

# **DUE PROCESS *PLUS***

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



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

White Paper to the U.S.  
Department of Justice

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## Due Process *Plus*

At the very least, probate courts and the attorneys they appoint to represent guardianship respondents must satisfy the requirements of due process of law. But Title II of the Americans with Disabilities Act demands that extra attention and services be provided to litigants with intellectual and developmental disabilities in order to ensure they receive access to justice. Thus, “Due Process *Plus*” is the best way to describe the advocacy and training standards necessary for probate courts and attorneys to comply with the ADA. Nothing less will do.

# Document Set

## White Paper to the U.S. Department of Justice

Document One is a policy paper that presents specific *ADA Advocacy and Training Standards* that should be adopted by state and local courts. The Judicial Branch has duties under Title II of the American's with Disabilities Act to provide access to justice to involuntary litigants in adult guardianship proceedings. The focus of the paper is how the courts can provide people with intellectual and developmental disabilities access to justice through proper and effective representation by court-appointed attorneys. <http://spectruminstitute.org/white-paper/>

## User's Guide to Reference Materials

Document Two is a guide to help readers understand the significance of materials contained in Document Three. Specific segments of documents are quoted or summarized, along with an explanation about how that document or segment of it is relevant to the formulation of one or more of the *ADA Advocacy and Training Standards*. <http://spectruminstitute.org/white-paper/users-guide.pdf>

## Reference Materials

Document Three contains court cases, statutes, judicial standards, administrative guidelines, policy statements, and legal commentaries relevant to the development of *ADA Advocacy and Training Standards* for guardianship attorneys. These precedents, guidelines, and recommendations serve as the foundation for the White Paper. The due process mandates and best practices approaches found in these materials have informed the development of these policy positions. Because of its length, the print version of Document Three is divided into two parts. Documents in the online version are accessible as individual exhibits through links on a table of contents. <http://spectruminstitute.org/white-paper/reference-contents.pdf>

## Use by Department of Justice

We encourage the Department of Justice to use the White Paper and the entire document set as resources when it investigates Title II violations by state and local courts in the administration of justice in adult guardianship proceedings. We trust that such DOJ investigations will occur in the coming years and that appropriate settlements will result in greater access to justice for people with intellectual and developmental disabilities who find themselves involved in such proceedings. We also encourage judges, court administrators, and appointed attorneys to use these materials to provide better access to justice for people with developmental disabilities in adult guardianship proceedings.

## Preface

### Guardianship Then and Now

As a legal construct, adult guardianships have existed for centuries. The legal roots of guardianship stretch back to early Greece and Rome. In its earliest forms, guardianship was a method of managing the property of a person who had a mental disability, not to provide care or protection for the person. The focus on property rather than the person continued in Europe through the Middle Ages.

The “royal prerogative” of guardianship was part of English law as early as the Fourteenth Century. The doctrine of “*parens patriae*” – meaning the ruler was the parent of the state and its subjects – became firmly embedded in the common law of England. The King exercised guardianship authority through the Lord Chancellor who initiated “inquisitions” to “inquire into the condition of the mentally disabled person and to appoint a committee for his person and property.” (Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (Springer Publishing 2005)) However, these proceedings were only initiated for people who had significant assets.

The common law doctrine of *parens patriae* carried over to Colonial America and was part of American common law when the nation was founded. The United States Constitution presupposed the authority of the states to place a dependent adult into a guardianship for his or her own safety and care.

Courts of equity assumed jurisdiction over “incompetency proceedings” and eventually were replaced by probate courts. By the mid-20th Century, protective proceedings involved two types of situations: mental commitment which stemmed from the state’s authority to protect society, and guardianship cases which arose from the state’s authority to protect people who could not protect themselves.

Reform efforts started targeting mental commitment proceedings in the 1960s and 1970s. The seeds of guardianship reform were planted in the 1970s and 1980s. State legislatures were being lobbied by political reformists, while courts received legal arguments from civil rights advocates. As legislators were considering the concepts of lesser restrictive alternatives and limited guardianships, judges were beginning to apply due process protections to these proceedings.

However, once the initial wave of reform had caused some basic changes in these protection proceedings, the guardianship system was allowed to operate on “auto pilot” for decades. Problems have been festering, with spurts of reform occurring from time to time, mostly in response to investigative reports by the media.

There has been a growing level of concern with abuses in adult guardianship proceedings – involving adults with developmental disabilities as well as seniors – over the past 10 years. While some reform activities have nibbled around the edges of the guardianship system, a growing chorus of disability rights activists have started to call for the abolition of guardianship. There is pent up frustration in many quarters, both with judicial negligence and governmental overreach.

Although this white paper does not take an outright abolitionist approach, it does call for major systemic reforms. Application of advocacy and training standards under the Americans with Disabilities Act seems like a good place to start. Such standards should be informed by due process requirements and best practices guidelines.

State guardianship systems have ignored the ADA for far too long. With the 25<sup>th</sup> anniversary of the ADA occurring this year, now is a good time to begin a new era – a time when guardianship proceedings comply with the ADA.

# Contents


Preface	
Introduction .....	1
Statistics on Adult Guardianships .....	2
The Role of Media in Guardianship Reform .....	5
Associated Press .....	5
Los Angeles Times .....	8
More Recent Media Attention .....	10
Other Priorities for Disability Organizations .....	12
Evolution of the Right to Counsel .....	14
Due Process and Guardianship Cases .....	18
The ADA and Guardianship Cases .....	21
The Duty to Ensure Safety .....	27
Review of Precedents and Recommendations .....	30
Montana .....	30
Missouri .....	32
Connecticut .....	33
New Jersey .....	33
Massachusetts .....	34
Texas .....	38
California .....	38
National Probate Court Standards .....	40
Conference of State Court Administrators .....	40
American Bar Association .....	41
Second National Guardianship Conference .....	42
National Academy of Elder Law Attorneys .....	42

Journal of Poverty Law .....	42
National Center for State Courts .....	43
ADA Compliant Standards for Guardianship Attorneys .....	44
Overview .....	45
Liability Issues .....	46
Liability for Attorneys .....	46
Liability for Public Agencies .....	48
Performance Standards .....	49
Investigation .....	50
Obtaining Relevant Records .....	50
ADA Access Plan .....	51
Records Relevant to the Petition .....	52
School or Day Program Records .....	52
Medical and Psychological Records .....	52
Service Provider Records .....	53
Criminal, Juvenile, CPS, APS Records .....	53
Court Investigator or Guardian Ad Litem Report ...	53
Contact Information for Potential Witnesses .....	54
Interview Personal Sources of Information .....	54
Interview Professional Sources of Information .....	54
Interviews of the Client .....	55
Interview the Proposed Guardian(s) .....	55
Advocacy and Defense .....	55
Evaluation of Evidence .....	56
Appointment of Experts .....	56
Negotiation and Settlement .....	57
Evidentiary Hearing .....	58
Appeal .....	58

Qualification and Training Standards .....	59
Appointment Process Standards .....	60
Monitoring Standards .....	62
Administrative Complaint Procedures .....	62
Marsden Hearings .....	63
Modified Rules for Appellate Standing .....	65
Periodic Auditing of Cases and Systems .....	66
ADA Noncompliance Complaint Procedures .....	66
DOJ Enforcement Procedures .....	67
Conclusion .....	69
Appendix:	
Summary of Standards .....	70
Table of States: Mandatory vs. Optional Attorneys .....	75
About Spectrum Institute .....	77
Executive Committee Members .....	77
Disability and Guardianship Project Consultants .....	78
Biography of Attorney Thomas F. Coleman .....	79



White Paper Online At:  
[www.spectruminstitute.org/white-paper](http://www.spectruminstitute.org/white-paper)

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## Introduction

This paper contains specific proposals for consideration by the United States Department of Justice as training and advocacy standards for court-appointed attorneys who represent litigants in adult guardianship proceedings. The Department of Justice has jurisdiction to promulgate guidelines and technical assistance manuals to assist state and local government agencies, including courts, to comply with their duties under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

State and local courts have an affirmative obligation to assist litigants, especially involuntary litigants, who have known cognitive and communication disabilities to secure access to justice. When a petition for guardianship is filed, the court is put on notice that the respondent allegedly has significant cognitive disabilities that may impair his or her ability to understand, to communicate, and to make decisions. Having meaningful access to justice requires the ability to understand, communicate, and make decisions. The court, therefore, knows or should know, by virtue of the petition itself, that it is summoning an involuntary litigant who likely will not be able to participate in the proceedings without some assistance or accommodation by the court. Most respondents who have intellectual and developmental disabilities and are “dependent adults” rather than seniors, are most likely indigents. The court knows that most dependent adults do not have financial means to obtain the supports and services necessary to gain access to justice in a way that will minimize or overcome their disability and allow them to have the ability and the choice to contest the proceedings or to dispute some or all of the allegations.

Once the court is put on notice that it is summoning before it an involuntary litigant who cannot defend himself or herself and who likely will not be able to understand the proceedings or participate in them in a meaningful manner, the court has a duty under Title II of the ADA and Section 504. It must modify its usual policies and practices to provide the supports and services necessary to maximize the potential for meaningful participation by the litigant. Usually the best method for accomplishing this result, and making sure the litigant experiences due process of law in the proceedings, is for the court to appoint an attorney to represent the litigant. No other method of accommodation would come close to the appointment of an attorney as a method of increasing the likelihood of access to justice for an involuntary litigant who has intellectual and developmental disabilities and perhaps physical disabilities as well.

Once an attorney is appointed to represent such a litigant, the court must take steps to ensure the attorney is qualified to handle such cases. The attorney must be properly trained in the legal, medical and psychological issues involved in such a proceeding. The attorney’s performance must be effective and conform to the requirements of due process as well as the mandates of the ADA.

There currently are no national standards for ADA compliance by state courts and by the attorneys they appoint to represent involuntary litigants in adult guardianship proceedings. This paper fills this informational void. It draws upon legal precedents, best practices guidelines, and performance recommendations developed over the past few decades. After reviewing legislative statutes, judicial precedents, research articles, law review articles, administrative reports, and policy papers, the best



ideas and most compelling suggestions have been synthesized. They are presented here for consideration by the Department of Justice as a tool to guide its investigations and to inform the development of guidelines for public agencies regulated by Title II of the ADA, including courts.

State and local courts need not wait for investigations, interventions or guidance from the Department of Justice. They can and should use these materials to voluntarily adopt their own standards and rules for qualifications, education, and performance of court-appointed attorneys in probate guardianship cases. Bar associations should also review these materials for use in their continuing education programs.

There is currently a lack of reliable and accurate information about ADA compliance by attorneys representing clients with intellectual and developmental disabilities in guardianship cases. This paper and the accompanying resource materials on which it relies are being made available as a resource for members of the bench and bar.

## Statistics on Adult Guardianships

Studies that have been done on adult guardianships over the years have been unsuccessful in arriving at an accurate number of open guardianship cases in the United States. Each state operates its own guardianship system and it is therefore the responsibility of each state to keep track of the number of adults who are under the protection of the court. Unfortunately, many states have not made guardianship statistics a priority and therefore a national figure of open cases cannot be determined.

“In a 2006 exploratory study of state guardianship data, the ABA Commission on Law and Aging found that many state court administrative offices did not receive information on guardianship from trial courts and noted that the majority of reporting states could not provide state-level data. The problem is compounded by the lack of statewide case management systems that can identify case events for guardianships and conservatorships. The lack of state-level data requires researchers to focus on local courts, the only source of accurate and reliable guardianship data.”<sup>1</sup>

Extrapolating from data in four states, the National Center for State Courts estimated that 1.5 million adults had open adult guardianship cases in the United States in 2011.<sup>2</sup> Some states have extremely large caseloads. In Texas, for example, 50,000 adults have open guardianship cases.<sup>3</sup> The Judicial

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<sup>1</sup> Website, Center for Elders and the Courts, “Guardianship Basics: Limitations on ‘Official’ Statistics.”

<sup>2</sup> “Adult Guardianships: A ‘Best Guess’ National Estimate and the Momentum for Reform,” National Center for State Courts (2011)

<sup>3</sup> “Guardianship Reform Could Offer New Freedoms,” The Texas Tribune, April 26, 2015.

Council of California reported having 45,000 open *general* conservatorship cases in 2006.<sup>4</sup> Another 40,000 *limited* conservatorships for adults with developmental disabilities were reported statewide by the California Department of Developmental Services in 2014. When limited and general conservatorships are combined, and if the data were updated to 2015, some 100,000 adults in California could currently have open conservatorship cases.<sup>5</sup>

Thousands of new guardianship cases are being opened each year. Approximately 10,000 new cases are filed each year in California.<sup>6</sup> Between 1998 and 2007, Indiana reported an average of 6,500 new guardianship filings annually.<sup>7</sup> Pennsylvania reported 2,991 new guardianship petitions filed in 2013.<sup>8</sup> Extrapolating from these three states, keeping in mind their combined populations in comparison to the population of the nation, it is reasonable to conclude that about 100,000 new guardianship cases are being opened each year in the United States.

Trends in Indiana suggest that the number of adult guardianships may explode in the coming decades.<sup>9</sup> The population over 65 is expected to increase 200 percent by 2040. The number of people over 60 with intellectual and developmental disabilities is expected to increase 300 percent by 2030. As a result of these trends, “Indiana adult guardianship filings are expected to increase by 300% - 500% = 18,000 to 30,000 cases per year.”<sup>10</sup>

When viewed together, the current number of open guardianship cases, the number of new cases filed annually, and the projections of ever increasing case loads for the courts, make it even more imperative that these involuntary litigants receive access to justice. Whether the initial proceedings

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<sup>4</sup> “Court Effectiveness in Conservatorship Case Processing,” A Report to the Legislature, California Judicial Council (January 2008)

<sup>5</sup> The Department of Developmental Services responded to a public records request submitted by the Disability and Abuse Project of Spectrum Institute.

<sup>6</sup> Some 5,600 general conservatorship petitions were filed in 2006. “Court Effectiveness,” fn. 4. The number of new annual filings has likely increased over the last nine years. Spectrum Institute estimates that more than 4,000 limited conservatorship cases are also filed in California each year. Therefore, 10,000 new conservatorship filings annually is a reasonable estimate.

<sup>7</sup> “Adult Guardianships in Indiana: What Case Managers, Caregivers & Advocates Need to Know,” IPGM Professional Development Workgroup, July 18, 2014.

<sup>8</sup> “Report and Recommendations of the Elder Law Task Force,” Supreme Court of Pennsylvania (November 2014)

<sup>9</sup> *Id.*, fn. 7

<sup>10</sup> *Id.*, fn. 7

have integrity or not will have a huge impact on the civil rights of millions of Americans – an impact that for many of them may last for decades.

There was an era when the rights of racial and ethnic minorities, and the rights of women, were left to the states to decide. Federal deference to states' rights was eventually replaced by the nationalization of basic civil rights because too many states failed to respect and protect the rights of marginalized segments of the population.

Some 25 years ago, Congress made a policy decision to make the rights of people with disabilities a national priority when it enacted the Americans with Disabilities Act. As a result, much progress has been made in terms of physical access and communication accommodations for people with disabilities. Although access to justice for people with mobility and physical disabilities is much more of a reality today than ever before, the same cannot be said of people with intellectual, developmental, and cognitive disabilities.

Virtually all of the 1.5 million Americans with open guardianship cases, as well as the 100,000 Americans who are involuntarily summoned to court each year for new guardianship cases, have cognitive or communication disabilities that preclude them from having meaningful participation in their cases. In most situations, their only hope of having access to justice is through a court-appointed attorney. This paper addresses the crucial need for these attorneys – *as ADA access-to-justice facilitators* – to have proper training and to be required to adhere to performance standards that ensure that the administration of justice has integrity for all regardless of disability status.

The nation celebrated the 25<sup>th</sup> Anniversary of the passage of the Americans with Disabilities Act this year. But for tens of thousands of Americans whose guardianship cases were being processed as this celebration was occurring, the ADA was little more than a hollow promise. The application of the ADA to involuntary litigants in guardianship cases is a topic that is absent from legal literature, training programs for judges and attorneys, and agendas for guardianship reform conferences.

Hopefully, the release of this paper and accompanying reference materials will bring visibility to the need to apply the ADA to state guardianship proceedings, and will stimulate the creation of minimum national standards for access to justice for millions of Americans who are involuntarily drawn into these proceedings. *It should not be optional for state courts to comply with Title II of the ADA.*

Judges and judicial branch administrators should be held accountable for ensuring access to justice for the adults with cognitive disabilities whom they summon to court. Appointing a properly trained attorney to assist litigants and to help them defend their basic rights should be mandatory. Requiring court-appointed attorneys to provide effective assistance to clients with intellectual and developmental disabilities is the responsibility of the judges who appoint them. Accountability, through clearly articulated and monitored performance standards, is the only way to achieve the type of access to justice that the ADA requires.

The intent of this paper is to help state courts and the Department of Justice breathe life into the ADA for millions of Americans who are and who will be participants in guardianship proceedings.

## The Role of Media in Guardianship Reform

Investigative reporting by media organizations has played a major role in stimulating reforms in guardianship laws and procedures throughout the nation. Being put in the spotlight by investigative media is uncomfortable to anyone, including government officials, and it can pressure them to take action or shift the focus elsewhere. Sometimes they react to media attention by convening a blue ribbon commission or punting the issues to the legislative branch.

### Associated Press

In 1986, the Associated Press initiated a year-long investigation of guardianship systems in all 50 states and the District of Columbia. In the process, journalists reviewed more than 2,200 randomly selected guardianship court files and conducted many interviews with a wide range of informants. The result was a national six-part series published the following year titled “Guardians of the Elderly: An Ailing System.” The public reaction to the series was the impetus for a national guardianship reform movement.

Among the findings of the AP investigation: “Elderly in guardianship court are often afforded fewer rights than criminal defendants. In 44 percent of the cases, the proposed ward was not represented by an attorney. Three out of 10 files contained no medical evidence. Forty-nine percent of the wards were not present at their hearings. Twenty-five percent of the files contained no indication hearings had been held.”<sup>11</sup>

Another finding: “When held, guardianship hearings sometimes last only minutes. Medical investigators and court-appointed examiners often perform perfunctory checks of proposed wards to see if guardianship is needed.”<sup>12</sup>

Yet another: “Competency examinations, when they are done, are performed by people with varying degrees of expertise, including urologists, osteopaths, social workers, nursing home employees and retired court clerks. Their decisions may be based on such tests as the proposed ward's ability to recall the names of the last three presidents or perform simple math problems.”<sup>13</sup>

The second story in the series had a lot more to say about the perfunctory role of attorneys in guardianship cases – if they are even involved at all.<sup>14</sup>

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<sup>11</sup> “Guardians of the Elderly: An Ailing System, Part I – ‘Legally Dead’ by a Troubled System,” Sept. 19, 1987, [AP News Archive](#).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> “Guardians of the Elderly: An Ailing System, Part II– Many Elderly Never Get Their Day in Court,” Sept. 20, 1987. [AP News Archive](#).

“As terrifying as the legal process can be, only 28 states mandate legal representation for people facing guardianship; 12 leave it optional, and 10 require no representation. Other studies made similar conclusions to the AP's finding. A look at Los Angeles courts by the National Senior Citizen Law Center found that 96 percent of proposed wards are not represented. On the other hand, the person seeking to become a guardian is nearly always represented by an attorney whose fee, along with that for the proposed ward's court-appointed attorney, is charged to the elderly person.”<sup>15</sup>

“It's ironic the very person that should be represented at the hearings is not represented by counsel,’ said Paul Zaverella, a Pittsburgh judge. But when attorneys are appointed, sometimes picked from a courthouse list and paid a limited fee, they often serve only as rubber stamps. In Fort Lauderdale, court-appointed attorneys receive \$125 to conduct a brief interview. The attorneys often waive the entire hearing process when they believe guardianship is best for the person.”<sup>16</sup>

“You just talk to them at great lengths for five to 10 minutes and you can tell if they're competent or not,” said Victor DeBianchi Jr., a Hollywood, Fla., attorney assigned by the court to represent Billie. One Fort Lauderdale file contained a medical examination saying an elderly woman was more coherent in the morning than in the evening. Yet the attorney appointed to represent the woman interviewed her at 7:20 p.m., found her incoherent, waived the hearing and, in effect, made the judge's decision.”<sup>17</sup>

“Dr. Dennis Koson, a forensic psychiatrist, looked at 200 guardianship cases in the Broward County, Fla., court system as an associate law professor at Nova University. He found that court-appointed attorneys told judges hearings would not be necessary 90 percent of the time. In 44 percent of the cases, the proposed ward's attorney served a dual role as a member of the examining committee called upon to determine the person's competency.”<sup>18</sup>

“That was shocking,’ said Koson. ‘Their own attorney was making the determination.’ Attorneys in Fort Lauderdale were waiving clients' rights so often that the state appeals court this summer ruled that hearings must be held in all guardianship cases. . . . Attorneys who want to help clients trying to fight guardianship often find themselves at odds with judges who believe lawyers should do what they think best for the proposed ward. ‘The judge wants to know what you're doing in his courtroom wasting time,’ said Steve Feldman, a Philadelphia lawyer. Judge Francis Christie, a Miami probate judge, sees no need for an attorney's advocacy if it is clear the proposed ward needs help. ‘I have told the attorneys that they should not formulate and adopt the Clarence Darrow philosophy,’ he said. ‘If a person is incompetent they should have a guardian. That should be obvious to the attorney once they meet the client.’”<sup>19</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

A guardianship reform movement sprang out of the AP media blitz. Since the focus of the series was on the elderly, the primary thrust of reform efforts was mostly on the same constituency. However, young and middle-aged adults with intellectual and developmental disabilities would also benefit, even if only tangentially.

In the wake of the AP series, the American Bar Association convened a National Guardianship Symposium in 1988. It was informally known as the “Wingspread Conference,” after the Johnson Foundation’s Wingspread Conference Center in Wisconsin where the gathering was held. The conference was jointly sponsored by the ABA’s Commission on the Mentally Disabled and the Commission on Legal Problems of the Elderly. The Conference brought together 38 experts from various disciplines, who agreed on 31 sweeping recommendations.<sup>20</sup>

A second national conference, called “Wingspan,” was convened in 2001. It assessed progress on the recommendations from the first conference and offered a prognosis for the future.<sup>21</sup>

Three years later, the National College of Probate Judges, the National Academy of Elder Law Attorneys, and the National Guardianship Association held a joint meeting in Colorado Springs, Colorado. It focused on implementation of the Wingspan recommendations and established action steps to move them forward.<sup>22</sup>

A Third National Guardianship Summit was convened in 2011, with 92 delegates participating. It focused on reforms in post-appointment guardianship performance.<sup>23</sup>

Out of the 2011 summit came a recommendation for the formation of interdisciplinary guardianship committees in the states.<sup>24</sup> The idea evolved from the Interdisciplinary Guardianship Committee which became a permanent subcommittee of the Ohio Supreme Court. From this foundation, the National Guardianship Network created the concept of “WINGS,” which stands for “Working Interdisciplinary Networks of Guardianship Stakeholders.”<sup>25</sup>

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<sup>20</sup> “Summits on Guardianship,” National Guardianship Network ([Website](#))

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> “Creating and Sustaining Interdisciplinary Guardianship Committees,” Utah Law Review, Vol 2012 No. 3., p. 1667.

<sup>25</sup> “Court-Community Reforms Through WINGS,” National Guardianship Network ([Website](#)). Organizations participating in the Network include: AARP Public Policy Institute, American Bar Association Commission on Law and Aging, the Alzheimer’s Association, National Academy of Elder Law Attorneys, National Disability Rights Network, National Center for State Courts, National College of Probate Judges, and the National Guardianship Association.

In 2013, four states were selected by the Network to receive technical assistance and support in creating and operating a WINGS group (NY, OR, TX, and UT). In 2015, six additional WINGS states were added (DC, IN, MN, MS, WA, and WI).<sup>26</sup>

The agenda and focus of the WINGS group in Washington was recently reviewed by Spectrum Institute. The focus was on improvements affecting petitioners, families, and guardian-ad-litem. No attention was given to improving the statutory and constitutional rights of proposed wards, nor was any priority given to the right of these involuntary litigants to have a court-appointed attorney in each case. Also absent from discussion or review was the need for these attorneys to be properly trained, or for the court to adopt and implement ADA-compliant performance standards for court-appointed attorneys. Respondents to guardianship petitions do not have an automatic right to an attorney in Washington.

The spread of WINGS groups to more states is a positive development. One beneficial aspect is that the groups go beyond the traditional “in house” committees of the judicial branch. They are collaborative efforts that involve experts, community members, and other stakeholders in the guardianship system. However, they are usually administered by staff people within the judicial branch and the funding for them goes to the judicial branch. As a result, the court has a disproportionate influence on the agenda and focus of the group. This could be part of the reason why, in Washington for example, the role of court-appointed attorneys was not on the agenda.

However, despite this institutional bias, the involvement of advocate and community organizations allows for the possibility of broadening the agenda to include issues such as compliance of the court with Title II of the ADA, and the need for the court to adopt rules and standards for the training and performance of court-appointed attorneys who represent litigants with intellectual and developmental disabilities.

### Los Angeles Times

A four-part story published by the Los Angeles Times in November 2005 exposed major problems with the adult guardianship system (called conservatorships) in California. The primary problems examined by the Times involved conservatorships of the estate, usually of elderly conservatees.<sup>27</sup> Reporters examined records of more than 2,400 cases handled by California's professional conservators since 1997. They also conducted hundreds of interviews -- with lawyers, judges and experts as well as conservatees and their loved ones.

“More than half of all conservatorships filed by professionals in Southern California between 1997 and 2003 were granted by the courts on an emergency basis, often bypassing initial assessments by

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<sup>26</sup> Ibid.

<sup>27</sup> “Guardians for Profit: When Family Matters Turn into a Business,” Nov. 13, 2005. ([Website](#))

court investigators and other safeguards designed to protect wards' rights.”<sup>28</sup> The story said that 64 percent of these orders were issued before an attorney was appointed.

The malfeasance of many professional conservators who were appointed by judges to manage the lives and assets of seniors was detailed in the series. The examples sparked outrage in many quarters and quickly gained the attention of Justice Ronald George, the Chief Justice of California. In January 2006, he convened a Probate Task Force which was charged with conducting a comprehensive review of the probate conservatorship system in California.

Over the course of 18 months, the Task Force studied conservatorship practices in California and other jurisdictions. A final report was released in October 2007. It contained 85 recommendations.<sup>29</sup>

One year later, the Administrative Office of the Courts issued a report to the Judicial Council of California about the status of the recommendations.<sup>30</sup> The memo contained a section on “Recommended Best Practices for Improving the Administration of Justice in Probate Conservatorship Cases.” It suggested that, pending adoption by rules of court or new legislation, several recommendations should be voluntarily adopted by local courts.

One recommendation stated: “There should be no appointment of a conservator without a probate investigator’s report and a written report from a court-appointed attorney, unless waiting for a report would cause substantial harm to the proposed conservatee.” An investigation by Spectrum Institute discovered that the Los Angeles Superior Court ignored this recommendation when, a year or two later, it stopped using court investigators in limited conservatorship cases. Court-appointed attorneys did not object to this cost-saving measure, even though it increased the risk of abuse to their clients and violated the mandates of state law which required reports from court investigators in all initial conservatorship proceedings.

Another recommendation stated: “The issue of least restrictive alternative should be discussed thoroughly by court-appointed counsel in their reports and should be the subject of a separate section in court investigators’ reports.” A review by Spectrum Institute of dozens of reports filed by court-appointed attorneys in the Los Angeles Superior Court in 2014 and 2015 revealed that the issue of least restrictive alternatives was not thoroughly discussed in these reports.

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<sup>28</sup> Ibid.

<sup>29</sup> “Recommended Practices for Improving the Administration of Justice in Probate Conservatorship Cases,” [Final Report of the Probate Conservatorship Task Force](#) (October 2007)

<sup>30</sup> “Status of Implementation,” [Memo](#) from Administrative Office of the Courts,” Dec. 9, 2008.



Most court-appointed attorneys in Los Angeles use a pre-approved form when they submit their reports to the court.<sup>31</sup> There is no place on the form for a thorough discussion of the issue of least restrictive alternatives. In reviewing the reports and fee claims submitted by dozens of court-appointed attorneys, it was clear that the attorneys had not conducted a thorough, much less a cursory, investigation of options to conservatorship. Many had not reviewed the report of the regional center or interviewed a regional center representative. Regional centers are nonprofit organizations funded by the state to coordinate services for people with developmental disabilities. There is one place on the form, never checked by any of the reports reviewed by Spectrum Institute, that stated: “ \_\_\_ Should be referred to the Regional Center for alternatives to the conservatorship.”

Another recommendation from the 2007 report and reiterated in the 2008 memo stated: “Attorneys on an appointment panel should have mandatory educational requirements that include a clear delineation of duties. The Judicial Council should collaborate with representatives of the State Bar of California to develop general guidelines as to what is expected by the court from counsel.” Nearly eight years later, as 2015 is fast coming to a close, the Judicial Council has not yet acted on this recommendation – nor has the Los Angeles Superior Court.<sup>32</sup>

Although the series on conservatorships published by the Los Angeles Times in November 2005 made a big splash and got some traction with the judicial and legislative branches of government, the initial excitement dissipated as time passed and as financial considerations became the dominant concern in Sacramento.

Many reforms were put on hold – an interim delay that is beginning to feel more permanent than temporary. When or whether conservatorship reform in California will regain traction is unknown.

### More Recent Media Attention

The work done by Spectrum Institute in California over the past two years has generated a modest amount of media attention.

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<sup>31</sup> [“PVP Counsel’s Report for Developmentally Disabled Adults,”](#) Probate Volunteer Panel, [Website](#), Los Angeles Superior Court.

<sup>32</sup> Spectrum Institute submitted “Proposals to Modify California Rules of Court” to the Judicial Council on May 1, 2015. The [proposals](#) offer new rules on qualifications, continuing education, and performance standards for court-appointed attorneys in limited conservatorship cases. As of September 8, 2015, the Probate and Mental Health Advisory Committee has not yet voted on whether to conduct a formal review of the proposals. The matter may be taken up at the November meeting of the committee. If it decides to proceed, and if the Judicial Council Committee on Rules and Projects concurs, the matter will be studied in 2016. Once the review and comment period is over, the Judicial Council could act on rule changes in 2017, to become effective in 2018. In the meantime, court-appointed attorneys are left to their own devices in terms of whether or not they provide effective assistance of clients with developmental disabilities and whether their performance complies with the Americans with Disabilities Act.

The Associated Press covered our complaint to the United States Department of Justice alleging that the Los Angeles Superior Court was engaging in systemic and routine violations of the voting rights of limited conservatees.<sup>33</sup> The wire story was published on July 10, 2014 by more than 180 media outlets throughout the United States.

The AP story generated additional stories by National Public Radio, Ring of Fire Radio, KFI Radio in Los Angeles, Courthouse News, Disability Scoop, Autism Daily Newscast, and Arise TV in New York. The national media attention given to the Department of Justice complaint helped promote Assembly Bill 1311, which was passed by the California Legislature the following month. Signed into law by Governor Jerry Brown, the clarification of voting rights had the effect of reducing orders of voter disqualification for limited conservatees by 90 percent in Los Angeles County alone.

AB 1311 was viewed as a partial fix to the problem of voter disqualification of people with developmental disabilities in California. It affirmed that conservatees could not be disqualified merely because they had assistance in completing an affidavit of voter registration. A more comprehensive and permanent solution was passed by the California Legislature in August 2015. As of September 8, 2015, SB 589 is on the governor's desk awaiting his signature.

The issue of protecting and restoring the voting rights of conservatees in California was mentioned in a variety of media contexts over the past year – all of which helped create a positive and supportive political climate for reform.<sup>34</sup> The influence of the media on public opinion and the political process cannot be overstated.

Los Angeles Times also gave visibility to the more recent complaint filed by Spectrum Institute with the Department of Justice against the Los Angeles Superior Court.<sup>35</sup> The complaint alleges that the court is violating Title II of the Americans with Disabilities Act because the attorneys it appoints to represent proposed limited conservatees are themselves violating the ADA. The complaint places the responsibility on the court for the ADA and due process violations experienced by these clients. It is the court that selects the attorneys, trains the attorneys, orders fees paid to the attorneys, and allows them to perform services without any performance standards to guide them.

The Los Angeles Daily Journal is the premier source of legal news in California. It is read by judges, attorneys, and legislators. Publication of a news story or an op-ed article in the Daily Journal is one

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<sup>33</sup> “California’s disabled ‘systematically’ kept from voting, report says,” [Los Angeles Daily News](#), July 10, 2014.

<sup>34</sup> “Disabled L.A. man’s desire to vote leads to probe of alleged state violations,” [Los Angeles Times](#), May 22, 2015; Editorial: “An unreasonable restriction on the right to vote,” [Los Angeles Times](#), June 10, 2015; “DOJ investigates California court restrictions on voting by intellectually disabled persons,” [ABA Journal Online](#), May 22, 2015; Column: “Stepping toward more full voting rights,” [Sacramento Bee](#), August 15, 2015.

<sup>35</sup> “Court-appointed attorneys violated Disabilities Act, federal complaint says,” [Los Angeles Times](#), June 27, 2015.

way of educating the legal profession about an issue. Readers of the Daily Journal have been educated about the need for conservatorship reforms over the past year.<sup>36</sup>

## Other Priorities for Disability Organizations

When Spectrum Institute started focusing on guardianship issues a few years ago, our attention was drawn to three specific cases in California. Our experience with those cases prompted us to open a full-blown investigation of the limited conservatorship system in that state. Limited conservatorships are guardianships of the person for adults with intellectual and developmental disabilities. General conservatorships are for people with cognitive disabilities associated with old age, accidents, or medical conditions.

Our preliminary investigation into the limited conservatorship system caused us to convene a conference in Los Angeles. The purpose of the conference was to share our findings and to solicit feedback and suggestions for reform from attorneys, parent advocates, and representatives of disability rights organizations and disability services organizations. It was during the process of convening this conference that we discovered that guardianship reform was not a priority for disability rights advocates in California. We received the same impression from subsequent outreach to national disability rights organizations.

With a few exceptions, it appeared to us that guardianship reform had not made its way to the work plans, or financial budgets, of most disability rights organizations in the United States. They were busy with issues they had prioritized in short term, intermediate, and long-range formal plans. Priority was being given to fending off proposed cuts to disability services, maintaining financial support, ending discrimination in housing and employment, securing equal educational opportunities, improving physical access to buildings and programs, and communication issues for people with speech, vision, and hearing disabilities. With all of these critical issues on their agendas, our invitations to participate in guardianship reform stirred very little interest.

We did notice a growing interest in supported decision making and a growing chorus of activists calling for repeal of guardianship laws. This prompted us to learn more about supported decision

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<sup>36</sup> “Legal Services Program Appears to Violate the ADA,” Op-Ed, [Daily Journal](#), August 17, 2015; “Deja Vu for Disability Rights at the Justice Department,” Op-Ed: [Daily Journal](#), June 26, 2015; “DOJ and Senate to decide when conservatees can vote,” [Daily Journal](#), May 18, 2015; Op-Ed: “Legal System Without Appeals Should Raise Eyebrows,” [Daily Journal](#), February 10, 2015; Op-Ed: “Reform Long Overdue for State Conservatorship Process,” [Daily Journal](#), February 5, 2015; “Conservatorships Reviewed: Judicial committee mulls whether to recommend that state revamp training,” [Daily Journal](#), November 17, 2014.

making and to write several essays and reports on the topic.<sup>37</sup> After considerable reflection and discussion, we endorsed supported decision making as a lesser restrictive alternative to guardianship *when it is feasible and when it contains adequate protections against abuse.*

We support the reform of guardianship laws, not their outright repeal. We believe that the guardianship process – when it comports with due process, is limited to areas of decision making where it is absolutely necessary, and conforms to the requirements of the ADA – has a proper place in the American legal system.

Some disability rights organizations, such as The Arc of California and The Arc of Indiana, for example, have been giving attention to guardianship reform as well as promoting the use of supported decision making. Other disability organizations are involved with WINGS projects in their states. We believe that in the coming years, guardianship reform will find its way into the 5-year plans of the State Council on Developmental Disabilities, and Protection and Advocacy organizations in all 50 states. We also encourage national organizations, such as the Disability Rights Network, TASH, and The Arc of the United States to make guardianship reform a priority – with special focus on making sure that state guardianship procedures comply with the ADA.

We envision disability rights legal organizations and lawyers leading the charge to require the judicial branch in each state to adopt ADA-compliant training and performance standards for court-appointed attorneys who represent clients with intellectual and developmental disabilities in guardianship proceedings. As matters are currently proceeding, guardianship reform efforts through collaborative projects such as WINGS are not focusing on the most fundamental violations of due process and the most important aspects of ADA noncompliance: not all states require the appointment of an attorney in each case, and to our knowledge no state – except for Massachusetts – has formal training and performance standards for attorneys in such cases.

Focusing on mandatory appointment of counsel for each respondent, and mandatory training and performance standards that are ADA compliant, will have an added benefit in terms of promoting the use of supported decision making. Properly trained attorneys who investigate lesser restrictive alternatives as a part of their duties, and who seek the appointment of experts to evaluate and formulate plans for the use of such alternatives, will be performing legal services that also advance the cause of supported decision making.

Disability rights advocates and organizations should not view guardianship reform and supported decision making as mutually exclusive goals. Both goals can and should be pursued simultaneously. Especially with an increasingly aging population, state legislatures are not going to repeal guardianship laws in favor of privatized supported decision making agreements. Supported decision making will augment guardianship as a lesser restrictive alternative.

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<sup>37</sup> “Our Position on Supported Decision Making (SDM): Guardianship Laws Should be Reformed, Not Repealed,” Spectrum Institute, [Website](#).

## Evolution of the Right to Counsel

The right to have an attorney appointed to represent a litigant is based on federal and state constitutional provisions as well as federal and state statutes.

The constitutional right to appointed counsel was first recognized by the United States Supreme Court in 1932 in the context of “special circumstances” death penalty cases.<sup>38</sup> The court ruled that the right to appointed counsel in such cases was rooted in the Sixth Amendment to the United States Constitution which declares that “In all criminal prosecutions . . . the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The court concluded that the Fourteenth Amendment’s guarantee of due process applied this provision of the Sixth Amendment to state court criminal proceedings involving “special circumstances” capital punishment.

Over the years, the Supreme Court built on the foundation established by the Powell decision, expanding the right to appointed counsel in state criminal proceedings to all capital cases,<sup>39</sup> all felony cases,<sup>40</sup> all cases involving imprisonment,<sup>41</sup> and eventually to any case involving a suspended sentence of imprisonment.<sup>42</sup>

The Supreme Court has also applied the federal due process right to appointed counsel to juveniles in delinquency proceedings.<sup>43</sup>

In terms of a due process right to counsel in civil proceedings, the Supreme Court has recognized a presumption in favor of the right to appointed counsel when, if a litigant loses, he or she may be deprived of physical liberty.<sup>44</sup> Three other factors are considered along with this presumption: the private interest at stake, the government’s interest, and the risk that the procedures used in the case will lead to an erroneous decision.

With this presumption as a starting point in the analysis, and knowing the consequences for an involuntary litigant in a civil commitment (mental health) proceeding, the right to appointed counsel

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<sup>38</sup> Powell v. Alabama, 287 U.S. 45 (1932)

<sup>39</sup> Hamilton v Alabama, 368 U.S. 52 (1961)

<sup>40</sup> Gideon v. Wainwright, 372 U.S. 335 (1963)

<sup>41</sup> Argensinger v. Hamlin, 407 U.S. 25 (1972)

<sup>42</sup> Alabama v. Shelton, 535 U.S. 654 (2002)

<sup>43</sup> In re Gault, 387 U.S. 1 (1967)

<sup>44</sup> Lassiter v. Department of Social Services, 452 U.S. 18 (1981)

is guaranteed in civil commitment cases in all states pursuant to judicial decisions or state statutes.<sup>45</sup>

State courts have been recognizing that the consequences to litigants in probate guardianship proceedings are sufficiently severe so as to warrant the mandatory appointment of counsel as a matter of due process. But regardless of whether counsel is mandated by judicial decision or by legislative recognition of basic fairness, the overwhelming majority of states require that proposed wards or conservatees have an attorney appointed to represent them in adult guardianship proceedings. Although the exact number of states that require the appointment of counsel for guardianship respondents is open to interpretation, it is reasonable to conclude that at least 32 states require counsel to be appointed in these proceedings.<sup>46</sup>

Once a litigant has the right to counsel, *the right is meaningless unless the attorney is required to provide effective assistance to the client in the proceeding*. Thus, the United States Supreme Court has recognized a constitutionally protected right to effective assistance of counsel in criminal proceedings.<sup>47</sup>

Regardless of whether the right to counsel in guardianship proceedings is mandated by constitutional or statutory provisions, some state courts have ruled that a guardianship respondent is entitled to effective assistance of counsel as a matter of due process.<sup>48</sup> These courts have found that it would be irrational to conclude that a legislature would have intended to confer a right to counsel and also have intended to allow the attorney to act in a deficient manner causing harm to the client.

The duty of counsel to perform in an effective and professional manner is implicit in the mandatory appointment of counsel.<sup>49</sup> Once a statutory right to counsel has been conferred, “a proposed conservatee has an interest in it which is protected by the due process clause of the Constitution.”<sup>50</sup>

It appears that in a significant number of states, the appointment of counsel for guardianship

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<sup>45</sup> [Status Map](#), National Coalition for a Civil Right to Counsel

<sup>46</sup> [Table](#): “Representation and Investigation of Guardianship Proceedings,” ABA Commission on Law and Aging (July 2014) [ABA table shows the mandatory appointment of counsel in 32 states]; [Website](#): “Guardianship Laws by State,” Jenny Hatch Project (2012) [website shows the mandatory appointment of counsel in 37 states and D.C.]; [Status Map](#), National Coalition for a Civil Right to Counsel [shows the mandatory appointment of counsel in 42 states]

<sup>47</sup> *Strickland v. Washington*, 466 U.S. 668 (1984)

<sup>48</sup> *Conservatorship of Person John*, 48 Cal.4th 131 (2010); *Commonwealth v. Patton*, 458 Mass. 119 (2010)

<sup>49</sup> *Conservatorship of Benvenuto*, 180 Cal.App.3d 1030, 1037, fn. 6 (Cal. App. 1986).

<sup>50</sup> *Conservatorship of David L.*, 164 Cal.App.4th 701, 710 (Cal. App. 2008)

respondents is discretionary with the court. Some states condition the appointment of counsel upon the request for an attorney by the respondent.<sup>51</sup> Such a provision would appear to be a violation of due process in that it is irrational to condition such a crucial benefit on a request that the litigant is most likely incapable of making.<sup>52</sup>

The court knows that the respondent who it is summoning to a guardianship proceeding is alleged to have serious cognitive and/or communication disabilities. The court also knows that the petitioner, who presumably knows the respondent very well, believes the respondent lacks the capacity to understand and make important decisions. Under such circumstances, it is irrational to assume that the respondent would know that he or she has a right to counsel or would understand the importance of being represented by an attorney in the proceeding.

However, even if such an assumption were not a violation of due process, it should constitute a violation of the court's duties under Title II of the Americans with Disabilities Act. Without the appointment of an attorney, an involuntary litigant with serious cognitive or communication disabilities would not be able to have meaningful participation in the guardianship proceeding. Such a litigant would lack the ability to defend his or her rights or to advocate for his or her freedom without having the court provide ancillary supports and services. The appointment of counsel is the most effective way, perhaps the only way, to ensure access to justice for guardianship respondents.

Since the court knows these respondents likely have serious cognitive and communication disabilities, and since the court knows or should know they likely lack the ability to request the appointment of counsel, the court should have a duty under the Americans with Disabilities Act to appoint counsel even without such a request.

A task force convened by the Chief Justice of California in 2006 had this to say about an ambiguity in California law as to whether counsel should automatically be appointed in every probate guardianship case: "It is the task force's view that the Judicial Council should adopt a policy that an attorney should be automatically appointed for the proposed conservatee in connection with every petition to establish a conservatorship. A basic premise of the current statute is that counsel be appointed for those who request appointment. The reality is that if the individual truly lacks capacity and cannot request an appointment of counsel, that is when advocacy is most needed."<sup>53</sup>

The implementation report added: "The task force concludes that practices in appointing counsel

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<sup>51</sup> Colorado, Hawaii, Illinois, Maine, Massachusetts, Michigan, Ohio, Rhode Island, South Dakota, Tennessee, and Virginia [per statutory language found on the [website](#) of the Jenny Hatch Project, fn. 46]

<sup>52</sup> "[Users Guide to Reference Materials](#)," ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases, p. 39. Also: [Document 29](#), "Reference Materials – Part II"

<sup>53</sup> [Report](#), "Status of Implementation," Administrative Office of the Courts (Dec. 9, 2008)

vary widely within the state, with many jurisdictions appointing attorneys only when mandated and others appointing attorneys in every instance. The needs of conservatees for representation do not vary by physical location within the state and should be met uniformly. This was the most far-reaching policy issue that the task force grappled with.”<sup>54</sup>

The remarks on this issue concluded: “In forming its recommendation, the task force likened the situation of a conservatee to that of others within the judicial system. Conservatees are as vulnerable as dependents in our juvenile dependency system, are as at risk as minors in our family law system, and are as subject to deprivation of personal liberty and property as defendants in our criminal law system. Putting all of these factors together, it became apparent that the most effective way of affording protection to conservatees is to require the appointment of counsel in all cases. This need to safeguard the rights of the conservatee, the task force decided, far outweighs the arguments that it would be too costly or not necessary in all cases.”<sup>55</sup>

The Conference of State Court Administrators has adopted a position favoring the mandatory appointment of counsel in all guardianship cases.<sup>56</sup> “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.”<sup>57</sup> This echoes the position taken by the American Bar Association in 1988.<sup>58</sup>

In 2001, a national conference cosponsored by the American Bar Association, National Academy of Elder Law Attorneys, National College of Probate Judges, National Guardianship Association, the Arc of the United States, and the Center for Social Gerontology, recommended that “Counsel always be appointed for the respondent and act as an advocate rather than as a guardian ad litem.”<sup>59</sup>

Whether premised on constitutional due process or on the court’s duty under Title II of the ADA, respondents in guardianship proceedings should be automatically entitled to the appointment of counsel so they have access to justice in these cases regardless of the state in which they reside.

“The Fourteenth Amendment to the United States Constitution . . . ensure[s] that an individual may

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> [“The Demographic Imperative: Guardianships and Conservatorships,”](#) Conference of State Court Administrators (December 2010)

<sup>57</sup> Ibid.

<sup>58</sup> “Guardianship: An Agenda for Reform,” [Recommendations](#) of the National Guardianship Symposium and Policy of the American Bar Association (1989); ABA Annual Meeting, [Resolution](#) by House of Delegates (1987)

<sup>59</sup> [Wingspan](#): Second National Guardianship Conference.



not be deprived of life, liberty or property without due process of law.”<sup>60</sup> A meaningful opportunity to be heard – the core of due process – may require the appointment of counsel regardless of whether an action is labeled criminal or civil.<sup>61</sup>

The time has come for the United States Department of Justice to clarify that the ADA entitles guardianship respondents to the appointment of counsel. Statutes that premise the appointment of counsel upon a request from the litigants should be considered a violation of Title II of the ADA.

## Due Process and Guardianship Cases

Due process is the legal requirement that the government may not deprive a person of life, liberty, or property without respecting the legal rights to which the person is entitled. The legal rights may stem from requirements of the federal or state constitutions or from applicable state or federal statutes.

In Anglo-American jurisprudence, the principle of due process was developed from Clause 39 of the Magna Carta in England, in which King John promised that “[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”<sup>62</sup> “The term ‘law of the land’ was early the preferred expression in colonial charters, which gave way to the term ‘due process of law,’ although some state constitutions continued to employ both terms.”<sup>63</sup>

Courts have interpreted due process as encompassing two distinct protections: procedural due process and substantive due process. Procedural due process, as the name implies, guarantees litigants basic fairness in the manner in which legal proceedings are conducted. Substantive due process protects against arbitrariness in legislative mandates and judicial rulings. Both aspects of due process have implications for guardianship proceedings.

Some 20 years ago, the Iowa Supreme Court was very direct in its conclusion that involuntary litigants in guardianship proceedings are constitutionally entitled to due process of law.<sup>64</sup> Quoting extensively from a law review article published in the University of Arkansas Law Review, the court wrote: “One commentator has described guardianship this way: ‘Guardianship is a legal mechanism

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<sup>60</sup> *Salas v. Cortez*, 24 Cal.3d 22, 26-27 (1979)

<sup>61</sup> *Ibid.*

<sup>62</sup> "[CRS Annotated Constitution: Due Process](#)," Cornell University Law School, Legal Information Institute.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Matter of Guardianship of Hedin*, 528 N.W. 2d 567 (Iowa 1995)

for substitute decision making which comes in the guise of benevolence, as it was originally intended to protect the disabled individual and his property from abuse, dissipation of resources, and the effects of designing persons. It is an exercise of the state's role as *parens patriae* for the mentally and physically disabled. Yet, guardianship, in reality, reduces the disabled person to the status of a child. Few incompetent persons ever truly benefit from the guardianship system as practiced in ... most ... states.' (Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights For the Mentally Disabled*, U.Ark.L.Rev.L.J. 485, 485-86 (1981))”

Again quoting from the law review article, the Iowa court found itself in agreement with courts in other states that due process protections must apply to adult guardianship proceedings: “Recently, several courts have agreed with commentators that a guardianship ‘involves significant loss of liberty similar to that present in an involuntary civil commitment for treatment of mental illness.’ In re *Guardianship of Reyes*, 152 Ariz. 235, 236, 731 P.2d 130, 131 (Ariz.Ct.App.1986); see also *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452, 2462, 73 L. Ed. 2d 28, 42 (1982) (mentally retarded person committed to state institution has constitutionally protected right to reasonable care and safety, reasonably non-restrictive confinement, and reasonable training ‘to ensure his safety and to facilitate his ability to function free from bodily restraints’); *Heller v. Doe by Doe*, \_\_\_ U.S. \_\_\_, \_\_\_, 113 S. Ct. 2637, 2645, 125 L. Ed. 2d 257, 274 (1993) (‘It is true that the loss of liberty following commitment for mental illness and mental retardation may be similar in many respects.’) (mentally retarded have same liberty interests as mentally ill and may not be constitutionally committed unless dangerous); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 492 (D.N.D. 1982) (‘[M]entally retarded residents [of state institutions] possess a right to free association guaranteed under the First Amendment.’); In re *Guardianship of Braaten*, 502 N.W.2d 512, 518 (N.D.1993) (‘The intrusion upon individual liberty by the involuntary imposition of a guardianship upon an incapacitated ward sufficiently resembles the involuntary commitment of a mental health patient to call for similar careful standards of decision making.’); In re *Boyer*, 636 P.2d 1085, 1090 (Utah 1981) (‘Although the restrictions on, and deprivation of, personal freedom by appointment of a guardian are less in extent and in intrusiveness than by involuntary commitment, nevertheless, the loss of freedom may be substantial.’); *Functional Evaluation*, at 214 (‘There can be little doubt that there is considerable potential for violation of the defendant's constitutional rights in the guardianship process.... Although the determination of incompetency is in no way a criminal proceeding, the result in terms of the defendant's liberty interests may be very similar. He may be deprived of control over his residence, his associations, his property, his diet, and his ability to go where he wishes.’)”<sup>65</sup>

The court noted that the stigma associated with an adjudication of incapacity is an added reason to require due process in guardianship proceedings, writing: “The stigma of incompetence has been compared to that of mental illness. The feeling is that incompetence ‘may be even more egregious since it implies that one is mentally defective, untrustworthy, and irresponsible.’ Dicker, at 488. In addition to this stigma, an adjudication of incompetence causes a multitude of legal disabilities. The adjudication adversely affects an individual's reputation, right to contract, right to enter into chosen occupations, and right to engage in all of the other orderly pursuits of free persons held to involve

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<sup>65</sup> Ibid.

protected liberty interests. . . . This stigma of incompetence is still another reason to invoke procedural due process guarantees in guardianship proceedings.”<sup>66</sup>

The court concluded its discussion by recognizing: “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.”<sup>67</sup>

“The consequences, and concurrent due process requirements, when the ward is a person with mental retardation or developmental disability—rather than an elderly person—are the same. As one federal court noted, ‘Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process’ (*Heryford v Parker*, 396 F2d 393, 396 [10th Cir 1968]).”<sup>68</sup>

The application of due process to guardianship proceedings has implications for the role of court-appointed counsel representing a respondent.

For example, the Missouri Supreme Court has ruled that due process requires that appointed counsel in a guardianship proceeding has duty to protect the rights and interests of the client. Counsel must engage in affirmative efforts to investigate and submit all relevant defenses or arguments.<sup>69</sup> The court wrote: “[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.”<sup>70</sup>

The California Court of Appeal has ruled that constitutional due process is violated when an attorney, without express consent of and waiver by the client on the record, stipulates to a judgment of conservatorship. Discussing an earlier pronouncement on the issue, the court wrote: “We explained that ‘[B]y accepting the stipulated judgment, the court allowed Short to waive Christopher's right to a court hearing on the issues of placement, disabilities, and powers of the conservator. The role of an attorney in litigation is to ‘[protect] the client's rights and [achieve] the

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> In the Matter of the Guardianship of Mark C.H. (Surrogates Court, NY 2010) 28 Misc.3d, at 766.

<sup>69</sup> In re Link, 713 S.W.2d 487 (Mo. 1986)

<sup>70</sup> Ibid.

client's fundamental goals.' [Citation.] In carrying out this duty, the attorney has the general authority to stipulate to procedural matters that may be necessary or expedient for the advancement of [the] client's interest[s].' [Citation.] However, the attorney may not, without the consent of his or her client, enter into an agreement that 'impair[s] the client's substantial rights or the cause of action itself.'"<sup>71</sup>

The application of due process standards to guardianship proceedings is so universally accepted that it was included by the National College of Probate Court Judges in "National Probate Court Standards" published by the organization in 2013.<sup>72</sup>

The publication states: "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."

The standards also call for clear and convincing evidence to prove incapacity and to show that less intrusive alternatives are not feasible. They also discuss the role of professionals and experts in assessing these issues.<sup>73</sup>

## The ADA and Guardianship Cases

The right of people with developmental disabilities to have meaningful access to justice has underpinnings in constitutional doctrines and statutory mandates.<sup>74</sup>

The primary source of the right to have meaningful access to justice is the Due Process Clause of the Fourteenth Amendment.<sup>75</sup> The Due Process Clause requires the states to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial

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<sup>71</sup> Conservatorship of Tian L., 149 Cal.App.4th 1022 (Cal. App. 2007)

<sup>72</sup> "[National Probate Court Standards](#)," National College of Probate Court Judges (2013) These standards were endorsed by the Conference of Chief Justices in a [resolution](#) adopted by it in 2013.

<sup>73</sup> Ibid.

<sup>74</sup> This section of the White Paper has been adapted from the section on "[The Right of Access to Justice](#)," found in a report submitted on May 1, 2015 to the Judicial Council of California.

<sup>75</sup> *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.*, 519 U.S. (1996).

proceedings.<sup>76</sup>

The United States Supreme Court has identified the Due Process Clause as the basis of congressional authority to enact the Americans with Disabilities Act (ADA). In doing so, the Court noted “The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.”<sup>77</sup>

Title II of the Americans with Disabilities Act applies to the operations of state and local governments.<sup>78</sup> Title II requires that “No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”<sup>79</sup>

The requirements of Title II apply to state and local courts. The United States Supreme Court made the following observations in upholding the application of the ADA to state courts: “Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility . . . . [A]s it applies to the class of cases implicating the fundamental rights of access to the courts, [Title II] constitutes a valid exercise of Congress’s . . . authority to enforce the guarantees of the Fourteenth Amendment.”<sup>80</sup>

Section 504 of the Rehabilitation Act of 1973, which predates the ADA, was the first civil rights legislation in the United States to guarantee that people with disabilities have access to government services. It applies to all government agencies that receive federal financial assistance, including state and local courts. Its provisions are nearly interchangeable with the ADA. However, Section 504 has an additional remedy beyond injunctive relief or damages. If a violation is found to occur, and compliance cannot be obtained through a consent decree, the Department of Justice can terminate any federal financial assistance the state or local court may be receiving.<sup>81</sup>

Title II requires courts to modify the usual court policies and practices so that people with disabilities

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<sup>76</sup> Ibid.

<sup>77</sup> *Tennessee v. Lane*, 541 U.S. 509, 531 (2004)

<sup>78</sup> ADA Title II Technical Assistance Manual, Department of Justice ([Exhibit 29](#) in Reference Materials - Part II)

<sup>79</sup> ADA Title II Regulations, Department of Justice ([Exhibit 28](#) in Reference Materials – Part II)

<sup>80</sup> *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 1993-4 (2004)

<sup>81</sup> “Application of Section 504 to State Court Services” ([Exhibit 28](#) in Reference Materials – Part II)

have meaningful access to justice. This requirement involves more than removing architectural barriers that impair access to courthouses, courtrooms, and other court facilities for people with mobility disabilities. It involves more than providing sign language interpreters for litigants, witnesses, and spectators who are Deaf or hard of hearing. All types of disabilities are covered by Title II, including intellectual and developmental disabilities. The most difficult task for courts in terms of ADA compliance is making modifications of policies and practices in order to accommodate people with cognitive disabilities.<sup>82</sup>

Courts have an obligation to modify policies and practices in order to provide meaningful access to justice for people with cognitive and other mental disabilities.<sup>83</sup> “The single most important means of ensuring access for people with cognitive disabilities is to educate and motivate court staff so they can provide effective assistance.”<sup>84</sup> In guardianship proceedings, court investigators and court-appointed attorneys need to be properly educated on how to interact with and communicate with people who have developmental disabilities.

All of the operations of the state and local courts are subject to section 504 scrutiny, including the administrative decisions of judges.<sup>85</sup> Establishing qualifications and continuing education requirements for attorneys who are appointed to represent people with developmental disabilities in guardianship proceedings is an administrative decision. The content of training programs and the credentials of presenters at such programs are also administrative decisions.

“The presence of cognitive disabilities raises many opportunities for miscommunication, misinformation and inadequate representation. Some communication difficulties may adversely affect the rights of persons with cognitive disabilities and the integrity of the judicial process.”<sup>86</sup> “Risks of inadequate representation increase when the client has cognitive disabilities.”<sup>87</sup>

“Until lawyers are sensitized to and educated on the needs of people with mental disabilities, they

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<sup>82</sup> “A Meaningful Opportunity to Participate: A Handbook for Georgia Court Officials on Courtroom Accessibility for Individuals with Disabilities.” (See [Exhibit 28b](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>83</sup> “Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts” (2006). (See [Exhibit 28a](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>84</sup> Ibid.

<sup>85</sup> “Access to the Courts: A Blueprint for Successful Litigation Under the Americans with Disabilities Act and the Rehabilitation Act,” p. 346. (See [Exhibit 28c](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>86</sup> “Pursuing Justice for People with Cognitive Disabilities,” Partners in Justice. (See [Exhibit 28e](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>87</sup> Ibid.

will be ill-equipped to provide adequate representation.”<sup>88</sup> Providing disability accommodations and modifying policies and practices to ensure equal access to justice are an integral part of the process.<sup>89</sup>

The Department of Justice (DOJ) has jurisdiction to receive complaints and conduct investigations into violations of Title II that occur in “All programs, services, and regulatory activities relating to . . . the administration of justice, including courts.”<sup>90</sup> A complaint may be filed by an individual who believes that he or she *or a specific class of individuals* has been a victim of a Title II violation.<sup>91</sup>

DOJ regulations explain that the provisions of Title II may be interpreted by reference to analogous provisions of Title I which regulates employment practices.<sup>92</sup> Provisions in Title I are instructive as to whether an entity must only respond to requests for accommodation or whether it has an affirmative duty to provide an accommodation even without request.

As a general rule, under Title I an employer must only provide an accommodation when an employee has made a request for one. However, there is an exception to the general rule: no request is needed if the employee’s condition “makes it obvious” that an accommodation is required, or “a condition renders the employee incapable of making a request.”<sup>93</sup>

Publications of the Equal Employment Opportunity Commission reinforce the principle that employers must provide accommodations even when no request has been made if the employer: (1) knows the employee has a disability; (2) knows or has reason to know that the employee is experiencing workplace problems because of the disability; and (3) knows or has reason to know that

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<sup>88</sup> “I’m OK – You’re OK: Educating Lawyers to ‘Maintain a Normal Client-Lawyer Relationship’ with a Client with a Mental Disability,” *Journal of the Legal Profession*, 28 J. Legal. Prof. 65 (2003-2004). (See [Exhibit 28d](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>89</sup> “Zealous Advocacy for the Defendant in Adult Guardianship Cases,” *Clearinghouse Review, Journal of Poverty Law*, Vol. 29, No. 9 (January 1996) (See [Exhibit 43](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>90</sup> “Title II Regulations, Supplementary Information.” (See [Exhibit 27](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* Title II Regulations, Section 35.103 – Relationship to other laws.

<sup>93</sup> *Cailler v. Care Alternatives of Massachusetts* (U.S.D.C. Mass. 2012) Civil Action No. 09-12040-DJC. (See [Exhibit 25](#), Report to the Judicial Council of California, May 1, 2015.)

the disability prevents the employee from requesting a reasonable accommodation.<sup>94</sup> The example in the guidance memo involves an employee with an intellectual disability. Another publication of the EEOC, in question and answer format, explains that an accommodation for an employee with an intellectual disability is required even if no request is made by the employee.<sup>95</sup>

A Title II Technical Assistance Manual published by the Department of Justice contains provisions pertaining to the obligations of a government program to provide accommodation for a known mental disability. The manual explains that when a recipient of government benefits or services has a mental disability that is known to program personnel, the agency has an obligation to provide reasonable modifications to its policies and practices to ensure that the person is not denied services or benefits. Requiring someone with a mental disability to request an accommodation would defeat the purposes of Title II.<sup>96</sup>

The provisions of Section 504 and the provisions of Title II of the ADA apply to state guardianship proceedings. People with developmental disabilities are involuntarily drawn into complicated court proceedings when a petition is filed in court and a notice is served on them. By the very nature of the proceedings, as amplified by allegations in the petition, the court knows that guardianship respondents have a variety of disabilities, including and especially those that impair their ability to reason and understand. Therefore, the mere filing of a petition puts the court on notice that it has an affirmative duty to assess the needs of the proposed limited conservatee and to take actions to ensure that he or she is given meaningful access to justice.

It is beyond the scope of this report to explore all of the modifications to policies and practices the court, its employees, and its agents must take to fulfill the requirements of federal disability laws. But regardless of the details, steps must be taken. The judges are in charge of the operations of the court systems that process guardianship cases. Court investigators and court-appointed attorneys respond to the administrative directives of the court. Because of their employment status or their status as court-appointed advocates, these personnel are agents of the court. Therefore, their actions implicate the court in potential Title II and section 504 violations. The actions of such agents would also implicate the court in civil rights violations under color of state law.<sup>97</sup>

The training and performance standards for court-appointed attorneys contained in this report will help state and local courts to fulfill their *sua sponte* obligations under these federal laws. The burden

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<sup>94</sup> “EEOC Enforcement Guidance,” No. 915.002 (2002). (See [Exhibit 24](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>95</sup> “Questions and Answers about Persons with Disabilities in the Workplace and the Americans with Disabilities Act,” EEOC, Question 10. (See [Exhibit 24](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>96</sup> “Title II Technical Assistance Manual,” Section II-3.61000 Reasonable modifications. (See [Exhibit 23](#), Report to the Judicial Council of California, May 1, 2015.)

<sup>97</sup> 42 U.S.C. 1983.



cannot be placed on vulnerable adults with developmental disabilities who are required by court order to participate in guardianship proceedings.

State courts can delegate some of their responsibilities to the court-appointed attorneys who serve at the pleasure of the court.<sup>98</sup> Such delegation, with appropriate oversight, can occur through standards of judicial administration. It can also occur by amending rules of court pertaining to qualifications of court-appointed attorneys in guardianship cases, continuing education requirements, ADA performance standards, and ethical and professional standards. Mandatory training programs for such attorneys, certified for quality and scope, are essential to this process.

A review of available literature on this subject suggests that state courts generally have not adopted training and performance standards for court-appointed attorneys in guardianship cases that would comply with the requirements of the ADA. Neither legal literature nor court decisions have been found that discuss the applicability of the ADA to guardianship proceedings.

Training materials on the topic of ADA compliance by court-appointed attorneys who represent clients with intellectual and developmental disabilities have not been found. No case has been identified in which a court-appointed attorney has been disciplined for failure to provide effective assistance to a client in a guardianship proceeding.

Although state courts are required to provide access to justice for litigants with cognitive disabilities by appointing and to train attorneys to represent such litigants, we have not discovered information on any investigations by the DOJ into ADA violations by courts for violations of these duties.

It appears that when it comes to fulfilling their duties under Title II of the ADA to provide access to justice to involuntary litigants in guardianship proceedings, state courts would benefit greatly by obtaining guidance from the United States Department of Justice. This White Paper, Reference Materials, and User's Guide, are intended to assist the Department of Justice in developing Title II guidelines for state courts in connection with the training and performance of the attorneys appointed by such courts in these cases.

While the DOJ is considering how best to use the standards proposed in this paper, state courts can take the initiative to review these materials and to voluntarily adopt such standards without further delay. The Americans with Disabilities Act was passed by Congress 25 years ago. The time for

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<sup>98</sup> The "ADA Technical Assistance Manual" published by the Department of Justice explains that a public entity cannot avoid its obligations and liability under Title II by delegating services to a private individual or enterprise. (See excerpts from Document 29, [User's Guide](#), pp. 39-40) For example: "A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to Title III and must meet those obligations. The State department of parks, a public entity, is subject to Title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its Title II obligations, even though the restaurant is not directly subject to Title II."

compliance by state courts with ADA requirements for access to justice by guardianship respondents is long overdue.

The standards contained in the following pages could be characterized as “due process *plus*.” At a minimum, guardianship respondents are entitled to legal services that comply with the requirements of due process of law in such proceedings. When the mandates of the ADA are added to these minimum due process duties – the ADA requires that *extra* measures be taken by these attorneys to ensure access to justice for their clients – the result is a hybrid standard we call “due process *plus*.”

## The Duty to Ensure Safety

This section discusses the prevalence of abuse of people with developmental disabilities and its relationship to guardianship. It reviews federal court decisions on the duty of the government to ensure the safety of wards who are under its care and supervision.

Applying this data and these precedents to guardianship proceedings underscores the duty of the court and the attorneys it appoints to conduct thorough investigations of the proposed guardians and of the homes into which they will place the respondent, in order to reduce the risk of abuse to the respondent. Failure to fulfill this duty properly can have devastating consequences to the respondent, in terms of physical or emotional harm or even death. Negligence by the attorney in vetting the proposed guardian or the safety of the anticipated residential setting could be grounds for professional discipline or civil liability to the attorney.

The mindset of the judges and attorneys involved in guardianship proceedings has historically been paternalistic, often assuming the motivations of the petitioners in the proceedings are benevolent. Petitioners and the proposed guardians have been assumed to be “good guys.” Missing from the proceedings is a genuine concern about the risk of abuse to guardianship respondents.

Statistics on abuse of people with developmental disabilities are alarming.<sup>99</sup> It is likely that most guardianship respondents have been victims of abuse, either as a child or as an adult or both. As a result, most guardianship respondents are trauma victims. The guardianship system, therefore, should be administering “trauma informed justice.”<sup>100</sup>

Perpetrators are unlikely to be strangers. Rather, they are people who are in the close circle of support of the respondent. Perpetrators may be a parent, stepparent, household member, close

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<sup>99</sup> “Abuse of People with Disabilities: Victims and Their Families Speak Out,” [Report](#) on the 2012 National Survey on Abuse of People with Disabilities. (Disability and Abuse Project, Spectrum Institute 2013)

<sup>100</sup> “Trauma Informed Justice: A Necessary Paradigm Shift for the Limited Conservatorship System” (Spectrum Institute 2014) (See [Document 25](#), “[User’s Guide](#),” p. 29)

relative, or caregiver. Given these realities, and considering that respondents are placed under the control of someone in this category, it is imperative that a thorough investigation be conducted about the suitability of the proposed guardian and all persons who the guardian will allow to have close contact with the respondent.

"Trauma-informed justice" is a relatively new concept in the law. It has been discussed and applied in the context of criminal, family, and juvenile courts. Not so with respect to the administration of justice in probate courts. Many mental health and substance abuse professionals have used a trauma-informed approach for some time now in counseling and therapy programs. It is in this context that much has been written on the subject.

"A *trauma-informed approach* refers to how a program, agency, organization, or community thinks about and responds to those who have experienced or may be at risk for experiencing trauma; it refers to a change in the organizational culture. In this approach, all components of the organization incorporate a thorough understanding of the prevalence and impact of trauma, the role that trauma plays, and the complex and varied paths in which people recover and heal from trauma."<sup>101</sup>

Three elements occur in a trauma-informed approach: (1) realizing the prevalence of trauma in the population being served; (2) recognizing how trauma affects this population; and (3) responding by putting this knowledge into practice in the delivery of services.<sup>102</sup>

A trauma informed system must realize the widespread impact of trauma, recognize the signs and symptoms of trauma, and integrate knowledge about trauma into policies, procedures, and practices.

This is not to suggest that judges, attorneys, and investigators should automatically view each parent or relative who wants to be a guardian as a likely abuser. They should, however, interact with a prospective guardian in a procedural context of caution and verification. Attorneys should realize that their failure to properly vet the proposed guardian and the prospective residence of the respondent may result in lasting harm to their client.<sup>103</sup>

More will be said about this in the section discussing the recommended training and performance standards for court-appointed attorneys. However, before moving on to other issues, a warning about legal duties and potential liabilities for failure to protect is in order. Federal precedents on duties and liabilities have been developed primarily in the context of children and adolescents who have been placed under the protection of the state. However, since adults placed under guardianship are just

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<sup>101</sup> Website, Substance Abuse and Mental Health Services Administration, "Trauma Definition: Part Two: A Trauma Informed Approach."

<sup>102</sup> SAMHSA, *supra*.

<sup>103</sup> "The Case of Michael P." (See [Document 34](#), "[User's Guide](#)," p. 48)

as vulnerable, these precedents should apply to guardianship placements as well.<sup>104</sup>

The California Law Revision Commission has issued a report that discusses the duty of the state to provide a safe environment to persons with intellectual disabilities over whom the state gains control of care and custody.<sup>105</sup> Although the discussion occurs in the context of civil commitment to a mental health facility, the due process principles should apply to other types of confinement.

For example, a person placed under a conservatorship or guardianship usually loses the right to make decisions regarding his or her place of residence. A guardian is appointed by the court and the person is required to reside in a location chosen by the guardian. This loss of liberty should be considered tantamount to confinement for purposes of imposing a duty on the state to ensure that the residence is safe.

Although the following cases involved the state placing children into foster care, the same “special relationship” between the state and an adult with a disability exists in adult guardianship proceedings. The state turns decision making over to a third party who is appointed by the state. With authority conferred by the state, that person controls the life of the adult, including decisions regarding where the adult lives. For all practical purposes, the adult is in state custody, even if he or she is living in a residence or group home and not an institution.

When the power and control is given by the state to a third party over the life of an adult with cognitive disabilities who is extremely vulnerable and at risk of abuse, the state has a duty – similar to its duty to children and adolescents placed into foster care – to take reasonable steps to make sure the decision maker is able to provide a secure and safe environment. When such a custodial situation may continue for years, even decades, the “special relationship” created between the state and the adult in question requires the state to implement measures to ensure safety for the adult.

Numerous federal precedents on this issue are found in the User’s Guide to the Reference Materials that accompany this paper.<sup>106</sup>

The ADA requires state courts to provide litigants with developmental disabilities access to justice. These litigants are entitled to the benefit of statutory and constitutional protections that are intended to ensure their safety while they are under the control and care of the state. When a guardianship order is entered, the litigant is placed under the control and care of the state. The state authorizes a third party to make major life decisions for the adult. As the California Legislature has observed,

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<sup>104</sup> “Conservatees are as vulnerable as dependents in our juvenile dependency system, are as at risk as minors in our family law system . . .,” Probate Task Force, State of California, [Report](#), “Status of Implementation,” Administrative Office of the Courts (Dec. 9, 2008)

<sup>105</sup> “Uniform Adult Guardianship and Protective Proceedings Act: Constitutional Constraints,” [Memorandum 2012-51](#) (Dec. 10, 2012)

<sup>106</sup> “State’s Duty to Ensure Safety of Adults in Guardianship” (See [Document 30](#), “[User’s Guide](#),” p. 41)

dependent adults are unable to protect themselves.<sup>107</sup> Therefore, the state has the duty to do so. It must screen the person into whose control the adult is being placed by the state. It must also put into place procedures to monitor that custodial setting on an ongoing basis to ensure that the adult remains safe. Providing these adults with access to justice requires the state to use due diligence in selecting guardians who do not pose a risk of abuse to the adult.

Court-appointed attorneys have a constitutional and statutory duty to provide effective assistance to their clients. This places on them a duty, especially since they are appointed by the court, to conduct thorough investigations into the prospective guardians and the households into which their clients may be placed. Failure to do so would constitute gross negligence and could cause substantial harm to their clients. They also have a duty to conduct proper investigations when specific allegations of abuse are raised. Conducting a pro forma investigation, or a negligent one, could result in irreparable harm to their clients.

Since Title II places a duty on the court to take affirmative steps to provide access to justice for proposed wards or conservatees, and since the court is delegating much of its responsibility to court-appointed counsel, the court must ensure that these attorneys are properly trained in substantive and procedural issues involving abuse of people with developmental disabilities. It must also provide performance standards on these issues in order to give the attorneys an incentive to perform their functions properly. There must also be some form of monitoring, even if only consistent audits of samples of cases to ensure compliance.

## Review of Precedents and Recommendations

This section reviews court precedents and policy recommendations regarding due process requirements for attorneys representing clients in civil proceedings where capacity is called into question and where elements of personal liberty are at stake. Some precedents arise out of specific cases, while others were developed as “best practices” guidelines to further the goals of due process.

### **Montana**

The strongest, most direct, and detailed set of due process standards governing the qualifications and performance of attorneys representing clients in mental health proceedings were announced some

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<sup>107</sup> “The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.” (Penal Code Section 368(a)) Furthermore, persons with developmental disabilities shall have “a right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect.” (Welfare and Institutions Code Section 4502(h))

14 years ago by the Montana Supreme Court.<sup>108</sup> Although they were articulated in the context of a civil commitment proceeding, these standards should apply as well to guardianship proceedings where fundamental aspects of liberty are involved.

The following excerpts are taken from the court's opinion.<sup>109</sup>

Qualifications for Appointment. “To be eligible for appointment, attorneys should have specialized course training, or have received supervised on-the-job training in the duties, skills, and ethics of representing civil commitment respondents . . . At a bare minimum, counsel should possess a verifiably competent understanding of the legal process of involuntary commitments, as well as the range of alternative, less-restrictive treatment and care options available.”

Initial Investigation. “[B]efore and after the required meeting with a patient . . . counsel should conduct a thorough review of all available records. Such inquiry must necessarily involve the patient's prior medical history and treatment, if and to what extent medication has played a role in the petition for commitment, the patient's relationship to family and friends within the community, and the patient's relationship with all relevant medical professionals involved prior to and during the petition process. In sum, we conclude that the rights afforded a patient-respondent . . . without the assistance of diligent, competent, and well-informed counsel at the commencement of the critical investigatory stage of the involuntary commitment process, would have little meaning. . . Prior to or following the initial client interview, counsel should also attempt to interview all persons who have knowledge of the circumstances surrounding the commitment petition, including family members, acquaintances and any other persons identified by the client as having relevant information, and be prepared to call such persons as witnesses. . . Again, counsel should freely and liberally request a reasonable amount of time for such an investigation prior to the hearing or trial on the petition . . .”

Client Interview. “Counsel ‘shall meet with the respondent, explain the substance of the petition, and explain the probable course of the proceedings.’ . . . ‘prehearing services of an attorney are an indispensable prerequisite for protecting a respondent's interests.’ . . . See also Rule 1.2(a), Montana Rules of Professional Conduct (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.14 (providing that when a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client). . . The initial client interview should be conducted in private and should be held sufficiently before any scheduled hearings to permit effective preparation and prehearing

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<sup>108</sup> [Mental Health of K.G.F.](#), 29 P.3d 485 (Montana 2001). (See Document 1, “[User's Guide](#),” p. 1)

<sup>109</sup> The opinion stated that in order to “enhance the due process protections,” the court was adopting portions of the National Center for State Courts' Guidelines for Involuntary Civil Commitment.

assistance to the client.”

Client’s Wishes. “In addition to explaining the petition and commitment process and the various rights at issue to the client, counsel should also ascertain, if possible, a clear understanding of what the client would like to see happen in the forthcoming commitment proceedings, whether it be arguing for dismissal of the petition, seeking a voluntary commitment status, formulating and then negotiating with the State a least-restrictive alternative to commitment, or agreeing to a State recommended court-ordered commitment. See § 53-21-127(2), MCA (listing options that court may impose following a disposition hearing). The above guideline recognizes that such an understanding may take additional time, due to the client's mental condition and medication, and therefore counsel may need to request a continuation of a scheduled hearing.”

Expert Evaluation. “It is also incumbent upon counsel to facilitate the exercise of the client's right . . . to ‘be examined by a professional person of the person's choice’ and to determine whether the evaluation and treatment should be objected to.”

Attorney Role as Advocate. “As the Commentary to the Guidelines states: ‘[w]hen an attorney fails to act as an advocate and assumes a paternalistic or passive stance, the balance of the system is upset, the defense attorney usurps the judicial role, and the defendant’s position goes unheard.’ Accordingly, we agree with the Guidelines as well the approach taken in Texas, that the proper role of the attorney is to ‘represent the perspective of the respondent and to serve as a vigorous advocate for the respondent's wishes.’ Further: To the extent that a client is unable or unwilling to express personal wishes, the attorney should advocate the position that best safeguards and advances the client's interest. Additionally: In the courtroom, an attorney should engage in all aspects of advocacy and vigorously argue to the best of his or her ability for the ends desired by the client. . . . The foregoing guidelines create the presumption that a client wishes to not be involuntarily committed. The ultimate decision of whether a patient-respondent should be involuntarily committed, therefore, should not be independently made by counsel. . . Thus, we conclude that pursuant to the foregoing guidelines, evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment in the absence of any evidence of a voluntary and knowing consent by the patient-respondent will establish the presumption that counsel was ineffective.”

Independent Duty of Court. “In so holding here today, we again emphasize that it is not only counsel for the patient-respondent, but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings, and must therefore rigorously adhere to the standards expressed herein . . .”

## **Missouri**

Nearly 30 years ago, the Missouri Supreme Court ruled that due process requires an appointed attorney in a guardianship proceeding to protect the rights and interests of the client. The court specified that counsel must engage in affirmative efforts to investigate and submit all relevant

defenses or arguments.<sup>110</sup>

Duty to Investigate and Advocate. “[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.”

## **Connecticut**

The Connecticut Supreme Court has ruled that an attorney for a guardianship respondent must advocate for the client’s stated wishes, not for what the attorney believes is in the client’s best interests.<sup>111</sup>

Attorney Role as Advocate. “Even though this choice [between advocating for the client's wishes and protecting the client's best interests] may be difficult to make personally, its resolution among courts and writers has been rather uniform. Most favor advocacy. The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate; Office of the Probate Court Administrator, "Performance Standards Governing Representation of Clients in Conservatorship Proceedings," (1998) p. I (“The attorney is to represent the client zealously within the bounds of the law .... The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes. Accordingly, we conclude that the primary purpose of the statutory provision of § 45a-649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship. The purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests.”

## **New Jersey**

More than 20 years ago the New Jersey Supreme Court spoke emphatically and at great length that an attorney for a conservatee must be an advocate and that the disability of a client does not diminish the duty of the attorney to act in that capacity.<sup>112</sup>

Attorney Role as Advocate. “Ordinarily, an attorney should "abide by [the] client's decisions concerning the objectives of representation," *RPC* 1.2(a), and "act with reasonable diligence ... in representing [the] client," *RPC* 1.3. The attorney's role is not to determine whether the client is

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<sup>110</sup> [In re Link](#), 713 S.W.2d 487 (Mo. 1986). (See Document 3, “[User’s Guide](#),” p. 5)

<sup>111</sup> *Gross v. Rell*, 40 A.3d 240 (Conn. 2012)

<sup>112</sup> [In the Matter of M.R.](#), 638 A.2d 1274 (N.J. 1994).



competent to make a decision, but to advocate the decision that the client makes. That role, however, does not extend to advocating decisions that are patently absurd or that pose an undue risk of harm to the client.”

“An adversarial role for the attorney recognizes that even if the client's incompetency is uncontested, the client may want to contest other issues, such as the identity of the guardian or, as here, the client's place of residence. . . . With proper advice and assistance, the developmentally-disabled client may be able to participate in such a decision.”

“Until such time as we amend *Rule 4:86*, we offer the following guidelines to assist the attorney for an incompetent. First, a declaration of incompetency does not deprive a developmentally-disabled person of the right to make all decisions. The primary duty of the attorney for such a person is to protect that person's rights, including the right to make decisions on specific matters. Generally, the attorney should advocate any decision made by the developmentally-disabled person.”

## **Massachusetts**

Massachusetts has the most comprehensive set of standards of any state in the nation regarding qualifications, education, and performance for attorneys in guardianship cases. The standards are administered by the Committee for Public Counsel Services.<sup>113</sup> The agency is governed by a 15-member body appointed by the Massachusetts Supreme Judicial Court, Governor, Senate and House of Representatives. It oversees the provision of legal representation to indigent persons who have a right to counsel in criminal and civil cases and administrative proceedings. This includes guardianship proceedings.

The standards promulgated by this agency are a primary source and serve as a model for the standards proposed in this paper. The standards of the committee are divided into five parts.

Part 1 – Qualification Standards. “IN ORDER TO OBTAIN CERTIFICATION to accept assignments in mental health proceedings (*e.g.*, civil commitments, guardianships . . .), an attorney must apply for admission into the program. At least one year of litigation experience, preferably in mental health proceedings, is typically required. If accepted, he or she must attend the two-part training program described below and then successfully complete a mentorship program. During an attorney's participation in the mentorship program, he or she will be provisionally certified.”

Part 2 – Training Requirements. A. Mental Health Proceedings and Advocacy for Assigned Counsel “A comprehensive five-day review of substantive mental health law and the procedural rules applicable in mental health proceedings. Conducted from a defense perspective, emphasis is placed upon litigation technique and strategy. [Sponsored by CCS and Mass. Continuing Legal Education, Inc. (MALE).] Written material: Goldman, S., *Mental Health Proceedings in Massachusetts: A Manual for Defense Counsel.*” B. Clinical Aspects of Mental Health and Treatment. “An overview of the clinical perspectives on the diagnosis and treatment of mental illness, with an emphasis on

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<sup>113</sup> See [Document 19](#), [“User’s Guide,”](#) p. 20.

those issues typically raised in mental health proceedings (*e.g.*, the prediction of dangerousness, treatment with antipsychotic medication).” C. Continuing Education Requirements. “IN ORDER TO MAINTAIN MENTAL HEALTH CERTIFICATION, attorneys must attend at least eight (8) hours of approved continuing legal education programs in each fiscal year (*i.e.*, 7/1 - 6/30). Written materials are developed for each program by the respective faculty. Further, attorneys are expected to maintain an active mental health practice. To that end, in order to maintain certification, an attorney must accept at least five (5) new mental health assignments in each fiscal year. Membership in the Mental Health Litigation Unit E-Group also is required.”

Part 3 – Application for Certification. The application process is not routine. Considerable information about an attorney’s education and experience must be submitted, such as: (1) resume describing education and employment history; (2) description of five most recent trials, evidentiary hearings, or appellate proceedings; (3) training programs within the last five years; (4) description of all education or experience representing or working with persons with disabilities; and (5) a short, concise legal writing sample.”

Part 4 – Mandatory Mentor Program. “Newly certified mental health attorneys, including those who accept guardianship cases, must enroll in the mentor program. The purpose is for them to get hands-on experience in handling such cases under the direct supervision of highly skilled and experienced mental health lawyers. There is no preestablished duration for participation in the program. A lawyer will remain in the program until the Director of Mental Health Litigation determined that the lawyer is able to independently provide his or her clients with the effective assistance of counsel to which they are entitled.”

Part 5 – Performance Standards for Guardianship Attorneys. Counsel appointed to represent clients in probate guardianship cases must comply with these performance standards. The standards describe the minimum steps that must be taken by an attorney in each such case. Counsel must also comply with the Rules of Professional Conduct.

Role as Advocate. “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.”

Stipulation to Incapacity. “[O]nly in exceptional circumstances may counsel stipulate to the client’s incapacity.”

Limitations on Guardian. “[U]pon a finding of incapacity, the probate court is required to exercise [its] authority ... so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person’s limitations or other conditions warranting the procedure. . . . Thus, full or plenary guardianship is to be the exception, rather than the rule. To that end, counsel must ensure that, in those cases in which his or her client is found to be incapacitated, the guardian’s authority is strictly tailored to the specific decision-making needs of the client.”

Meet with Client. “At this initial meeting the attorney shall, at a minimum, explain to the client the

purpose of and procedures involved in the impending guardianship proceeding, the client's rights and options in respect to the proceeding, and ascertain the client's wishes and perspectives as to the matters that will be at issue. . . . Rule 1.14 of the Massachusetts Rules of Professional Conduct affords attorneys guidance as to their ethical responsibilities in dealing with clients 'under a disability.' The rule provides that, as with other clients, attorneys generally should follow the wishes of their cognitively, emotionally, or otherwise impaired clients, and provides suggestions as to steps that might be taken when an attorney has serious doubts as to his or her client's ability to competently direct litigation or other legal matters. . . Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.”

Investigating the Facts. “The attorney shall thoroughly investigate the facts. This investigation shall include at a minimum (a) a review of the medical certificate, or the clinical team report, filed with the petition, and an interview of the clinician(s) who conducted the examination(s) upon which the certificate or report is based; (b) for a client who is or has been residing in a mental health, developmental disability or nursing facility, a review of (i) facility records, including medication history, (ii) treatment review notes, including diagnoses, treatment history, and comments regarding the client's capacity, (iii) unit and nursing notes, for notations as to the client's relationship and cooperation with staff and treatment programs, and (iv) the client's Individual Service Plan or similar document; (v) an interview of the petitioner, current treatment providers, staff (including doctors, nurses, and social workers) of current residential programs, if applicable, and of former providers and program staff if reasonably accessible; and (vi) other persons familiar with the client, such as friends and family.”

Appointment of Experts. “In most instances, independent psychiatric or psychological expertise will be of assistance in the preparation and defense of the proceeding, particularly in the assessment of a client's capacity. . . After meeting with the client and investigating the facts . . . , the attorney shall determine whether expert assistance will be of value and, if so, he or she shall move for funds therefor, pursuant to the Indigent Court Costs Act. . . . Upon allowance of the motion for funds, the attorney shall contact the independent clinician and instruct him or her as to the purpose and parameters of his or her role and responsibilities. To the extent appropriate, the attorney should share with the clinician all pertinent information obtained pursuant to [the attorney's investigation of the facts]. The attorney shall remind the clinician that all information gleaned and opinions formed by the clinician shall remain confidential and may be shared only with the client and the attorney, and that such information and opinions may not be divulged to the court, petitioner, or petitioner's attorney without the permission of the client's attorney. After the clinician examines the client, reviews the records and speaks with staff and others, as appropriate, he or she and the attorney shall meet to discuss the clinician's findings and opinions. Of particular concern should the clinician opine that the client may indeed be incapacitated to some extent, will be the identification of those areas of decision-making in which the client is not incapacitated and those areas of decision-making in which the client, although perhaps having difficulty, is able to care for him- or herself with assistance, in order that the court may tailor its order to the specific decision-making needs of the client.”

Interviews of Potential Witnesses. “The attorney shall confer with potential witnesses, including but

not limited to the petitioner, personally or through counsel, treating psychiatrists and psychologists, nursing and any other staff familiar with the client's care and treatment, the prospective guardian, if one has been nominated, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in order to prepare them for direct- and cross-examination. The attorney shall review the medical record to identify those parts of the record that may be inadmissible and, therefore, whose admission should be objected to if proffered at trial. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.”

Defenses and Motions. “After reviewing the petition and the pleadings, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.”

Negotiations. If it appears likely that the client will be found to be incapacitated, the attorney shall negotiate with petitioner's counsel as to the scope of the guardian's authority. If the parties are able to agree on a proposed guardianship order that is appropriately tailored to the specific decision making needs of the client, the attorney may stipulate thereto at the hearing.” [Editorial Comment. Due process would require that the court not accept a stipulation to a judgment on the merits without first determining that the client agrees to the stipulation and is giving a knowing, intelligent, and voluntary waiver of the right to a trial, to present evidence, and to cross-examine witnesses.<sup>114</sup> If such a waiver cannot be obtained, the stipulation should not be accepted. Instead, the matter might be submitted to the court for a decision on the pleadings and other evidentiary documents if the attorney determines that holding such a hearing or raising objections would be frivolous and futile.]

Evidentiary Hearing. “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. To that end, the attorney shall: (a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding the assertion of privileges and confidential relationships, and the admission, exclusion or limitation of evidence; (b) present and cross-examine witnesses, and provide evidence in support of the client's position; (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and (d) take any and all other necessary and appropriate actions to advocate for the client's interests.”

Appellate Process. “After the hearing the attorney shall meet with the client to explain the court's decision and, if a guardianship or substituted judgment order has issued, the client's appellate rights. If the client wishes to exercise such appellate rights, the attorney shall file a timely notice of appeal with the trial court. Where an appeal is filed, the attorney shall, without delay, notify CCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.”

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<sup>114</sup> Conservatorship of Tian L., 149 Cal.App.4th 1022 (Cal. App. 2007)

## Texas

Training. A law was enacted in Texas in 2015 that requires attorneys who represent guardianship respondents to receive one hour of training on lesser restrictive alternatives to guardianship.<sup>115</sup>

## California

The Honorable Maria Stratton, appointed in 2015 as the presiding judge of the probate division of the Los Angeles Superior Court, offered her own views of “best practices” for attorneys who represent proposed conservatees.<sup>116</sup> This was the first time that a mandatory training program for court-appointed attorneys in Los Angeles offered such specific guidance on these subjects.

Prior training programs which were attended by or reviewed by representatives of Spectrum Institute either omitted critical topics or gave misinformation to the attorneys who attended the trainings.<sup>117</sup>

These are the “best practices” suggestions from the presiding judge of one of the busiest probate courts in the nation.

Asking for Additional Hours. “The first thing is, if you need more hours ask for them before you spend them. You don't need to know the paperwork behind all of this, but its just better to ask before instead of asking for forgiveness later. Ask before, and don't be shy. You don't have to use everything you get. Ask for 10, ask for 15, but ask before.”

Advocating for Client’s Stated Wishes. “The second thing I'm going to tell you is the judge really needs to know what your client wants, as crazy as your client may want it. The judge needs to know it. So if your client is telling you "I'm opposed to this conservatorship, I'm fine, I don't need any help," then the judge needs to know that. . . . When people come in and they say in their PVP reports - and I've seen some like this - ‘Well, I think my client should have a conservatorship.’ Well, you know what, I appreciate your opinion but I need to know what your client wants first, before I know what you want. And maybe I shouldn't even really hear what you think if it's contrary to what your client wants.”

Duty of Loyalty. “Your client says "I want a trial" or "I want a hearing" or "I don't want this particular person as my conservator," the judge needs to know that. And maybe you shouldn't be saying, "and by the way judge, even though my client says she doesn't want a conservatorship, she is so demented she doesn't really know what she wants and she really need one." No, you can't say that. That's being disloyal to your client.”

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<sup>115</sup> See [Document 20](#), “[User’s Guide](#),” p. 24.

<sup>116</sup> See [Document 21](#), “[User’s Guide](#),” p. 24.

<sup>117</sup> See “[A Missed Opportunity](#): Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities.” See: Review of Prior Trainings – [Part I](#). Also see: Review of Prior Trainings – [Part II](#).

No Best Interests Advocacy. “While ultimately the judge is going to take into account, perhaps, what the best interests of your client are, if the client's best interests aren't what the client wants, then you don't have any business telling me what your opinion about what the best interests are. I will get that from the court investigator's report, or I'll get that argument from the other side - the conservator or the conservator's counsel who's coming in to tell me why it's in the client's best interest to have a conservator and to have a particular conservator. . . So as bench officers we need to hear your client's side of the story, because we're already getting the best interests side from the court investigators.”

Advisement of Rights. “[T]he judge needs to be able to discern from your PVP report that you advised your client of all of your client's rights, including the right to be present. This is critical in conservatorship cases. And if you read conservatorship cases, whether they are general conservatorships or LPS conservatorships, the biggest issue that comes down the pike in most of these cases is presence - the right to be present - whether the lawyer can act without the client being present. The bench officer wants to know, did you advise your client of all your client's rights - the right to fight the conservatorship, the right to fight who should be the conservator, the right to fight what powers the conservator should have, the right to fight what disabilities are imposed on the conservatee. Your client needs to know all that and the judge needs to know you have told your client all of that - the most important right being the right to be present.”

Confidentiality. “A lot of times when we get a PVP report that goes into great length about what would be in the client's best interest, oftentimes there is little discussion of what the client wants, or the client's statements or the client's reactions. It seems like it's more of a narrative of I've looked at all the facts and this is what I think should happen. Some of the PVP reports don't even state whether they've visited the client or talked to the client. Maybe they will state these are the people I talked to and list them, but then I don't really know what the upshot of the discussion was. But that may well be because you feel it's privileged information. That's fine. Just let me know it's privileged. Just let me know I have had discussions and I don't think it is appropriate to disclose them to the court what I heard or what was told to me. That's fine. I guess what I'm asking for is a little more detail, especially around the subject of rights, advisement of rights.”

More on Confidentiality. “To me, if you don't feel you've got a knowing waiver from your client, the default position is that you don't reveal the conversation. That's my position. You go in with the attorney-client relationship - with the privilege that attaches - the minute you become their attorney. It attaches as a default position. So if you have a conversation with a 75 year old client who is very impaired because of Alzheimers or dementia or just old age, and you start out with an attorney-client conversation with them, and then in the middle of the conversation you realize that they have no idea what I am talking about. I think you are able to impart your observation to the court that I advised them of all their rights and powers and disabilities and they seemed to not get it. But at that point, I would not go any further because you don't have a waiver.”

Methods of Resolution. “I know that when I was in mental health court, there were actually four ways to resolve an LPS conservatorship. The lawyers would come in and say, the client agrees, go ahead and appoint, judge. I've advised them of their rights, powers, and disabilities, they're fine with it, go ahead, let's do it. That's the first way. The second way is the client just submits on the paperwork. It's kind of like a no contest plea, right? So, the client's just Submitting. That's the second

way. The third way is the client is doing a limited submission, which means the client is willing not to contest any of the facts you have before you in the paperwork, but the client wants to talk. And tell you why you shouldn't do what the paperwork is telling you to do. That's almost like guilty with an explanation. It's like, "I understand you may go ahead and do this judge, but I really want to tell you why you shouldn't. That's good. So then the client will talk and the client is able to give their side of the story. The fourth way is a full blown hearing, with live witnesses and the whole thing."

## **More California**

The Coalition for Compassionate Care of California issued a report in 2014 that, among other things, reviewed the limited conservatorship system and made recommendations for improvement.<sup>118</sup> Better training for court-appointed attorneys was one of their recommendations.

Attorney Role as Advocate. Another issue called out is that in its minimal training, the Los Angeles Court gives court-appointed attorneys instruction that if they disagree with the 'stated wishes' of the client, they should advocate for what they believe are the client's best interests. While project informants point out that experienced conservatorship attorneys understand the duty to represent the proposed conservatee as specified in the Probate Code, this report concludes that such instructions can result in attorneys acting as de-facto guardians *ad litem*, advocating for what they believe are the best interests of the client rather than advocating for what the client expressly wants. That outcome does not appear to be consistent with the intention and purpose of the Limited Conservatorship process."

Training. "Training about the I/DD population and the process, duties and responsibilities of Limited Conservatorship should be formally initiated for those seeking to petition for conservatorship as well as for attorneys who work on Limited Conservatorship. These trainings should include information about facilitating communication and providing reasonable accommodations under the Americans with Disabilities Act to allow disabled persons to have meaningful participation in the legal process."

## **National Probate Court Standards**

Attorney Role as Advocate. The National College of Probate Court Judges published "National Probate Court Standards" in 2013. Standard 3.3.5 "Appointment of Counsel" clearly states: "The role of counsel should be that of an advocate for respondent."<sup>119</sup>

## **Conference of State Court Administrators**

A report published by the Conference of State Court Administrators in 2010 takes a strong position that: "Courts should ensure that the person with alleged diminished capacity has counsel appointed

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<sup>118</sup> See [Document 22](#), , "[User's Guide](#)," p. 24.

<sup>119</sup> See [Document 10](#), "[User's Guide](#)," p. 15.

in every case to advocate on his or her behalf and safeguard the individual's rights." It also speaks to the issue of training of court-appointed attorneys.<sup>120</sup>

Training. "Appointed counsel should be trained to explain the consequences of guardianship in a manner the person can understand; ensure there is no less restrictive alternative to guardianship which will provide the desired protection; ensure due process is followed; ensure the petitioner proves the allegations in the petition to the standard required in the jurisdiction; confirm the proposed guardian is qualified to serve; and ensure the order is drafted to afford the person with diminished capacity maximum autonomy."

Although this recommendation does not specifically mention the ADA, it is implicit that the attorney explain the consequences of guardianship "in a manner the person can understand." This calls for effective communication between attorney and client, which means that the attorney must investigate how best to elicit the views of the client and how best to explain concepts involved in guardianship to the client. This requires specialized training about various types of developmental disabilities in a general sense. It also requires the attorney to develop an ADA accommodation plan for each specific client who has such disabilities.

Also, in order for an attorney to explore lesser restrictive alternatives, the attorney must have general knowledge about such alternatives and may need to have an expert appointed to help explore such options for a particular client. Further, an attorney will need training about disability and abuse issues in order to investigate whether the client has been a victim of abuse and whether there is a risk of such abuse if a specific person is appointed to be the guardian.

### **American Bar Association**

The House of Delegates of the American Bar Association adopted a resolution in 1987 that supported the appointment of counsel in every guardianship case. It also specified services that counsel should perform for the client.<sup>121</sup>

Investigation and Expert. "Counsel as advocate for the respondent should be appointed in every case . . . 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."

This policy clearly states that an appointed attorney shall be an advocate. It also specifies that counsel has a duty to conduct a thorough investigation so that counsel can be fully informed of the situation. This may include the need for appointment of an expert to assist counsel in assessing the capacity of the client.

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<sup>120</sup> "[The Demographic Imperative: Guardianships and Conservatorships](#)," (See Document 12, [User's Guide](#),"p. 16.)

<sup>121</sup> Policy of the American Bar Association. (See [Document 14](#), "[User's Guide](#)," p. 17)



## **Second National Guardianship Conference**

The Second National Guardianship Conference, cosponsored by the American Bar Association, National Academy of Elder Law Attorneys, National College of Probate Judges, National Guardianship Association, the Arc of the United States, and the Center for Social Gerontology, was conducted in 2001.<sup>122</sup> The conference recommended advocacy standards for attorneys representing guardianship respondents.

Attorney Role as Advocate. The conference recommended that: “Counsel always be appointed for the respondent and act as an advocate rather than as a guardian ad litem.”

Communication Accommodation. “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.”

The recommendations also implicitly incorporate concepts from the Americans with Disabilities Act regarding the need for an attorney to use whatever means are reasonably necessary to ensure effective communication with client.

## **National Academy of Elder Law Attorneys**

Communication Accommodation. This national organization of attorneys takes the position that attorneys representing guardianship respondents should use “plain language” and “accommodations” so that the individual in question can understand and participate in the proceedings.<sup>123</sup>

## **Journal of Poverty Law**

A law review article published nearly 20 years ago is remarkable in its discussion of the Americans with Disabilities Act and how it should impact the role of attorneys in guardianship cases. The author concluded that the ADA requires attorneys to act as advocates for the stated wishes of their clients rather than as paternalistic “best interests” guardians ad litem.<sup>124</sup>

ADA Mandates Role as Advocate. “The attorney must undertake every effort to maintain a normal attorney-client relationship with the defendant, despite the defendant's actual or perceived disabilities. . . . By extending the prohibition against discrimination to people with disabilities, the

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<sup>122</sup> See [Document 15, User’s Guide](#),” p. 17.)

<sup>123</sup> See [Document 16, User’s Guide](#),” p. 18.)

<sup>124</sup> “[Zealous Advocacy for the Defendant in Adult Guardianship Cases](#),” Clearinghouse Review Journal of Poverty Law Vol. 29, No. 9, Jan. 1996. (See Document 7, “[User’s Guide](#),” p. 9.)

ADA reversed a public philosophy that required only protection and isolation of people with disabilities. . . . In a way, the ADA's purpose of empowerment runs counter to the *parens patriae* philosophy of guardianship, which is meant to protect those thought too incapacitated to protect themselves. The role of the attorney as advocate is more closely aligned with the purpose of the ADA. The attorney promotes empowerment by advocating self-determination for the defendant. The guardian ad litem function is founded more on the notion of *parens patriae*, the right of the state to protect the welfare and best interests of its citizens, since the guardian ad litem decides what is in the individual's best interests. As the ADA changes the notion of how people with disabilities are dealt with by society as a whole, it should also change the way guardianships are viewed and the way in which attorneys for the defendant represent their clients.”

Communication Accommodations. “Use techniques to improve communications when interviewing the defendant. The attorney should meet with the defendant face to face and be cognizant of potential communication problems, such as language barriers, hearing impairments (not all hearing-impaired individuals use sign language or even the same sign language), or aphasia (partial or total loss of the ability to articulate ideas in any form). The environment of the meeting place also may cause sensory problems associated with the defendant's specific disability. Light, noise, print size of legal documents, and other distractions may affect the defendant's ability to understand and discuss the issues. If communication barriers are present, the attorney should have auxiliary aides during any interview and during all judicial proceedings. . . . Discussions with the defendant are private; communications with defendants in guardianship proceedings are subject to the same respect and confidentiality given to communications with clients in other types of cases.”

Investigation of Less Restrictive Alternatives. “In the guardianship context, advocacy also involves investigation of possible, less restrictive alternatives to guardianship, including powers of attorney and advance directives, representative payees, trusts, and social services. The results of the prehearing investigation may determine the availability of less intrusive assistance and could lead to a negotiated settlement or to dismissal of the case.”

Additional Interviews and Investigation. As with other civil cases, the attorney should review the file and other relevant information and interview interested persons, neighbors, friends, social workers, and others who may have contact with the defendant. Reviewing medical records may not yield sufficient information, however, and doctors' certificates should not be considered *prima facie* evidence of disability. Doctors who prepared the medical certificates should be interviewed to determine the extent of their personal knowledge about the defendant and their overall expertise with the kinds of conditions the defendant is alleged to have. When evaluating medical evidence, care should be taken to find out what medications the defendant is taking and to explore the possibility that drug interactions are causing confusion. The attorney may want to obtain independent medical reports.”

### **National Center for State Courts**

Many of the guidelines promulgated by the National Center for State Courts for civil commitment cases were discussed above in the section addressing the due process standards adopted by the

Montana Supreme Court.<sup>125</sup> However, one additional recommendation needs to be highlighted here.

Method of Appointing Attorney. “The manner in which attorneys are appointed from the panel of attorneys eligible to represent civil commitment respondents should **safeguard the autonomy of attorneys** in representing their clients. To accomplish this objective, an independent third party, such as the local bar association or a legal services organization, should be responsible for maintaining the panel. The court should appoint attorneys from that panel serially, unless an attorney's absence or other compelling reasons require otherwise.” (Emphasis added)

“Paragraph (b) provides that an independent third party, such as a local bar association, control the appointment of attorneys. This procedure ensures the attorney's autonomy and avoids undue deference being paid to a judge's or referee's particular views concerning procedure, preparation, and disposition. Attorneys should be sure who their clients are and should **not be beholden to the judge** or the court who selected them.” (Emphasis added)

In some places, such as Los Angeles, the court that hears and decides the conservatorship cases also decides which attorneys get on the appointment list, selects attorneys for specific cases, authorizes payment of fees, and decides whether attorneys get future appointments. The court also plays a major role in the training programs, often sending judges to the programs to instruct attorneys on what issues to raise or not raise and how to advocate in conservatorship cases. There seems to be too many roles for the judges, which creates a conflict of interest or at least the appearance of such a conflict. Judges should be deciding cases, not appointing attorneys and telling them how to argue cases.

## ADA-Compliant Standards for Guardianship Attorneys

This section applies the precedents, guidelines, and principles discussed in the preceding pages, in a practical way, to the performance of attorneys appointed to represent guardianship respondents. The standards enunciated here comply with constitutional due process requirements, procedural and substantive legal entitlements conferred by statute, and extra supports and services that may be necessary under the ADA to give these litigants access to justice.

These “due process *plus*” performance standards form the foundation for the discussion of ADA compliant training standards. Finally, there is a discussion of the appointment process itself, establishing standards that legislative bodies or judicial administrators can use in creating a fair method of recruiting, appointing, and compensating attorneys in guardianship cases.

Before specifying detailed and practical performance standards, step by step from the time the attorney is appointed until the time the attorney is relieved as counsel, a general overview is presented.

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<sup>125</sup> See fn. 109.

## Overview

A review of the judicial precedents and “best practices” recommendations discussed above reveals several recurring themes: Attorneys should be qualified to handle these special cases. They should be properly trained. Their competency on relevant issues should be verifiable.

Attorneys should act as advocates, not guardians ad litem. They should advocate for the client’s stated wishes, not what they believe is in the client’s best interests. If the client’s wishes cannot be ascertained, they should defend the client’s existing rights and require the petitioner to prove all allegations with clear and convincing *evidence*.

Court-appointed attorneys should treat clients with cognitive and communication disabilities the same as they would any other client. They should adhere to the same standards of performance and ethics as they would for a client who privately retains them. The same requirements of confidentiality with respect to attorney-client communications and the work-product privilege apply. There is always a duty of loyalty.

The attorneys should be able to communicate *effectively* with their clients in a manner that works best for their clients. If additional supports and services are needed to have effective communication with clients who have disabilities, then the attorneys should seek authorization from the court for ancillary supports and services to accomplish this objective. Attorneys may not stipulate to a judgment or surrender significant rights without a knowing and intelligent waiver by their clients.

Attorneys have a duty to conduct a thorough investigation of all issues. This includes the issue of capacity to make various decisions as well as whether there are any lesser restrictive alternatives to guardianship that are feasible. The investigation should include whether the proposed guardian is qualified and if he or she is the best choice for this position of authority.

Clients should be interviewed in private. Potential witnesses should be interviewed, including the petitioner, proposed guardians, family members, neighbors, and close friends of the clients. Professionals who have been involved in the life of the clients should be interviewed as well, including doctors, psychologists, social workers, and teachers.

A thorough review of all records relevant to the issues in the case should be conducted. This includes the petition and supporting documents, medical and psychological records, existing or previous capacity assessments, and school records.

If there are any relevant defenses or suggested alternatives, evidence should be developed to support these positions and submitted to the court. Experts should be appointed to evaluate potential defenses or alternatives to guardianship.

If an attorney has any objections to the granting of a petition, the selection of a particular person as guardian, or to specific terms of the guardianship, a notice of appeal should be filed to preserve the right of a client to obtain appellate review of these issues.

## **Liability Issues**

Before delving into standards for investigation, advocacy, and defense activities by attorneys for guardianship respondents, a matter of self-interest needs to be addressed. Probate courts and guardianship attorneys should be aware of and concerned about issues of liability. There may be significant consequences for the failure of courts to adopt appropriate advocacy and training standards. There may also be ramifications, financial and otherwise, for court-appointed attorneys.

### Liability for Attorneys

Once performance standards are established, failure of an attorney to adhere to them in the context of a specific case may give rise to liability under any number of legal theories. The first and foremost ground for liability would be the failure to provide effective assistance to the client.

Most states require the mandatory appointment of counsel for a guardianship respondent. Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner.<sup>126</sup> Most other states provide for the right to counsel upon request or in the court's discretion. Once a statutory right to counsel has been conferred, a guardianship respondent has an interest in it which is protected by the due process clause of the Constitution.<sup>127</sup> An attorney appointed to represent a conservatee must vigorously advocate on the client's behalf.<sup>128</sup>

Failing to provide a guardianship client with effective assistance may be grounds for discipline by the state bar association. The minimum threshold for disciplinary action may vary from state to state. In California, for example, an isolated and inadvertent act of negligence would not be grounds for discipline. However, if the failure was intentional, reckless, or repetitive, an attorney would be in violation of the Rules of Professional Conduct and could be disciplined.<sup>129</sup>

Violations of the rules of ethics could also have disciplinary consequences. Advocating a position adverse to the client's stated wishes or adverse to their existing rights could be considered an act of

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<sup>126</sup> Conservatorship of Benvenuto, 180 Cal.App.3d 1030, 1037, fn. 6 (1986)

<sup>127</sup> Conservatorship of David L., 164 Cal.App.4th 701, 710 (2008)

<sup>128</sup> Conservatorship of John L., 48 Cal.4th 131 (2010)

<sup>129</sup> Rule 3-110 Failing to Act Competently. (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. (B) . . . "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service. (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

disloyalty and therefore a violation of professional ethics. The duty of confidentiality is violated when an attorney, without a knowing and intelligent waiver from a client, discloses confidential communications or releases attorney work product to the court or to other parties to the case.

In addition to triggering administrative proceedings with a bar association, the failure to act competently or the violation of ethical duties of loyalty and confidentiality could give rise to civil liability under a claim of malpractice. Depending on the harm caused to a client, the extent of damages could be significant. For example, if the attorney negligently failed to investigate the suitability of a proposed guardian and the client later died from abuse at the hands of the guardian, a wrongful death action could be filed against the attorney.

An attorney who fails to acquire proper training to effectively represent clients with cognitive and communication disabilities, or who fails to obtain and provide sufficient supports and services to give the client access to justice as required by the ADA, could be liable under Title II, Title III, or both. Liability under Title II would be premised on the theory that because the attorney is appointed by the court and is paid by the government, the attorney's actions are services provided by a public agency. Liability under Title III would be based on a theory that all professional services are covered by this provision of the ADA. The attorney could be sued in state or federal court. The attorney may also be liable for failing to provide accommodations under state laws that prohibit discrimination on the basis of disability.<sup>130</sup>

An attorney who fails to provide effective assistance could find his or her deficient performance the subject of inquiry during an appeal or a writ proceeding. Ineffective assistance of counsel is a ground for appeal. When the details of the deficiencies are not apparent from the face of the record, an appellate court may inquire through an ancillary petition for writ of habeas corpus, through which matters outside of the record can be brought to the court's attention.

The deficient activities of court-appointed attorneys have generally gone unnoticed in the past, mostly because they occurred in a culture of paternalism and no one was auditing the system. With a greater focus on guardianship reform by a growing number of individuals and organizations, the actions and omissions of court-appointed attorneys may receive greater scrutiny in the future.<sup>131</sup>

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<sup>130</sup> "No otherwise qualified person by reason of having a developmental disability shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds." (Lanterman Act, Statement of Rights, Cal. Welf. & Inst. Code 4502) Court-appointed attorneys receive public funds.

<sup>131</sup> Spectrum Institute has been monitoring the performance of court-appointed attorneys in Los Angeles for two years. Samples of cases have been reviewed and the results have been reported to the United States Department of Justice in two separate class-action complaints, one filed in 2014 (voting rights violations) and the other filed in 2015 (deficient attorney performance generally). The most recent [report](#) to the DOJ showed a pattern and practice of deficiencies. (*Efficiency v. Justice*: The deliberate bypass of legal protections has denied many limited conservatees access to justice in violation of Title II of the ADA)

## Liability for Public Agencies

Title II of the ADA imposes duties on public agencies to provide access to services without discrimination on the basis of disability. This duty applies to state and local courts. Modification of policies or the use of supports and services may be necessary in order for courts to comply with their obligation to provide access to justice to people with developmental disabilities. State statutes may also impose similar duties on public agencies, including courts.<sup>132</sup>

Section 504 of the Rehabilitation Act of 1973 imposes similar duties on public agencies that receive federal funds for any of their programs. The duties apply to all programs, not just those receiving federal funds.

One remedy is for the complaining party to file a complaint with the United States Department of Justice.<sup>133</sup> The DOJ may investigate and, if it finds a violation, may negotiate a settlement with the offending public entity. If a settlement is not reached, the DOJ may file a lawsuit in federal court.

The complaining party also has the option of bypassing the DOJ and filing a federal lawsuit against the court for violations of Section 504, the ADA, and ancillary state-law causes of action. In addition to declaratory and injunctive relief, the court may award attorney fees to the plaintiff. The court may also appoint a monitor to ensure that the defendant complies with the terms of the injunction. The defendant can be ordered to pay the fees of the monitor.

Sometimes an agency other than the court funds the legal services program that provides representation to guardianship respondents. In California, for example, the funding is provided by the county governments. The board of supervisors makes a political decision about which agency operates the legal services program. As the system currently functions in Los Angeles County, the board has designated the Los Angeles Superior Court as the agency to operate the program. The boards of supervisors in other counties have designated the public defender's office to provide representation to conservatees.

Because the county is the funding agency for legal services for probate conservatees, it has liability under Section 504 and Title II of the ADA. The county has a responsibility to have some quality assurance controls in place to make sure that the funds it provides are not supporting systematic violations of the ADA by the court-appointed attorneys who receive the funds. It can voluntarily take action to bring the program into compliance with the ADA.<sup>134</sup> If it fails to take corrective action, the county could find itself to be a target of an investigation by the Department of Justice.

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<sup>132</sup> Cal. Welf. & Inst. Code 4502

<sup>133</sup> Spectrum Institute has filed two class-actions complaints with the DOJ against the Los Angeles Superior Court. (<http://spectruminstitute.org/doj/>)

<sup>134</sup> Spectrum Institute filed an informal complaint with the County of Los Angeles, alleging it has been violating Section 504 and the ADA for failing to take steps to make sure that the legal services program is ADA compliant. (<http://spectruminstitute.org/lacounty/>)

## Performance Standards

Massachusetts appears to be the only state government to have developed a comprehensive set of detailed performance standards for attorneys who represent guardianship respondents.<sup>135</sup> As articulated in previous sections of this report, a variety of advocacy standards have been recommended by judicial, administrative, and professional organizations.

Spectrum Institute has recently published a report in which it proposed a framework for new court rules adopting comprehensive standards for the qualifications, educational requirements, and performance standards for attorneys who represent adults with developmental disabilities in limited conservatorship proceedings.<sup>136</sup> Previously, it released specific step-by-step suggestions for attorneys to follow during each phase of a limited conservatorship proceeding.<sup>137</sup>

The California Association for Nursing Home Reform has published an advocacy and defense guide for attorneys representing respondents in general conservatorship proceedings in California.<sup>138</sup> These clients are generally elderly, although they could also be younger and middle-aged adults who have cognitive disabilities due to illnesses or injuries.

Spectrum Institute has also offered a template for ADA compliance in such proceedings, contrasting these guidelines with how a significant sample of court-appointed attorneys have actually been performing in limited conservatorship proceedings in the Los Angeles Superior Court.<sup>139</sup>

The performance standards described in this paper are drawn from all of these sources. These best practices have been extracted and synthesized, with additional consideration given to the extra services that may be needed to provide access to justice under the ADA. The performance standards articulated below also serve as the foundation for the training standards in the following section.

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<sup>135</sup> The standards developed by the Supreme Court of Montana, which are based on guidelines promulgated by the National Center for State Courts, specifically apply to attorneys who represent clients in civil commitment proceedings. By analogy and logical extension, they should apply to attorneys in guardianship cases as well. But technically the court case in which the standards were announced was an appeal in a civil commitment proceeding. (*Mental Health of K.G.F.*, 29 P.3d 485 (Mont. 2001))

<sup>136</sup> “Proposals to Modify the California Rules of Court,” Spectrum Institute (May 1, 2015) (<http://spectruminstitute.org/attorney-proposals/>)

<sup>137</sup> “A Strategic Guide for Court-Appointed Attorneys in Limited Conservatorship Cases,” (See [Document 23](#), [User’s Guide](#), p. 27)

<sup>138</sup> “[California Conservatorship Defense](#): A Guide for Advocates,” California Association for Nursing Home Reform (2010)

<sup>139</sup> “[Efficiency v. Justice](#): The deliberate bypass of legal protections has denied many limited conservatees access to justice in violation of Title II of the ADA” (Aug. 17, 2015)



## **Investigation**

A guardianship proceeding is initiated by the filing of a petition. The petition asks the court to summon to the proceeding an adult who allegedly is unable to provide for his or her own basic needs and who allegedly lacks the capacity to make major life decisions. Once the petition is filed, the court must ensure that the named respondent receives notice of the proceedings and is provided an adequate opportunity to respond to it and to contest the allegations.

By the very nature of the allegations, the court is informed that the respondent allegedly has cognitive and communication disabilities that, if true, will impair his or her ability to participate in the proceedings in a meaningful manner. The court, therefore, has a duty under the ADA to take reasonable steps to provide the supports and services that will give the respondent access to justice.

For most courts, the initial and most significant measure taken to provide the respondent access to justice is the appointment of an attorney. It may be a public defender or an attorney from a panel of eligible lawyers. Some courts also appoint a guardian ad litem, an investigator, or a visitor.

The advocacy duties of the attorney begin when the attorney receives notification from the court that he or she has been assigned to represent a particular client in a guardianship proceeding. Upon receipt of such notification, an attorney-client relationship begins, with all of the ethical and advocacy obligations associated with representation of a client who has special needs.

These performance standards assume that the attorney appointed to such a case has the qualifications to provide effective assistance to a client with cognitive and communication disabilities and who may have physical and emotional disabilities as well. An attorney should not accept an appointment to a case unless he or she has acquired the training and skills needed for effective representation.<sup>140</sup>

For any type of legal proceeding, but especially in a case where incapacity is alleged and the client likely has special needs, the most important function of an attorney is conducting a thorough investigation into all relevant facts. If the investigation is deficient, the advocacy will be deficient.

### Obtaining Relevant Records

The attorney should initiate a process to gather all records necessary to: (1) develop an ADA access plan for the client; (2) evaluate the accuracy of the factual allegations of the petition; (3) determine whether the allegations are supported by clear and convincing evidence; (4) ascertain the client's wishes as to (a) the guardianship itself, (b) the proposed terms of the guardianship, (c) the person nominated to be guardian, and (d) any less restrictive alternatives to guardianship; (5) identify witnesses to be interviewed (for and against) relevant issues; and (6) determine what experts, if any, should be appointed to assist with an evaluation of the issues or advocacy for the client.

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<sup>140</sup> Rule 3-110 of the California Rules of Court require that, before representation in a case is undertaken, an attorney shall acquire the learning and skill necessary to perform the required services in that case.

Identification of the records the attorney needs for effective representation is a function that only the attorney can perform. Once identified, retrieval of the records is a function the attorney should be able to delegate to an employee or outside investigator. Reasonable costs of investigation should be reimbursable by the court. However, it may be necessary, per court rules, for the attorney to obtain a court order appointing an investigator to assist with the case.

Some records may assist the attorney in multiple ways. For example, school records may help the attorney assess the capacity of the client to make decisions, as well as providing information about the client's preferred method of communication. The same records will identify individuals to interview who may have opinions about the suitability of the nominated person to serve as guardian.

### *ADA Access Plan for the Client*

Before the attorney has an initial interview with the client, the attorney needs to determine what methods will be used to maximize the effectiveness of communications with the client. A variety of facts regarding communication and comprehension need to be obtained from multiple sources.

Is the client verbal or nonverbal? If verbal, what is the client's primary language? Will a language interpreter be needed? Is the client blind? If so, does the client use braille? Is the client Deaf or hard of hearing? Will a sign language interpreter be needed? Does the client read and write, and if so, at what grade level? Does the client have an intellectual disability? If so, to what extent does the client comprehend? Does the client have any phobias? In what environment does the client communicate the best – home, school, or other? Is the client negatively affected by specific lighting or sounds or smells? What is the length of the client's attention span?

These and other facts must be ascertained, from reliable sources, in order to develop an ADA access and communication plan for the client. The plan will inform how, when, and where to communicate with the client. It will also assist the attorney in making specific ADA requests of the court, in terms of special needs both in and out of the courtroom. The attorney may need to request the court to appoint an ADA access expert to assist in the development of the plan and to seek court approval of ADA supports and services to implement the plan.<sup>141</sup>

Sources of information for the ADA access and communication plan will include records to review as well as people to interview. A good starting point is to contact individuals who are familiar with the client. The petitioner is probably the first person to consult. A service provider or an agency that coordinates services is another likely source of reliable information, as would be a school or day program in which the client is enrolled. School records will probably contain information regarding the client's method of communication and level of comprehension, as well as any supports and services that are used at school to assist the client to understand and communicate.

The ADA plan will be used by the attorney throughout the proceedings, both for interactions with the client outside of the courthouse as well as to enhance the client's participation in court hearings.

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<sup>141</sup> Some courts have ADA request forms. (See [MC-410](#) which is used in California.)

### *Records Relevant to the Petition*

The attorney needs to gather records that will assist in the evaluation of the factual basis for the allegations in the petition and whether the allegations are supported by clear and convincing evidence. Such evidence may involve proof contained in documents, the testimony by lay witnesses, or the opinions of expert witnesses.

The allegations generally include: (1) facts regarding the petitioner and his or her relationship to the respondent and knowledge of respondent's situation; (2) names of and contact information for close relatives of the respondent; (3) assertions that the respondent is unable to provide for his or her basic needs; (4) facts showing the incapacity of the respondent to make one or more major life decisions, such as where to live, medical care, education, financial transactions, marriage, sexual activities, and/or social relationships; (5) assertions that less restrictive alternatives to the requested limitations on rights and transfer of powers are not feasible; and (6) that the person nominated to be guardian is qualified to serve in this capacity and is the most appropriate person to be appointed.

The attorney needs to obtain a copy of the petition and all supporting documents filed by the petitioner. Once those records are reviewed by the attorney, a determination can be made as to what other documents should be obtained. Documents can be requested through a variety of methods: email, telephone, or letter. The person or agency receiving the request may want a copy of the court order appointing the attorney to represent the client. If there is a resistance to or a delay in providing the documents, the attorney may need to have a subpoena issued for the records.

### *School or Day Program Records*

Petitions for guardianship for a person with a developmental disability are often initiated relatively soon after the person reaches the age of 18. As a result, it is likely that the client is enrolled in school. If not, the client may take part in a day program operated by a disability services agency.

If the client is in school, the attorney should obtain the Individualized Education Program (IEP) for the client. If the last three IEP's are obtained, the attorney can determine whether the client is making progress, regressing, or remaining the same in terms of abilities and capacities.

If the client is not in school, the attorney should determine what records may be available from any day program in which the client is enrolled. Records should be obtained for the last three years, even if it is necessary to contact more than one day program in which the client has participated during that time frame.

In addition to providing information about the client's abilities and disabilities, these records will also contain the names of personnel who can be interviewed regarding one or more relevant issues.

### *Medical and Psychological Records*

In addition to any capacity declaration or report that was filed with the petition or that will be filed prior to a hearing, the attorney should review or obtain copies of all medical and psychological

records for the client for the preceding several years.

The petitioner should be asked to provide the name and contact information for any hospitals and clinics the client has received services from during the past five years. The names and contact information for any medical, dental, psychological, or therapy service providers (in addition to a hospital or clinic) should also be requested.

These records will give the attorney insights about the extent and nature of the client's disabilities as well as his or her capacity to make various decisions. They may also contain clues about possible abuse or neglect that is happening or has occurred in the past.

#### *Service Provider Records*

Most clients who have developmental disabilities will be receiving various types of services. The attorney should obtain contact information from the petitioner for all vendors who are providing services to the client. The staff or investigator for the attorney should contact the service providers to determine what records they have that may be relevant to the case.

For example, the provider may have done an evaluation of the client's abilities and needs. Also, there may be "incident reports" that document problems that have occurred in connection with the client.

#### *Criminal, Juvenile, CPS and APS Records*

The attorney will want to know if the client, petitioner, proposed guardian, or members of their households have had previous contact with law enforcement agencies, child welfare agencies, or protective service agencies. Such records will provide clues to the attorney about whether adults who have been in charge of the client's life, and adults who have lived in the same household, have been accused of or found guilty of abuse or neglect – of the client or of anyone else for that matter.

These records will also show whether the client has ever been removed from the care of the primary custodians and whether the client has himself or herself been accused of wrongdoing.

#### *Court Investigator or Guardian Ad Litem Reports*

If the court has appointed or will appoint a court investigator, guardian ad litem, or court visitor, the attorney should make contact with such individuals and arrange to obtain a copy of any report they will file with the court about the case.

These individuals are a valuable source of information. Since the court will be relying on their reports, the attorney needs to review them to determine if their methodology was fair, if their findings are based on accurate facts, and if their conclusions and recommendations are supported by clear and convincing evidence.

The attorney may not rely on these reports as a substitute for his or her own investigation. Unlike

these reports, which are supposed to be objective and neutral, the attorney will be conducting an investigation from a defense perspective. The attorney's investigation should be designed to elicit evidence in support of the client retaining his or her rights, or to identify less restrictive alternatives that are feasible. Further, the attorney should be searching for facts that may test or challenge the credibility of witnesses or documents in support of the petition.

#### *Contact Information for Potential Witnesses*

As soon as possible after being appointed to the case, the attorney should provide the petitioner with a list of individuals and agencies for which the attorney needs contact information and for whom that information is not in the petition or supporting documents. If the petitioner does not have the information, he or she may know who does.

Contact information should be obtained for individuals and agencies who have records the attorney wishes to obtain, as well as potential lay witnesses and expert witnesses who may have information that would support or negate allegations in the petition. This would include: parents, grandparents, siblings, neighbors adjacent to the client's home, support staff, service providers, schools, medical doctors, hospitals, clinics, psychological therapists, dentists, and close friends of the client.

#### Interview Personal Sources of Information

Individuals should be interviewed who can supply reliable information about the client and his or her abilities and disabilities, as well as the client's life history and circle of support. This includes: parents, grandparents, siblings, neighbors, and close friends.

These interviews should not occur until the attorney has done a complete review of all records associated with the case. The records will give the attorney ideas for questions to ask these potential witnesses and will give the attorney a sense as to whether the person being interviewed is being honest or may be withholding or slanting information.

The attorney should decide which individuals he or she should interview personally and which ones should be interviewed by the support staff or investigator who is assisting the attorney with the case.

#### Interview Professional Sources of Information

Just as with personal sources of information, the attorney should decide which professionals to interview personally and which ones should be interviewed by support staff or an investigator. A decision should also be made as to which interviews can be done by phone and which ones should be done in person. These decisions would be made after reviewing all of the records.

Professionals to be interviewed include: support staff, teachers and teacher aides, day program staff, other service providers or service coordinators, medical doctors, psychological therapists, and dentists.

These professionals can provide information about the client's abilities and disabilities, as well as

supply facts or give opinions about whether the person proposed to be guardian is qualified and is the best person for this position. If the professional indicates reluctance to provide negative information, the attorney should decide whether to solicit such information “off the record.” It may be better to receive information on a confidential basis than not to receive that information at all.

### Interviews of the Client

The attorney should not interview the client until after an ADA access and communication plan has been developed. With that plan in place, the attorney should decide when and where and on how many occasions to interview the client.

The attorney may want to meet with the client on two or more occasions – once at home and later in other settings where the client is comfortable. The first meeting may occur before all records are reviewed and may serve as a “getting to know you” session. A subsequent meeting or meetings can occur after the attorney has reviewed all records and interviewed all potential witnesses. At the subsequent meetings, the attorney can share information with the client, at the client’s level of understanding, and receive feedback from the client about that information.

The attorney will need to determine if the client has the ability to participate in decisions regarding whether to support the petition or some of the requests in the petition, or to oppose some or all of these requests. If the client appears not to understand the proceedings and does not have the ability to make decisions about the outcome of the case, the attorney’s role will align with a default position. In that mode, the attorney must defend the client’s existing constitutional and statutory rights from *unnecessary* infringement, insist that due process is followed, and decide whether the petition and its significant allegations and requests are supported by clear and convincing evidence.

### Interviews of the Proposed Guardian(s)

The attorney should personally interview the individual or individuals who have been nominated to serve as guardian. This should be done after the review of records is complete.

The interview should also be done after the other interviews have occurred, since they will give the attorney information and insights that will help guide the interview of the proposed guardian(s).

### **Advocacy and Defense**

Both during and after the investigation, the attorney should keep in mind that his or her role is that of an advocate and defender. At the time the petition is filed, the client has a wide range of existing constitutional and statutory rights that are being placed at risk by the petition. Even if the investigation establishes that most of the allegations and requests in the petition are supported by clear and convincing evidence, there are still issues to be explored and resolved.

Is the person who has been nominated to be guardian qualified to serve in this capacity? Is there anyone else the client would prefer or who is better qualified? Are there any less restrictive means of protecting the client? Should the client share decision making with the guardian on any matters?

### *Evaluation of Evidence*

Once all of the records have been obtained and given a preliminary review, and all of the potential witnesses have been interviewed, the next step is to evaluate the evidence. Although the facts are the facts, they can be viewed differently depending on the perspective of the viewer.

Ultimately, the judge should view the evidence objectively. The petitioner is likely to view the facts from a perspective that looks for nuances or implications that favor the granting of the petition and the requests made in it. The respondent's attorney should be aware of all relevant facts and the manner in which they may be presented by the petitioner and interpreted by the judge.

The attorney for the respondent should present the facts in the light most favorable to the client. This is not to suggest that evidence should be suppressed or unfairly manipulated. Rather, the facts should be presented in a manner that is consistent with the role of being an advocate for a guardianship respondent.

Are there credibility problems with any of the lay witnesses? Do they have a bias or interest that is influencing their presentation of the facts? Are there internal inconsistencies in their statements, or are their views contradicted by other evidence?

If any professional witnesses are involved and have rendered opinions, are their opinions supported by evidence? Are they qualified to render such opinions?

Before proceeding to develop potential defenses or reasonable alternatives, the strength of the body of available evidence needs to be assessed. There is one approach that may be taken if, after a thorough investigation and an honest evaluation of the evidence, the attorney decides that the petition and all allegations and requests are supported by clear and convincing evidence and there are no affirmative defenses or mitigating circumstances. In such case, the attorney may proceed directly to negotiations with the petitioner to seek the most reasonable outcome. The attorney is not obliged to, or even allowed to, raise frivolous objections or arguments.

However, if the case is not an obvious win for the petitioner, and there are flaws in the petitioner's evidence or defenses or alternatives that have *potential* merit, then those lines of inquiry should be explored further. This may be the time to seek a court order to have expert witnesses appointed to assist the attorney in developing these issues further.

### *Appointment of Experts*

The attorney for the respondent is constitutionally required to provide effective representation. State Bar rules of professional conduct require that the attorney act in a competent manner. In some, but not all cases, this may require the attorney to enlist the help of expert witnesses.

There are two areas of inquiry in which expert testimony may be necessary in order to provide effective assistance: capacity to make decisions and lesser restrictive alternatives.

As a matter of due process, if not a matter of statutory entitlement, a guardianship respondent who is indigent is entitled to the appointment of experts at the government's expense.<sup>142</sup> Failure to use the services of an expert, if such services would be relevant and helpful to develop an arguably meritorious position on a material issue, would constitute professional malpractice.

The issue of capacity is not an all-or-nothing issue. There are several areas of decision making, each of which needs to be evaluated separately. A client may lack capacity to make medical and financial decisions, for example, but have capacity (perhaps with help) to make social decisions. Therefore, the attorney should review all documentary and testimonial evidence on each area of decision making – residence, finances, medical, education, marriage, sexual, and social – to determine if an evaluation by a qualified expert would be helpful. Perhaps if capacity in one of these areas is borderline, without assistance, the client would have capacity if supported decision making services were used.

The issue of supported decision making is implicit in the issue of least restrictive alternative. With proper supports and services, the client may be able to retain authority to make some decisions, such as social or sexual, for example. A capacity assessment by a qualified professional is part of the equation. The other part is knowing what supports and services are available in the community where the client will live and whether the client is entitled to receive financial assistance to pay for such services. So two qualified professionals are needed to present such an option to the court – an expert on capacity and an expert on supported decision making services in that geographic location.

In some states, such as California, either the State Department of Developmental Services (DDS) or agencies with which they contract for services, are resources the attorney should use.<sup>143</sup>

### *Negotiation and Settlement*

Once the attorney has gathered the documents, interviewed potential witnesses, reviewed the documentary and testimonial evidence, and obtained expert evaluations and recommendations (or waived that step), strategic decisions must be made about how to proceed. The client should

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<sup>142</sup> In California, for example, Evidence Code Section 730 gives the court authority to appoint experts on its own motion or at the request of a party. If the client in a conservatorship case is indigent, the court can order the county to pay for the fees of the expert – regardless of whether the attorney is a public defender, appointed by the court, or providing legal services on a pro bono basis. (Conservatorship of Scharles, 233 Cal.App.3d 1334 (Cal. App. 1991).

<sup>143</sup> In California, DDS contracts with regional centers to identify and coordinate services for clients with developmental disabilities. The law provides a process that the attorney can initiate to have a qualified professional work with a team of service providers to identify the services the client needs and is entitled to receive. That process would not be paid for by the court's budget or the county's budget, but by the regional center's budget as allocated through legislative mandates and contractual arrangements between DDS and the regional centers. (See "Individual Program Plan," [Document 24](#), [User's Guide](#), p. 28)



participate in this process, to the extent that the client is able to do so (with any supportive services that are part of the ADA access and communication plan).

The attorney should not advocate for the denial of the petition if there is clear and convincing evidence that a guardianship is necessary to protect the client from harm and that lesser restrictive options are not feasible, even with supported decision making. The attorney has a duty not to make frivolous arguments or objections. The attorney also has a duty to advocate for the interests and rights of the client. The client has a right to be free from abuse or neglect and to be safe – rights that are advanced by the granting of a guardianship petition. Therefore, even if the client does not have the capacity to waive the right to a trial or to authorize the attorney to stipulate to an order granting a guardianship, the attorney can still fulfill his or her ethical and constitutional duties to the client.

The attorney need not demand an evidentiary hearing if the facts are uncontested. Under such circumstances, the parties could stipulate that the court may make its decision based on the documents and reports in the court file. Perhaps prior to submitting the case on the court file, the attorney may convince the petitioner to amend the petition to conform to whatever negotiated terms of guardianship seem reasonable to the parties. In any event, the attorney can argue for the outcome that seems the most reasonable, even if the petitioner is not willing to amend the petition.

### *Evidentiary Hearing*

If there are facts in dispute, or arguably meritorious issues that need testimony to prove, the attorney should demand a trial on those issues. Unless there are very strong reasons to the contrary, the client should be present at the trial (consistent with the ADA access and communication plan).

Stipulations to undisputed evidence can be made to save time. Testimony of lay witnesses, experts, and documentary proof are submitted at trial. Motions and objections should be made if they are arguably meritorious, so that a proper record is created for any potential appeal.

### **Appeal**

Many court-appointed attorneys who represent a client in a trial court are not authorized to do so on appeal. There may be a different legal services agency or panel of attorneys for the appellate process. However, even if only as a matter of ADA accommodation, the attorney should assist the client to preserve the right to appeal if there are any arguably meritorious grounds for doing so.

If the client is capable of understanding the right to an appeal and the purposes of an appeal, the attorney should explain these issues to the client. Again, this should be done consistent with the ADA access and communication plan.

If the client is not able to understand these issues, and if there are arguably meritorious appellate issues that can be raised, the attorney should file a notice of appeal and request for appointment of counsel on appeal as an accommodation to the client. An appellate attorney can always ask for the appeal to be dismissed if he or she feels there is no merit to an appeal. But the right to appeal should not be lost merely because the trial attorney took no action to preserve the right.

## Qualification and Training Standards

The Commonwealth of Massachusetts has the most comprehensive qualification and training standards of any state specifying prerequisites for attorneys to receive appointments to represent guardianship respondents and to remain on the appointment panel. The training program, however, is broader than necessary for attorneys who will be representing clients in guardianship cases but not civil commitment cases. The two types of cases involve similar issues in some respects, but have very different considerations in others. The standards recommended here, therefore, exclude some components of the Massachusetts training program.

### *Qualification Standards*

In order to qualify for such appointments in Massachusetts, an attorney must receive thorough training on issues related to guardianship, have some trial experience in any type of case, and participate in a mentorship program. While the training and experience components could be seen as related to due process requirements, the mentorship program is more a matter of “best practices” than a requirement of due process or the ADA. That component, therefore, is not included here as a prerequisite for qualification to receive appointments in guardianship cases. Mentorship seems like a good idea, but whether it is made mandatory or not is not a necessity for providing access to justice as required by the ADA.

Training on factual and legal issues relevant to guardianship cases is the focus here. Whether a court requires any number of years of trial experience or participation in a mentorship program would be optional in terms of “due process *plus*” qualification standards.

### *Training Standards*

The content of training programs should be informed by ADA-compliant performance standards. In order to perform properly, guardianship attorneys need to receive training on topics that coincide with performance.

First and foremost, they need to understand their clients and how their disabilities affect the attorney-client relationship, as well as how such disabilities interface with material issues involved in a guardianship proceeding. As to the former, attorneys need a course in “Disabilities 101.” As to the latter, they need to learn from seasoned guardianship attorneys who have tried contested cases, disability rights advocates (including self advocates), forensic psychiatrists or psychologists, abuse and trauma therapists, disability services providers, and supported decision making specialists.

Guardianship attorneys also need training on the constitutional and statutory rights their clients possess on the day the guardianship petition is filed. These are the rights at stake in the proceedings – the rights the attorneys should be defending from unnecessary infringement: the right to due process of law, which includes the right to effective assistance of counsel; the freedom of intimate association, which includes consenting sexual relationships; freedom of speech and expressive association, which means the right to decide who they spend time with (or not) and how often.

They also need to acquire information about the federal statutory rights of their clients. This includes the right to vote. It also includes the right to be free from disability discrimination and the right to meaningful participation in the guardianship proceedings pursuant to the mandates of the ADA.

As for “Disabilities 101,” the attorneys need to acquire an understanding of the types of physical, cognitive, emotional, and communication disabilities their clients may have. While the attorneys need not become experts on the nature of these disabilities and how they may be relevant to a guardianship proceeding, they do need to acquire basic knowledge on this topic. They also need to learn from self advocates – people who, at first glance, may appear to lack capacity to make decisions, but with supported decision making services were able to make their own decisions or to share decision making with a guardian. They also need to learn about disability services available in their geographic area that, if accessed, may help the client retain decision making authority in or more areas of decision making.

A necessary component of a training program is the issue of capacity to make decisions. This forensic issue is a hybrid product of law and psychology. Attorneys should hear from forensic psychologists with experience in evaluating people with developmental disabilities. They should also learn from seasoned guardianship attorneys on how to challenge assessments, either because the evaluator is not qualified, or because the assessment failed to take various factors into consideration.

The issue of disability and abuse should be part of the training requirements too. A significant percent of guardianship respondents have been victims of abuse, either as a child or as an adult or both. Attorneys should know the high rate of abuse of this population, who the most likely perpetrators are, how to reduce the risk of abuse, and how to investigate suspected abuse.

State Bar rules of professional conduct make it clear that an attorney must perform in a competent manner and should acquire the necessary skills for a specialized area of advocacy before undertaking representation in that area.<sup>144</sup> A training program that includes presentations and materials on the issues described above will not only satisfy these professional requirements, it will assist the attorney in complying with the mandates of Title II and Title III of the ADA.

### Appointment Process Standards

The process of appointing attorneys to guardianship cases varies from state to state, just as it may vary from county to county within a state.

In California, for example, each county decides how to operate the legal services program that supplies attorneys for conservatorship respondents. The board of supervisors in some counties decides to fund the public defenders office to represent such litigants, while in counties such as Los

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<sup>144</sup> Rule 3-101 of the California Rules of Professional Conduct.

Angeles<sup>145</sup> a decision has been made to allow the court to operate a panel of attorneys, and the county pays the attorneys in response to court orders in specific cases.

In contrast, Massachusetts has a state agency that operates the panel of attorneys who are appointed to represent clients in various types of cases, including guardianship proceedings. The information requested on the application form is extensive. The agency runs the entire program, including the nomination of an attorney for a specific case, training, and investigating complaints.

There is much to be said about having an agency independent of the court to operate the legal services program that supplies attorneys for guardianship respondents. It allows the judges to focus on the task they are primarily charged with – deciding cases. There may be an appearance of impropriety when a judge can blacklist an attorney from representing clients in his or her courtroom. Perhaps the attorney was blocked from receiving cases because the attorney advocates too vigorously and takes up too much of the judge’s time. A conflict of interest is of concern when the court runs the training program for these attorneys, especially when speakers are selected who help shape whether attorneys advocate for a certain position or not.

Recommendations by the National Center for State Courts have informed the standard recommended here for the appointment process.

The National Center’s standard for this process states:<sup>146</sup> “The manner in which attorneys are appointed from the panel of attorneys eligible to represent civil commitment respondents should safeguard the autonomy of attorneys in representing their clients. To accomplish this objective, an independent third party, such as the local bar association or a legal services organization, should be responsible for maintaining the panel. The court should appoint attorneys from that panel serially, unless an attorney’s absence or other compelling reasons require otherwise.”

Los Angeles County has a variety of appointment processes, depending on the type of case. In all of them, except guardianships, an agency other than the court operates the program. The selection system and training program for advocates should not be run by the judges who decide the cases.

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<sup>145</sup> The manner in which the panel is operated by the court was explained by the presiding judge of the probate court at a [seminar](#). The process is very informal. Attorneys apply and certify they meet the qualifications. There is no auditing by the court as to whether the certification is true or not. They must also take a training course within one year. The court staff runs the process of selecting one of the 220 attorneys on the panel for specific cases. There are about 2,200 new cases filed each year that require attorneys to be appointed. So in a rotational system, each attorney should receive about 10 cases a year. Instead, some attorneys receive 60 to 80 cases while others receive almost no cases. This has caused resentment and insinuations of favoritism. There is no process for taking an attorney off the panel. Individual judges can blacklist an attorney from receiving appointments in their courtrooms.

<sup>146</sup> “Guidelines for Involuntary Civil Commitment,” National Center for State Courts (1986) (See [Document 33](#), [User’s Guide](#), p. 46)

## Monitoring Standards

A policy is only as good as the implementation process. Implementation is only as good as the monitoring process. Monitoring creates accountability. Without accountability, whether a policy is implemented or not is either unknown or a matter of chance.

Whether a defendant receives due process in a guardianship case should not depend on the state in which he or she lives. The same is true for whether a guardianship respondent receives access to justice as required by the ADA. But as many, if not most, state guardianship systems are currently operating, there is no way of knowing whether people with disabilities, as a class, are receiving “due process *plus*” legal services in any given jurisdiction, much less whether individual litigants are.

The only way to ensure equal protection and uniform operation of the law is through effective monitoring standards. Such standards should be voluntarily adopted by the states.<sup>147</sup> Monitoring of the effectiveness of ADA-compliant “access to justice” advocacy and training standards for court-appointed attorneys who represent guardianship respondents has two dimensions. One is the monitoring of the performance of attorneys in *individual cases* as well as monitoring samples of cases to determine if there is a pattern of noncompliance. The other is to put into place methods to monitor the *system* for appointment, training, and oversight of the panel of attorneys. The following sections discuss both aspects of the monitoring of these components of ADA compliance.

### *Administrative Complaint Procedures*

There should be a procedure whereby the official or agency in charge of operating a legal services panel of attorneys can receive complaints about the performance of members of that panel. If the investigation of such a complaint shows a violation of ethics or a violation of performance standards, the agency or official may place the attorney on probation or remove the attorney from the panel. In order to be fair to the attorney, the investigatory and remedial process should not be conducted on an ad hoc basis but should be guided by established procedures that should be applied in a uniform manner.

Some courts have adopted an administrative complaint procedure regarding the performance of

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<sup>147</sup> If ADA-compliant “access to justice” policies, implementation guidelines, and monitoring procedures are not voluntarily adopted by the judicial branch in a state, the DOJ may investigate any of these deficiencies. If an investigation is opened by the Department of Justice, and if the state is found by the DOJ to be out of compliance with the ADA, the DOJ should require the state to adopt ADA compliant policies, to establish procedures to implement those policies, and to create a system to monitor the implementation program. When a federal court issues an injunction against a defendant or the Department of Justice reaches a settlement with an offending party, a monitoring system is often put into place. (See section titled “DOJ Enforcement Procedures,” below.)

court-appointed attorneys,<sup>148</sup> while others have announced a complaint procedure that, upon closer examination, is either illusory or operates without objective guidelines.<sup>149</sup> Those who fund or who operate legal services panels of attorneys for guardianship cases should move beyond the ad hoc approach and promulgate policies and procedures for processing administrative complaints against panel attorneys.

In the context of guardianship proceedings, a standard should be adopted establishing administrative procedures whereby a complaint can be filed for allegedly deficient performance by a court-appointed attorney representing a guardianship respondent. The administrative complaint process can provide one or more remedies. One is to redress deficiencies affecting a client in a specific case. The other is to ensure that an attorney whose performance is deficient does not cause harm to clients in the future. The remedy for the former would be to assign a new attorney to the case. For the latter, the attorney would be placed on probation, suspended, or terminated from the panel or from the agency with which he or she is employed.

### *Marsden Hearings*

When an attorney is appointed by the court to represent a guardianship respondent, the statutory right to counsel carries with it a due process right to effective assistance of counsel.<sup>150</sup> In order to implement that right in individual cases, some courts have adopted procedures in which a litigant can complain to the judge about the allegedly deficient performance of his or her attorney and request the appointment of a new attorney. In California such a request will trigger a “Marsden” procedure – a name adapted from the seminal case on that topic.<sup>151</sup>

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<sup>148</sup> Rule 7.32 – Client Complaint Process, “Juvenile Division Rules,” Los Angeles Superior Court [Rules of Court](#), p. 188. This procedure, however, seems to be geared more to deciding whether to replace the attorney on a specific case than whether the attorney should remain on the panel or be placed on probation. An interview with the supervising attorney who runs the Indigent Criminal Defense Appointments Program operated by the Los Angeles County Bar Association confirmed that the [ICDA Program](#) does have a complaint [procedure](#) in place. If the conduct of an attorney warrants discipline, the attorney can be suspended or terminated from the panel. Some public defenders offices have an internal complaint [procedure](#) that a client can use if the client believes that his or her attorney is not performing competently.

<sup>149</sup> At a recent luncheon [seminar](#) for attorneys who were considering whether to apply to be on the conservatorship attorney panel operated by the probate court, the presiding judge of the court said that attorneys can notify her if they observed any violations of ethics or deficient performance by a court-appointed attorney. However, she noted that the court does not have any procedures or guidelines for removing attorneys from the panel.

<sup>150</sup> *Conservatorship of Person John*, 48 Cal.4th 131 (2010); *Commonwealth v. Patton*, 458 Mass. 119 (2010); also see Rule 8.47, California Rules of Court)

<sup>151</sup> *People v. Marsden*, 465 P.2d 44, 4 Cal.3d 118.

Marsden procedures apply to conservatorship cases.<sup>152</sup> Under established procedures in California, when someone with a court-appointed attorney requests a new attorney, an in-camera hearing is conducted.<sup>153</sup> Other parties to the case are excluded from the hearing.<sup>154</sup> The purpose of the hearing is to inquire into the reasons for the request and, if there is evidence of a deficient performance by the attorney, to relieve counsel and appoint a new attorney.<sup>155</sup>

It should be obvious to a court that hears guardianship cases that most respondents will not be able to recognize deficient performance by their attorneys or know that they have a right to ask for a new attorney. Therefore, to fulfill its obligations under Title II of the ADA, the court must provide some accommodation to enable a guardianship respondent with cognitive or communication disabilities to have access to a Marsden procedure or some equivalent. When a litigant is unable, due to a mental disability, to exercise the right to request new appointed counsel, the court must allow someone else to fill the void by allowing them to act as a Marsden communication agent of sorts.<sup>156</sup>

Sometimes the "Marsden communication agent" could be a petitioner, a guardian, or a guardian ad litem, but when the position of these participants in the proceeding is at odds with the respondent retaining his or her rights, then someone else must be allowed to raise the issue of ineffective assistance of counsel in the context of a Marsden hearing. This might be a relative, friend, or disability rights advocacy agency.

In the context of a guardianship proceeding, the court should establish standards for a respondent, or someone acting as his or her communication agent, to raise the issue of ineffective assistance of counsel. The communication agent should not have an actual or potential conflict of interest with the respondent. Once such an issue is raised, the court should conduct a confidential and non-

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<sup>152</sup> In re David L., 164 Cal.App.4th 701 (2008); People v. Hill, 219 Cal.App.4th 646 (2013)

<sup>153</sup> Rule 8.47, California Rules of Court

<sup>154</sup> In re Joann E. (2002) 104 Cal.App.4th 347, 3S 1; also see California Judges Benchguides, Benchguide S4, Right to Counsel Issues, p. 54-5, Exhibit B.

<sup>155</sup> Once the court becomes aware that a client with a court-appointed attorney wants a new attorney, the court has an obligation to inquire, through a legally sanctioned procedure, as to whether the existing attorney has been performing in a deficient manner. Appointing a temporary "conflict" attorney to research and argue the matter is not an authorized procedure. (People v. Sanchez, 53 Cal.4th 80, 89 (2011))

<sup>156</sup> Michelle K. V. Superior Court 221 Cal.App.4th 409, 451-452 (2013). Citing the state's Lanterman Act which recognizes the rights of people with developmental disabilities, as well as the due process and equal protection clauses of the constitution, the court stated that a mental disability "does not make a conservatee any less entitled to receive effective representation or any less entitled to request new appointed counsel if the representation [he] is receiving is ineffective." (Michelle K., supra, at p. 452)

adversarial hearing at which the communication agent is allowed to identify the areas of deficient performance and to ask for appointment of a new attorney.

The only parties to be present at the hearing would be the respondent and his or her communication agent, respondent's current attorney, the judge, and officers of the court. In order to maintain client confidences and prevent attorney work product from being disclosed to adversarial or potentially adversarial parties, other participants in the case should not be present at the hearing. A transcript of the proceedings should be created for purposes of a potential appeal. However, the transcript should not be made available to participants in the case who were not present at the confidential hearing.

### *Modified Rules for Appellate Standing*

Rules of standing for the right to appeal generally limit standing to someone whose rights have been directly affected or infringed. For most litigants, this does not pose a problem and does not deprive them of access to justice.

However, the normal rules of standing to appeal could deprive an involuntary litigant in a guardianship proceeding the ability to appeal from an order that adversely restricts his or her constitutional or statutory rights. This is especially so if the attorney representing the litigant caused or acquiesced in such a violation of rights.

Due to the nature of their disabilities, the litigant would not know why or how to appeal. His or her attorney would be unlikely to file a notice of appeal for the client since the attorney either acquiesced in the ruling or because errors or omissions of the attorney caused or contributed to the adverse ruling. Therefore, unless standing rules are modified, the litigant would be deprived of access to appellate review of rulings by a trial court or deficient performance by a trial attorney that adversely affected the litigant's rights.<sup>157</sup>

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<sup>157</sup> The California Court of Appeal refused to consider arguments that a probate court judge violated the constitutional rights of a respondent in a limited conservatorship proceeding. (*Conservatorship of Gregory D.*, 214 Cal.App.4th 62 (2013)) The respondent had developmental disabilities. His attorney had acquiesced in the order that was being challenged on appeal. His mother, who was a participant in the conservatorship proceeding, filed the appeal to protect her son's constitutional rights since the young man's own attorney did not appeal. The Court of Appeal refused to consider the merits of the case, instead dismissing the appeal for lack of standing. A court sensitive to the rights of litigants with developmental disabilities, and aware of Title II duties under the ADA, would have asked for additional briefing on the need to modify the normal rules of standing to allow the mother to raise the constitutional issues on her son's behalf, perhaps in the capacity as his "next friend." Next friend standing is sometimes allowed when a litigant has a disability that impairs his or her participation in the case and when the person seeking to act as next friend has a close relationship to the litigant and is likely to vigorously advocate on behalf of the litigant.



Rules of appellate standing should be modified to ensure access to the appellate process for guardianship respondents who have developmental or communication disabilities. An individual or advocacy agency should be allowed to proceed with an appeal on behalf of the respondent, especially if the appeal seeks to vindicate the litigant's civil or constitutional rights. That person would proceed with the appeal in the capacity of next friend of the litigant. If an appellate court has doubts about the ability of the next friend to advocate competently for a litigant with such disabilities, the court can appoint a guardian ad litem to make decisions for the litigant during the appeal. If the litigant is indigent, the guardian ad litem can ask the court to appoint counsel at the expense of the government to represent the litigant (through the guardian ad litem) on appeal.

### *Periodic Auditing of Cases and Systems*

To make sure that individual attorneys are complying with performance standards, there should be a periodic and random audit of attorneys who are on the panel. If an attorney is randomly selected for an audit, a few of his or her cases should be reviewed. Court records and pleadings should be examined. The attorney's case file should be reviewed as well. Because this process may be time consuming, the review of just a few cases of just a few attorneys would be sufficient.

Systems involved in the process of managing court-appointed attorneys should also have a monitoring process. The process of appointing attorneys (recruitment and placement on the panel) should be audited. A few of the new applications for admission to the panel should be viewed to determine if the facts and assertions made in the application are true. Training programs should also be audited.<sup>158</sup> The system of assigning attorneys to individual cases should be audited to determine if attorneys are assigned on a rotational basis or if there is any unfairness in the assignment process.

The "standing to appeal" process should be audited to make sure that a new modified rule on standing for litigants with developmental disabilities has been adopted by court rule and that it is made known to the panel of guardianship attorneys and explained on the website of the Court of Appeal. The "Marsden" IAC process should also be audited. Has a court rule been adopted about that process and have attorneys been informed of the process? Is there information on the court's website or in instruction booklets to advise petitioners and objectors about their ability to complain about the deficient performance of an attorney representing a guardianship respondent?

### *ADA Noncompliance Complaint Procedures*

Agencies that are governed by Title II are supposed to adopt an informal complaint procedure in which people can file a complaint because a policy or practice of that agency is not in compliance with the ADA. This grievance procedure is separate and distinct from a complaint regarding the

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<sup>158</sup> The audit would determine if all topics that should be included in such a program have been included. It would also examine whether the speakers who made presentations were qualified to teach on that topic and whether in fact their presentation covered the topic that was advertised and for which MCLE credits were approved by the State Bar. An audit may uncover a [major deficiency](#) in a training program.

failure to provide an accommodation in a specific case.

Federal regulations implementing the Americans with Disabilities Act of 1990 (ADA) require public entities with 50 or more employees to designate a responsible employee and adopt grievance procedures providing for prompt and equitable resolution of complaints alleging noncompliance or complaints alleging any actions that would be prohibited under title II of the ADA.<sup>159</sup>

Some courts have information about this grievance procedure on their websites.<sup>160</sup> Other government agencies that may have some role in the legal services program that supplies attorneys for guardianship respondents may also have information available about their Title II internal grievance procedures.<sup>161</sup>

All courts with 50 or more employees should have information on their websites to make attorneys and the public aware that the court has an internal grievance procedure that can be used by anyone who believes that policies or practices of the court are not in compliance with Title II of the ADA. Having such a procedure in place is another way to monitor whether the policies and practices of an agency may be out of compliance with the ADA.

## DOJ Enforcement Procedures

State and local court systems that do not adopt advocacy and training standards for court-appointed guardianship attorneys may someday find themselves receiving a letter of inquiry from the United States Department of Justice. A letter might also be received in response to a complaint regarding a pattern of ADA violations by some of the attorneys on its guardianship panel.

The letter of inquiry is the first step of an investigative process that could eventually lead to negotiations prior to the filing of a complaint in federal district court. Prior to or after a lawsuit is filed, negotiations may result in a settlement agreement or a consent decree in which the court system

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<sup>159</sup> 28 C.F.R. § 35.107

<sup>160</sup> The Superior Court of California for the County of Sonoma described such a process on its [website](#). This is the type of procedure that would be used to alert the court about the specific policies or procedures that are depriving guardianship respondents of access to justice. The court has a specific [form](#) for the complaining party to use. The Sixth Judicial District Court in Florida also has information on its [website](#) about its internal ADA grievance procedure. No information on this topic could be found on the website of the Los Angeles Superior Court.

<sup>161</sup> Los Angeles County has such a procedure mentioned on its website. Spectrum Institute used that procedure to [complain](#) that the county was in violation of Title II because it was funding the court-appointed attorney program operated by the Superior Court and that the county was in violation of Title II because it did not adopt any quality assurance controls to make sure that the attorneys whose services it was funding were not violating the ADA. The letter was eventually [withdrawn](#) because the county was violating its own internal grievance procedures.

commits to taking various remedial actions, such as adopting new policies, creating a transition plan, adopting an implementation program, and possibly even hiring an independent monitor to conduct ongoing verification of whether the court system is complying with the agreement or decree.<sup>162</sup>

Sometimes when training is required as part of a settlement agreement or consent decree, it is specified that only “competency based training” will suffice. “‘Competency-based training’ . . . [means] the provision of knowledge and skills sufficient to enable the trained person to meet specified standards of performance consistent with generally accepted professional standards or specified in law, regulation, or policy, as validated by that person's demonstration that he or she can use such knowledge or skills effectively.”<sup>163</sup> The training that has been occurring in Los Angeles County could be described as efficiency-based training. It is certainly not competency based. Training programs that fail to include key topics that are essential to meeting ADA-compliant advocacy standards are prime targets for ADA complaints to the DOJ.<sup>164</sup>

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<sup>162</sup> Many examples are available to show the types of remedial actions that may be contained in a settlement agreement or consent decree. The city of [Jackson](#), Mississippi agreed in 2010 to pay for various ADA modifications, a new training program, and an independent monitor to verify compliance over a three year period. The Justice Department entered into a settlement agreement with the [Louisiana Supreme Court](#) in 2014 to revise its practices with respect to the admission to the bar of applicants with a history of mental illness and to reexamine previous applications that may have been denied in violation of the ADA. The Michigan [Department of Human Services](#) agreed in 2006 to adopt new policies, implement new training programs, and to self monitor its compliance and to submit periodic progress reports to the Department of Justice. The [Department of Justice](#) in Puerto Rico agreed in 2001 to implement a new training program. Because of violations by the local court, [Adair County](#), Oklahoma agreed to evaluate its current practices, create a transition plan, and adopt new policies. [Oklahoma County](#), Oklahoma entered into an agreement in which it agreed that it would be the responsibility of attorneys representing a litigant to request any necessary ADA accommodations for their clients.

<sup>163</sup> This definition was contained in a [settlement agreement](#) between the State of Georgia and the Justice Department in 2010. A separate provision required “all hospital staff members charged with investigative responsibilities to complete competency-based training on investigation methodologies and documentation requirements necessary in mental health service settings.” The [Commonwealth of Virginia](#) also agreed to implement competency-based training in a 2012 settlement agreement.

<sup>164</sup> Audits by Spectrum Institute of the training program mandated by the Los Angeles Superior Court and operated by the Los Angeles County Bar Association, show that attorneys have not been trained about: (1) the basics of each of the types of intellectual and developmental disabilities; (2) how to effectively interview a client by providing accommodations for his or her specific disabilities; (3) criteria for capacity assessments in each of the seven key areas of decision making; (4) how to challenge capacity assessments by professionals or regional centers; (5) procedures available at regional centers to insure that qualified capacity assessments are done in each case; (6) the requirements of the ADA and section 504 as to courts and court-appointed

With a huge push by disability rights groups throughout the nation for supported decision making as a less restrictive alternative to guardianship, it is plausible that we will see a wave of new ADA complaints filed with the DOJ in the coming years on this issue. If courts do not train guardianship attorneys on this issue, or if there is a pattern of the issue not being investigated or argued in samples of cases in a particular court, that court may find itself negotiating a settlement agreement with the DOJ. Law review articles have already been written to promote this theory for ADA complaints.<sup>165</sup>

## Conclusion

The guardianship reform process began decades ago. It has received a boost from time to time as a result of media attention alerting the public to corrupt and deficient practices that have been allowed to fester and grow by the courts that run the guardianship systems.

Momentum for reform has picked up steam in recent years, partly due to the emergence of a growing demand for supported decision making as a less restrictive alternative. The creation of “WINGS” projects in a dozen states has moved judges out of their courtrooms and administrators out of their high-rise offices, and has put them out into the community. The collaborative approach of WINGS projects has replaced secretive judicial meetings on policy with public discussions with various guardianship “stakeholders.” Transparency and openness are fast becoming the new norms.

Media attention and collaborative discussions may not be sufficient to reform a system that has a vested interest in safeguarding its current priorities of efficiency and low cost. Replacing paternalistic attitudes and incapacity assumptions with policies and practices that promote self determination for people with developmental disabilities is not an easy task. Training a cadre of legal advocates, who will push the judicial system to do what the ADA promises, is the next step. These advocacy and training standards are intended to help lead the way toward such a goal.

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attorneys; (7) federal voting rights laws; (8) less restrictive alternatives to conservatorship; (8) civil rights and constitutional rights of adults with developmental disabilities and how to defend those rights; (9) how to challenge the lack of an investigation by a court investigator or an inadequate investigation; and (10) the prevalence of abuse against people with developmental disabilities, likely perpetrators, the need for scrutiny of relatives who want to become conservators, and how to investigate allegations of abuse. (See: “[A Missed Opportunity: Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities](#),” Spectrum Institute (2014). “PVP Training on Limited Conservatorships – [Part I](#),” Spectrum Institute (2014). “PVP Training on Limited Conservatorships – [Part II](#),” Spectrum Institute (2014). “[Limited Conservatorship Reform in California: Several Areas That Need Improvement](#),” Spectrum Institute (2014).

<sup>165</sup> [Rethinking Guardianship](#) (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act. 81 Univ. Of Colo. Law Review 157 (2010); [Guardianship for Persons with Mental Illness](#) – A Legal and Appropriate Alternative?, 4 Saint Louis Journal of Health Law and Policy 279 (2011)

# Summary of Standards

Standards should be established for the performance of attorneys representing respondents in guardianship cases. Qualification and training standards are also needed. Standards should regulate the operations of the system used for the recruitment, appointment, and discipline of such attorneys. Monitoring standards should be developed to provide quality assurance oversight for representation in individual cases as well as making sure that the standards for all aspects of the legal services system are being properly implemented.

The following is a summary of the “due process *plus*” standards being recommended to ensure that clients with developmental disabilities have access to justice in guardianship cases.

## **A. Performance Standards** (White Paper, p. 50-58)

### **A-1. Investigation**

*A-1-A. Records.* The attorney has a duty to obtain all records that may be relevant to the investigation and evaluation of, and advocacy for, all issues that may arise during the course of a guardianship proceeding. Requests for such records should be made immediately after the attorney is appointed to a case.

*A-1-B. Witnesses.* The attorney should identify all potential witnesses, whether personal or professional, on whom the petition relies for evidence and obtain contact information for such witnesses. The attorney should identify and obtain contact information for all potential witnesses who may be helpful to advocating or defending positions that advance the wishes or interests of the client. Potential expert witnesses should be identified. All potential witnesses for the petitioner or for the respondent should be interviewed.

*A-1-C. Client and Guardian.* The client should be interviewed in private and in an appropriate setting, on as many occasions as necessary. The proposed guardian or guardians should also be interviewed by the attorney.

*A-1-D. Background Checks.* Background checks should be made to determine whether the proposed guardian is qualified and is the best person to serve as guardian. Background checks should also be conducted on members of the household in which the respondent will live if the petition is granted.

### **A-2. ADA Access Plan** (White Paper, p. 51)

Prior to interviewing the client, the attorney should gather records and conduct interviews of relevant informants for the purpose of preparing an ADA access and communications plan for the client. This plan will assist the attorney in making sure that attorney-client interactions are as meaningful as possible and that the client is able to understand the legal proceedings and participate in them to the best of his or her abilities.

### **A-3. Advocacy and Defense** (White Paper, p. 56-58)

*A-3-A. Evaluation of Evidence.* After all documents have been obtained and all potential witnesses and sources of information have been interviewed, this documentary and testimonial evidence should be evaluated by the attorney. The attorney should decide whether this information provides clear and convincing evidence in support of the petition and all allegations and requests made in it. The attorney should determine if the existing evidence raises doubts about any of the allegations of incapacity, doubts that less restrictive alternatives are feasible, or doubts that the person nominated to be guardian is qualified and is the most suitable candidate for this position of trust.

*A-3-B. Appointment of Experts.* The attorney should determine whether to ask the court to appoint experts to assist the attorney with the evaluation of evidence or to provide professional opinions on any issues in the case. If the attorney believes that expert evaluations or evidence is necessary to effective advocacy, a request for such appointments should be made. If experts are appointed, the attorney should work closely with the experts to maximize the value of their participation in the case.

*A-3-C. Negotiation and Settlement.* Once the attorney has gathered the documents, interviewed potential witnesses, reviewed the documentary and testimonial evidence, and obtained expert evaluations and recommendations (or waived that step), the attorney should make strategic decisions about how to proceed with the case. The client should participate in this process, to the extent that the client is able to do so (with any supportive services that are part of the ADA access and communication plan).

The attorney should not advocate for the denial of the petition if there is clear and convincing evidence that a guardianship is necessary to protect the client from harm and that less restrictive options are not feasible, even with supported decision making. The attorney has a duty not to make frivolous arguments or objections. The attorney also has a duty to advocate for the interests and rights of the client. The client has a right to be free from abuse or neglect and to be safe – rights that are advanced by the granting of a guardianship petition. Therefore, even if the client does not have the capacity to waive the right to a trial or to authorize the attorney to stipulate to an order granting a guardianship, the attorney should take appropriate steps to fulfill his or her ethical and constitutional duties to the client on each of these issues.

The attorney need not demand an evidentiary hearing if the facts are uncontested. Under such circumstances, the attorney should consider inviting the petitioner to stipulate that the court may make its decision based on the documents and reports in the court file. Prior to submitting the case pursuant to such a stipulation, the attorney should consider asking the petitioner to amend the petition to conform to whatever negotiated terms of guardianship seem reasonable to the parties.

*A-3-D. Evidentiary Hearing.* If there are facts in dispute, or arguably meritorious issues that need testimony to prove, the attorney should demand a trial on those issues. Unless there are strong reasons to the contrary, the client should be present at the trial (consistent with the ADA access and communication plan). Stipulations to undisputed evidence can be made. Testimony of lay

witnesses, experts, and documentary proof should be submitted at trial. Motions and objections should be made if they are arguably meritorious. A record should be created for any potential appeal.

#### **A-4. Appeal** (White Paper, p. 58)

Whether or not the attorney is authorized to represent the client on appeal, the attorney should assist the client to preserve the right to appeal if there are any arguably meritorious grounds for doing so. If plausible grounds exist, the attorney should file a notice of appeal, even if only as an ADA accommodation for the client.

If the client is capable of understanding the right to an appeal and the purposes of an appeal, the attorney should explain these issues to the client. This should be done consistent with the ADA access and communication plan.

#### **B. Qualification and Training Standards** (White Paper, p. 59)

*B-1. Qualification Standards.* The attorney should have received thorough training on issues related to guardianship and should have some general trial experience in order to be considered qualified for appointments to represent guardianship respondents.

*B-2. Training Standards.* The content of training programs should be informed by ADA-compliant performance standards. In order to perform properly, guardianship attorneys need to receive training on topics that coincide with performance.

Training programs should provide the necessary information to assist attorneys in understanding their clients and how their disabilities affect the attorney-client relationship, as well as how such disabilities interface with material issues involved in a guardianship proceeding.

The program should include a course in “Disabilities 101.” In this training segment, attorneys need to acquire an understanding of the types of physical, cognitive, emotional, and communication disabilities their clients may have and how they affect communication and decision making abilities.

Speakers on guardianship advocacy and defense should include seasoned guardianship attorneys who have tried contested cases. Presenters should also include disability rights advocates (including self advocates), forensic psychiatrists or psychologists, abuse and trauma therapists, disability services providers, and supported decision making specialists.

A training component should include information about the constitutional and statutory rights that guardianship respondents possess when a guardianship petition is filed. These are the rights at stake in the proceedings – the rights the attorneys should be defending from unnecessary infringement.

A necessary component of a training program is the issue of capacity to make decisions. This forensic issue is a hybrid product of law and psychology. Attorneys should hear from forensic psychologists with experience in evaluating people with developmental disabilities. They should

also learn from seasoned guardianship attorneys on how to challenge assessments, either because the evaluator is not qualified, or because the assessment failed to take various factors into consideration.

The issue of disability and abuse should be included in the training program. A significant percent of guardianship respondents have been victims of abuse as a child, or as an adult, or both. Attorneys should learn the high rate of abuse of this population, who the most likely perpetrators are, how to reduce the risk of abuse, and how to investigate suspected abuse.

### **C. Appointment Process Standards (White Paper, p. 59)**

The manner in which attorneys are appointed from the panel of attorneys eligible to represent guardianship respondents should safeguard the autonomy of attorneys in representing their clients. To accomplish this, an independent third party, such as the local bar association or a legal services organization, should be responsible for maintaining the panel. The court should appoint attorneys from that panel serially, unless an attorney's absence or other compelling reasons require otherwise.

### **D. Monitoring Standards (White Paper, p. 60-66)**

Procedures should be established to monitor the effectiveness of ADA-compliant “access to justice” advocacy and training standards for court-appointed attorneys who represent guardianship respondents. The procedures should have two dimensions. One is the monitoring of the performance of attorneys in *individual cases* as well as monitoring samples of cases to determine if there is a pattern of noncompliance. The other is to put into place methods to monitor the *system* for appointment, training, and oversight of the panel of attorneys.

#### **D-1. Administrative Complaint Procedures**

Procedures should exist whereby the official or agency in charge of operating a legal services panel of attorneys receives and processes complaints about the performance of members of that panel. If the investigation of such a complaint shows a violation of ethics or a violation of performance standards, the agency or official should take appropriate corrective action, such as placing the attorney on probation or removing the attorney from the panel. In order to be fair to the attorney, the investigatory and remedial process should not be conducted on an ad hoc basis but should be guided by established procedures that are applied in a uniform manner. Another remedial action is to remove the attorney from a specific case and to appoint a new attorney to represent the client.

#### **D-2. Marsden (IAC) Hearings**

In order to implement the right to effective assistance of counsel in individual cases, a procedure should be established in which a litigant can complain to the judge about the allegedly deficient performance of his or her attorney and request the appointment of a new attorney. The procedure should be similar to what occurs in California when a litigant requests that a new attorney be appointed due to ineffective performance (a “Marsden” procedure). The procedures used in such a proceeding should have the safeguards inherent in the Marsden model.



### **D-3. Modified Rules of Standing to Appeal**

Rules of appellate standing should be modified to ensure access to the appellate process for guardianship respondents who have developmental or communication disabilities. An individual or advocacy agency should be allowed to proceed with an appeal on behalf of the respondent, especially if the appeal seeks to vindicate the litigant's civil or constitutional rights. That individual or agency should be allowed to proceed with the appeal in the capacity of next friend of the litigant.

### **D-4. Periodic Auditing of Cases and Systems**

To make sure that individual attorneys are complying with performance standards, there should be a periodic and random audit of attorneys who are on the panel. If an attorney is randomly selected for an audit, a few of his or her cases should be reviewed. Court records and pleadings should be examined. The attorney's case file should be reviewed as well. Because this process may be time consuming, the annual review of just a few cases of just a few attorneys would be sufficient.

Systems involved in the process of managing court-appointed attorneys should also have a monitoring process. The process of appointing attorneys (recruitment and placement on the panel) should be audited. A few of the new applications for admission to the panel should be viewed to determine if the facts and assertions made in the application are true. Training programs should also be audited. The system of assigning attorneys to individual cases should be audited to determine if attorneys are assigned on a rotational basis or if there is any unfairness in the assignment process.

The "standing to appeal" process should be audited to make sure that a modified rule on standing for litigants with developmental disabilities has been adopted, that it is being made known to the panel of guardianship attorneys, and is being explained on the website of the Court of Appeal.

The "Marsden" IAC process should also be audited. The auditing agency should determine whether a court rule been adopted to allow for a Marsden process and that attorneys have been informed of the process. The auditor should check to verify that information about the Marsden process is on the court's website or in instruction booklets, and that the information advises petitioners and objectors about their ability to complain about the deficient performance of an attorney representing a guardianship respondent. Local disability rights organizations should also be informed.

### **D-5. ADA Noncompliance Complaint Procedures**

Agencies involved in appointing, training, and supervising guardianship attorneys should adopt an informal complaint procedure in which people can file a complaint because a policy or practice of that agency is not in compliance with the ADA. This grievance procedure should be separate and distinct from a complaint procedure for failure of the agency to properly respond to a specific request for an ADA accommodation.

## Statutory Right to Counsel for Adults in Initial Proceedings in Probate Guardianships

Original Research by [Jenny Hatch Project](#)

\*Differing View by Spectrum Institute (Compare [ABA](#) Analysis)

State	Automatic Right	Conditional Right	Comments
Alabama	yes		attorney may act as guardian ad litem
Alaska	yes		attorney to be zealous advocate
Arizona	yes		maintain normal attorney-client relationship
Arkansas	yes		maintain normal attorney-client relationship
California	yes		
Colorado	no	yes	upon request, recommended by visitor, or court's discretion
Connecticut	yes		represent stated wishes of client; maintain normal attorney-client relationship
Delaware	yes		may sometimes advocate best interests
District of Columbia	yes		act as zealous advocate; but may argue best interests if client cannot state wishes
Florida	yes		represent stated wishes; maintain normal attorney-client relationship
Georgia	yes		maintain normal attorney-client relationship
Hawaii	no	yes	upon request, recommended by visitor, or court's discretion
Idaho	yes		duties of guardian ad litem
Illinois	no	yes	upon request, recommended by visitor, or court's discretion
Indiana	no	yes	court's discretion
Iowa	yes		not act as GAL; maintain normal relationship
Kansas	yes		maintain normal attorney-client relationship
Kentucky	yes		maintain normal attorney-client relationship
Louisiana	yes		maintain normal attorney-client relationship
Maine	no*	yes*	if respondent wishes to contest the proceeding
Maryland	yes		maintain normal attorney-client relationship
Massachusetts	no	yes	upon request or in court's discretion
Michigan	no*	yes*	upon request or if respondent wishes to contest the proceeding
Minnesota	yes		maintain normal attorney-client relationship
Mississippi	no	no	statutes are silent on right to counsel

State	Automatic Right	Conditional Right	Comments
Missouri	yes		maintain normal attorney-client relationship
Montana	no	yes	court discretion in interests of justice
Nebraska	no*	yes*	right to private counsel or court may appoint counsel in its discretion
Nevada	yes		maintain normal attorney-client relationship
New Hampshire	yes		maintain normal attorney-client relationship
New Jersey	yes		maintain normal attorney-client relationship
New Mexico	yes		role of guardian ad litem
New York			
North Carolina	yes		role of guardian ad litem
North Dakota	yes		role of guardian ad litem
Ohio	no*	yes*	upon request
Oklahoma	no	yes	court may appoint attorney
Oregon	no	yes	court may appoint counsel
Pennsylvania	no	yes	may appoint counsel upon request
Rhode Island	no*	yes*	upon request or if respondent wishes to contest the proceeding
South Carolina	yes		role of guardian ad litem
South Dakota	no*	yes*	upon request, if respondent contests proceeding, or in court's discretion
Tennessee	no*	yes*	upon request, on recommendation of GAL, or if court deems it necessary
Texas	yes		unclear what role attorney has
Utah	yes		maintain normal attorney-client relationship
Vermont	yes		act as advocate, not GAL
Virginia	no*	yes*	right to private counsel; appointed counsel upon request of respondent or GAL if deemed necessary by court
Washington	no	yes	right to retain private counsel; if court deems it necessary then counsel is appointed
West Virginia	yes		advocate best interests of client
Wisconsin	no	yes	upon request or if respondent contests or if court deems it necessary
Wyoming	yes		advocate preferences, not best interests
Total	30 Yes	19 Yes	Mississippi is silent on the right to counsel; New York page is temporarily unavailable

\* Spectrum Institute does not read the statutes in these states the same as the Jenny Hatch Project does. To us, the wording of these statutes indicate that appointment of counsel is not automatic but is dependent on some action or request by the respondent or the guardian ad litem, or that it rests in the discretion of the court. JH Project listed 38 states with mandatory appointment of counsel. We find only 30 states.

# Spectrum Institute

A Nonprofit Organization Engaging in  
Research, Education, and Advocacy

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The logo for the Disability & Abuse Project features a stylized graphic on the left consisting of a green arrow pointing upwards and to the right, and a blue arrow pointing downwards and to the right, both originating from a central point. To the right of this graphic, the words "Disability & Abuse Project" are written in a blue, serif font.

# Disability & Abuse Project



Tom Coleman, Nora Baladerian, Jim Stream

Activities of the Disability and Abuse Project are coordinated and directed by an Executive Committee. Dr. Nora J. Baladerian is the Project Director, Jim Stream is the Principal Consultant, and Thomas F. Coleman is the Legal Advisor. Nora has decades of experience as a clinical psychologist, educator, and advocate. Jim has extensive experience in agency management and delivery of services to people with disabilities. He is also an advocate. Tom has more than 40 years of experience as a legal advocate involving civil, criminal, and constitutional law. What they have in common is a passion for justice, a strong desire to bring national attention to the ongoing problem of disability and abuse, and a commitment to convince governmental agencies and nonprofit organizations to provide people with intellectual and developmental disabilities access to justice.



## Thomas F. Coleman

*People with Disabilities Have Been  
Part of His Advocacy for Decades*

Thomas F. Coleman has been advocating for the rights of people with disabilities since he met Dr. Nora J. Baladerian in 1980. That was the year when Coleman became the Executive Director of the Governor's Commission on Personal Privacy.

Coleman wanted the Commission to focus on the privacy rights of a wide array of constituencies, one of which was people with disabilities. On his recommendation, Dr. Baladerian became a Commissioner and Chaired its Committee on Disability.

The Commission's Report, issued in 1982, contained recommendations to clarify and strengthen the rights of people with disabilities. One of its proposals was that "disability" be added to California's hate crime laws. That happened in 1984.

Coleman's next project involving disability issues was his work as a Commissioner on the Attorney General's Commission on Racial, Ethnic, Religious, and Minority Violence. In addition to focusing on violence motivated by racial prejudice and homophobia, the Commission's work – spanning several years from 1983 to 1989 – also included violence against people with disabilities.

The next phase of Coleman's work with disability issues involved family diversity. Coleman was the principal consultant to the Los Angeles City Task Force on Family Diversity. He directed this 38-member Task Force from 1986 to 1988. He wrote its final report, which included a major chapter on Families with Members Who Have Disabilities. Recommendations were made on how the city could improve the quality of life for all families, including people with disabilities.

A few years later, he and Dr. Baladerian created a Disability, Abuse, and Personal Rights Project, which was organized under the auspices of their nonprofit organization, Spectrum Institute.

Coleman's advocacy shifted to other issues for several years, focusing on widely divergent sub-

jects such as promoting the rights of single people, to fighting the abuse of troubled teenagers by boot camps and boarding schools.

Several years ago, Coleman began working again with Dr. Baladerian, devoting more of his time to the disability and abuse issues which she has championed for decades. As he learned more about these issues, he dedicated more of his time and talent to abuse of people with disabilities.

A few years ago, Coleman and Dr. Baladerian instituted a new Disability and Abuse Project, which recently conducted the largest national survey ever done on abuse and disability.

Although most of the work of the Project involves research and advocacy on policy, Coleman has become involved in several individual cases. One challenged a plea bargain as too lenient to serve justice for the sexual assault victims. Another sought to reduce the 100 year sentence of an 18 year old man with a developmental disability as disproportionately harsh. The other three involved adults whose rights were not being protected by the conservatorship system.

The most recent campaign is the Disability and Guardianship Project, which seeks to better protect the rights of adults with developmental disabilities involved in the guardianship process.

[www.tomcoleman.us](http://www.tomcoleman.us)