience or preferences of the family, the service system, or others.
- Individuals with I/DD must have access to all the accommodations and supports, including communication supports, they need to demonstrate their competency at initial evaluations for guardianship and at all periodic reviews of any guardianship.

- State laws should be reformed to prioritize less restrictive alternatives to full and plenary guardianship, including without limitation informal supports, supported decision-making, limited (and revocable) powers of attorney, health care proxies, trusts, and limited guardianships that are specifically tailored to the individual's capacities and needs. These alternatives should always be considered first. Use of these alternatives can help an individual who may have limited capacity to consent to satisfy statutory privacy or other requirements and to have records released to a person or entity designated as the individual's agent or provider of support and services. If used at all, any restrictions on the individual's rights and decision-making powers should be confined to those areas in which the individual demonstrates a need for assistance that exceeds what can be provided through a less restrictive alternative.
- Laws should be reformed to require that less restrictive options are tried and found to be ineffective to ensure the individual's autonomy before full (plenary) guardianship is even considered. Alternatives and related procedures to change overly restrictive forms of any existing guardianship, including restoration of rights and termination of any guardianship, must be available under state law.
- Since guardianship represents a transfer of rights and the responsibility for exercising them, adequate safeguards must be in place to protect those rights. These safeguards include procedural due process (including without limitation **the right to counsel** representing the interests of the individual, impartial hearing, appeal, and burden and quantity of proof) must protect the individual's autonomy. The state must also ensure that the individual is informed and retains as much decision-making power as possible. The **state should pay the costs** of providing these due process protections and not impose the costs on families or on individuals with I/DD.
- Members of the **judiciary, attorneys, and other professionals need training and education** on alternatives to guardianship for individuals with I/DD, and they must **zealously advocate for preserving the substantive and procedural rights** of all individuals with I/DD.
- If a guardian is to be appointed, the preferences and assent of the individual with I/DD with respect to the identity and function of the proposed guardian should be considered.
- The appointment of a guardian should be appropriately time-limited in order to provide regular periodic review of the individual's current capabilities and functioning and whether a less restrictive alternative is now indicated. The reviews should include an independent professional assessment by a highly qualified examiner of the individual's functioning with necessary accommodations and communication supports. All costs of the review should be paid by the state and not imposed on individuals with I/DD or their families.
- Guardianship should include a person-centered plan of teaching and/or supports for decision making so the individual with I/DD will have opportunities to learn and practice the skills needed to be autonomous and to direct his or her own life. Understanding the nature and purpose of guardianship and understanding that most people with I/DD can manage their own affairs with assistance and guidance should be part of transition planning in schools and of any curriculum or procedures that prepare the individual's person-centered plan for adulthood. Schools should not give legal advice to students and families, and should provide students and families with information about less restrictive alternatives to guardianship.
- The ultimate goal of any such curriculum or procedures should be to ensure the individual's autonomy to the maximum extent possible, individualize decision-making supports for the individual, and ensure that the individual has maximum access to equal opportunity, independent living, full participation, and economic self-sufficiency, each with supports that take into account the individual's capacities and needs.

## **Guardian Responsibilities**

- Guardians should be knowledgeable about decision-making and other types of supports, services, and systems that can significantly affect the individual's autonomy, supports, and quality of life. Moreover, guardians must be committed to the individual's well-being and avoid any appearance or actual lack of commitment to the individual. They must know and understand the

individual's needs and wishes and act in accordance with them whenever possible and whenever any action will not negatively affect the individual's health, safety, financial security, and other welfare.

- Family members are often preferable choices when a guardianship is ordered and the family members meet these standards of knowledge, they do not have conflicts of interest (other than also serving as a paid advocate or paid service provider), and the individual with I/DD does not object to the family member's appointment as guardian.
- Guardians shall defer to the individual's preferences when decisions do not jeopardize the individual's health, safety, financial security, and other welfare.

## **Oversight**

- States should adopt a set of minimum standards for all guardians and require training and technical assistance for all guardians.
- Professional guardians (those who both serve two or more people who are not related to each other and also receive fees for these services) should, at a minimum, be registered, and preferably licensed or certified by the state, either directly or through delegation to an appropriate independent professional organization. They should also have the appropriate education and skills. They should be independent from and not be receiving payment for providing other services to the individual.
- Guardians shall be legally accountable for all of their decisions and other actions with respect to the individual. Their decisions and other actions must be subject to the reporting and review procedures of the appropriate state court or other agency.

[1] "People with intellectual disability (ID)" refers to those with "significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18", as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) in its manual, *Intellectual Disability: Definition, Classification, and Systems of Supports* (Schalock et al., 2010), and the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), published by the American Psychiatric Association (APA, 2013). "People with developmental disabilities (DD)" refers to those with "a severe, chronic disability of an individual that- (i) is attributable to a mental or physical impairment or combination of mental and physical impairments; (ii) is manifested before the individual attains age 22; (iii) is likely to continue indefinitely; (iv) results in substantial functional limitations in 3 or more of the following areas of major life activity: (I) Self-care, (II) Receptive and expressive language, (III) Learning, (IV) Mobility, (V) Self-direction, (VI) Capacity for independent living, (VII) Economic self-sufficiency; and (v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated," as defined by the Developmental Disabilities Assistance and Bill of Rights Act 2000. In everyday language people with ID and/or DD are frequently referred to as people with cognitive, intellectual and/or developmental disabilities.

[2] Terminology for guardianship and guardians differs by state and can include tutor, conservator, curator, or other comparable terms.

Adopted:

American Association on Intellectual and Developmental Disabilities  
Board of Directors  
March 16, 2016

The Arc  
Board of Directors  
April 10, 2016



March 17, 2017

Thomas F. Coleman  
Legal Director  
Spectrum Institute  
9420 Reseda Blvd., #240  
Northridge, CA 91324

Mr. Coleman:

I am the Legal Services Manager of Alta California Regional Center (ACRC), a nonprofit corporation organized and existing pursuant to the laws of the State of California and contracted with the State of California to provide services and supports to individuals with developmental disabilities. Part of my responsibility at ACRC is to manage and provide oversight of conservatorships of regional center clients, including reviewing newly proposed conservatorships and monitoring clients under existing conservatorships. Based upon my years of experience in this role, I believe that the current conservatorship law and procedures in California are insufficient to protect the rights of individuals with developmental disabilities.

At our agency, for example, approximately 80% of our conserved clients are under general conservatorship, and not, as you might imagine under limited conservatorship, an arrangement which was designed specifically for Californians with developmental disabilities. And the law and probate courts treat general and limited conservatorships quite differently.

For example, proposed general conservatees are not provided a court-appointed attorney, as are proposed limited conservatees. Further, the Probate Code does not require the regional center to assess the proposed conservatee and file an assessment report for general conservatorship petitions, whereas this is mandatory for limited conservatorship petitions. The net result is that in general conservatorships, the probate courts are deprived of objective test data reflecting the proposed conservatee's level of intellectual and adaptive functioning, as well as the regional center's recommendations regarding conservatorship, in making these incredibly important decisions.

Moreover, I have concerns over the qualifications and focus of the court-appointed attorneys assigned our clients for limited conservatorship petitions. I have personally met court-appointed attorneys who represent themselves as Spanish speaking whose Spanish is so poor that they are unable to communicate with their Spanish-speaking clients. More concerning is the lack of familiarity and training of court-appointed attorneys about individuals with developmental disabilities and their rights. It is my understanding that an individual's attorney should advocate for the client to retain

his/her civil rights. In practice, the court-appointed attorneys I have seen nearly always support removal or restriction of their own client's civil rights. I'm unaware of why this should be different for an individual with a developmental disability.

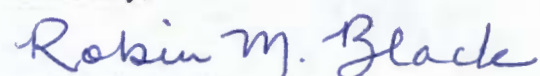
Additionally, petitioners and their attorneys are often unaware of the legal requirement to serve a copy of conservatorship petitions on the regional center at least 30 days prior to the conservatorship hearing. Savvy courts will not allow conservatorship hearings to proceed until after they receive proof the regional center has served at least 30 days before the hearing. However, I have seen multiple instances of courts granting conservatorship petitions without the regional center receiving notice, much less recommendations—this typically occurs in smaller counties.

Also, in my opinion, the presumption of attorneys and probate courts that parents and family members are always suitable conservators for their relatives with developmental disabilities should be reversed for our clients' protection. In my experience, even the most well-meaning and loving family member, once given conservatorship authority, can easily make decisions which unduly restrict the rights of the conservatee, and at worst, can seriously compromise the individual's health and safety. And the court's statutory biennial review of conservatorships (which does not always occur) has historically been insufficient to prevent this type of abuse.

Finally, conservatorship is not the least restrictive method of providing assistance and protection to individuals with developmental disabilities. Probate Code Section 1821(a)(3) requires conservatorship petitions to list all "alternatives to conservatorship considered by the petitioner or proposed conservator and reasons why those alternatives are not available." In reality, petitioners can simply check a checkbox on the petition form and need provide no explanation whatsoever of why the alternatives were not available. ACRC continues to recommend that clients and families consider and exhaust the use of less restrictive methods for providing assistance and protection to individuals with developmental disabilities before even considering seeking conservatorship. Such alternative methods include, but are not limited to, supported decision making, regional center funded services and supports, the regional center planning team process, powers of attorney, written consents for disclosure of records/information, and assignments of educational decision making rights. I note, however, that local school districts, juvenile dependency courts, and probate attorneys do not share this perspective.

Should you have any questions in this regard to this letter, please do not hesitate to contact me.

Sincerely,



Robin M. Black  
Legal Services Manager  
Alta California Regional Center  
(916) 978-6269  
[rblack@altaregional.org](mailto:rblack@altaregional.org)

## Declaration of Anthony Chicotel, Esq.

I, Anthony Chicotel, state:

1. I am an attorney licensed by the State of California. For the last twelve years, I have worked as a staff attorney for California Advocates for Nursing Home Reform (CANHR). My primary roles at CANHR include counseling and representing long term care consumers and advocating for statutory and regulatory policy improvements. My areas of expertise include nursing home residents rights, dementia care, capacity and decision making, and conservatorships.
2. Prior to working at CANHR, I was a rights attorney for older residents of San Diego and Imperial Counties at Elder Law & Advocacy, a legal services organization. I saw over 1,000 clients annually regarding a wide variety of legal subjects, including conservatorship. Representing proposed conservatees in conservatorship cases was part of my practice.
3. My first job as an attorney was representing people with alleged mental disabilities for Nevada Disability Advocacy and Law Center. I represented clients in civil commitment and forcible administration of medication hearings and counseled clients facing adult guardianship proceedings.
4. In 2010, I wrote "Conservatorship Defense Guide" for attorneys representing conservatees in the California court system. Around that same time, I reviewed the files of 300 conservatorship cases throughout California to gather data and evaluate the conservatorship process from a statewide perspective.
5. I consider myself an expert in the areas of decision making capacity and competency, both the legal standards and assessing clients. I am very familiar with conservatorship proceedings and the cognitive resources required to meaningfully participate in a conservatorship case as a conservatee.
6. I have read the article titled "Meaningful Participation and Effective Communication by a Pro Per Respondent in a Conservatorship Case." The article effectively summarizes the functions that a proposed conservatee would need to perform to effectively participate in a conservatorship proceeding. These functions are generally performed by counsel when counsel is appointed.
7. Based on my experience, it is my professional opinion that most proposed conservatees in general conservatorship proceedings suffer from a significant cognitive disability and would not be able to effectively perform any of the tasks listed in the "pro per" article. Without the assistance of competent counsel, the disabilities of these individuals would prevent them from having meaningful participation and effective communication in these legal proceedings.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on August 13, 2018.



Anthony Chicotel  
California Advocates for Nursing Home Reform  
650 Harrison St., 2nd Floor  
San Francisco, CA 94107  
(415) 974-5171 / [www.canhr.org](http://www.canhr.org)

## **Meaningful Participation and Effective Communication by a *Pro Per* Respondent in a Conservatorship Case**

A respondent who represents himself or herself would need to be able to perform the following tasks in order to have meaningful participation and effective communication in a conservatorship proceeding:

**1. Review the petition and moving papers.**

The respondent would *need to be able* to read the allegations in the petition and the information in related documents (or have the papers read to them by someone else who does not have a conflict of interest) to determine whether the information is true. This would require the respondent to understand the meaning of the words and sentences used in these documents.

**2. Respond to the petition and moving papers.**

The respondent would *need to be able* file paperwork with the court to point out any areas where information is not true. This would require the respondent to be able to articulate words that convey any objections that may exist to the facts that have been alleged.

**3. Review and respond to the capacity declaration.**

The respondent would *need to be able* to evaluate the information contained in the medical capacity declaration filed by the doctor who presumably examined him or her. This would require the ability to understand technical medical words and concepts. It would also require the ability to determine if the examination was done properly. The respondent would need to have the ability to call the doctor on the phone to discuss the evaluation process and to question the opinions contained in the declaration.

**4. Challenge sufficiency of petitioner's evidence.**

The respondent would *need to be able* to understand the concept of "clear and convincing evidence" and make an informed decision about whether the allegations in the petition – and evidence produced by the petitioner – meets this standard on each and every legal element necessary for the issuance of a conservatorship order.

**5. Develop an affirmative defense.** The respondent would *need to be able* to present evidence that a conservatorship is not needed, that there is a lesser restrictive alternative, that capacity to make decisions exists in some of the relevant areas (financial, medical, residence, marital, social, sexual, etc), there is a better choice of who should be conservator, that petitioner has ulterior motives in initiating the proceeding, that the proposed conservator has been or would be abusive, etc. The respondent would need to be able to call witnesses, to present evidence, and to cross-examine the petitioner's witnesses to challenge their assertions.

**6. Call expert witnesses.** The respondent would *need to be able* to ask that an independent expert be appointed to develop an affirmative defense that respondent has capacity in one or more areas.

**7. Demand contested hearing and jury trial.**

The respondent would *need to be able* to decide whether to demand a contested hearing and if so, whether also to demand a jury trial.

**8. Insist on due process.** The respondent would *need to be able* to know what statutory and constitutional protections exist and to insist that the judge and other participants follow the law.

**9. Waive rights.** In order to forego the procedures listed above, the respondent would *need to be able* to make a knowing and voluntary waiver of these rights and be able to communicate the waiver of each of them to the court.

*The appointment of counsel is a way to ensure meaningful participation and effective communication by a respondent in a conservatorship case.*

# Access to the Courts for People with Developmental Disabilities

## California Statutes and Regulations

People with developmental disabilities, like everyone else, have a right of “access to the courts.” This right is specifically recognized and emphasized in the California Code of Regulations. (17 CCR § 50510) This regulation implements the statement of rights contained in Welfare and Institutions Code Section 4502. That statute affirms the right of people with such disabilities to full participation in any program or activity that receives public funds. Courts receive public funds.

Legal proceedings are an activity of the courts. Full participation in a legal proceeding would include the right to examine and evaluate pleadings, offer objections, make motions, produce evidence, challenge evidence, call witnesses, cross-examine witnesses, and file an appeal.

People with serious cognitive and communication disabilities are denied access to the courts and full participation in conservatorship proceedings when their disabilities prevent them from performing these activities. Appointment of counsel, therefore, would be required to ensure that they have meaningful participation in the proceedings. The rights of such litigants under this statute and this regulation are coextensive with their “equal access” rights under the Americans with Disabilities Act and Government Code Section 11135.

Relevant portions of Section 50510 appear below:

“Each person with a developmental disability . . . is entitled to the same rights, protections, and responsibilities as all other persons under the laws and Constitution of the State of California and the Constitution of the United States. . . These rights include, but are not limited to the following:

“(A) Access Rights . . .

(10) A right to advocacy services, as provided by law, to protect and assert the civil, legal, and service rights to which any person with a developmental disability is entitled.

(12) A right of access to the courts for purposes including, but not limited to the following:

(D) To contest a guardianship or conservatorship, its terms, and/or the individual or entity appointed as guardian or conservator.”

In interpreting and enforcing Section 11135 and relevant provisions of the ADA, as these legal protections would apply to people with developmental disabilities who are involved in conservatorship proceedings, the Department of Fair Employment and Housing should do so in a manner that recognizes and protects the equal access rights of such persons under Section 4502 and Section 50510. (Cf. *Payne v. Superior Court*, 17 Cal. 3d 908 (Cal. 1976))

Thomas F. Coleman  
Spectrum Institute  
November 20, 2018

# WINGS ACTION TOOLS

## Right to and Role of Counsel\*

An important issue for WINGS is the right to and role of counsel in *guardianship* proceedings. Stakeholders could conduct research, spur education and training, or advocate for changes in statute or court rule.

Counsel can:

- ✓ make the difference between a guardianship and a less-restrictive option, between a full and limited order, between a restoration of rights and continuation in a guardianship that may be unnecessary or overbroad;
- ✓ make the voice of the individual subject to guardianship heard; and
- ✓ promote a care plan according to the individual's values and preferences.

Your WINGS could focus on specific counsel issues in guardianship proceedings, including:

- ✓ right to counsel for individuals alleged to need a *guardian*;
- ✓ role of counsel for such individuals;
- ✓ role of the *guardian ad litem*;
- ✓ role of counsel for petitioners;
- ✓ right to counsel for individuals subject to guardianship (post-appointment);
- ✓ role of counsel for individuals subject to guardianship (post-appointment).

This Action Tool includes:

- ✓ Stakeholder Action Strategies;
- ✓ Key Background;
- ✓ Resources (with links to access information quickly).

\*Italicized terms are used generally and may be different in your state. Words in blue are hyperlinks to important resources.

## **Conservatee's Right to Retain an Attorney**

The memorandum titled "Access to Justice through the Right to Counsel" has a section citing constitutional and statutory authorities about the right of a proposed conservatee to select and retain an attorney of choice to provide representation in the conservatorship proceeding. (Right to Retain Counsel, p. 4)

That section did not specifically address the right of an adjudicated conservatee to select and retain an attorney for representation in post-adjudication proceedings. As explained below, a conservatee does have such a right. However, since some judges are refusing to recognize this right, further clarification by the Legislature appears to be necessary.

Probate Code Section 1872 states: "Except as otherwise provided in this article, the appointment of conservator of the estate "is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate." Section 1871 makes an express exception to Section 1872. It states that a conservatee shall not be denied "the right to enter into transactions to the extent reasonable to provide the necessities of life to the conservatee."

The question then arises as to whether retaining an attorney to represent a conservatee in a conservatorship proceeding is a necessary of life. Appellate courts have answered that question in the affirmative.

As a basic principle, legal services have been held to constitute a "necessary of life." (*In re Marriage of Pallesi* (1977) 73 Cal.App.3d 424, 428.) While the Pallesi decision was rendered in the context of a marriage dissolution proceeding, the principle also applies to probate conservatorship proceedings.

"There is no doubt that legal services rendered an incompetent in proceedings looking toward restoration to capacity are necessities, and a contract to pay the reasonable value thereof will be implied by law and may be enforced in suitable proceedings." (*Stone v. Conkle* (1939) 31 Cal.App.2d 348, 351.) The conservatee or her estate is liable to pay for such services regardless of whether the attorney was hired by the conservatee or by a third party for the benefit of the conservatee.

This statute and these court decisions are merely protecting the constitutional right of an individual to be represented by retained counsel in civil actions. (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925.) The right to retain one's own attorney is especially important in conservatorship proceedings where the positions of the conservatee and the conservator are in conflict.