

DUE PROCESS *PLUS*

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



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

White Paper to the U.S.
Department of Justice

Thomas F. Coleman
Legal Director
Spectrum Institute
October 1, 2015

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.

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.³⁸ 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,³⁹ all felony cases,⁴⁰ all cases involving imprisonment,⁴¹ and eventually to any case involving a suspended sentence of imprisonment.⁴²

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

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.⁴⁴ 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

³⁸ Powell v. Alabama, 287 U.S. 45 (1932)

³⁹ Hamilton v Alabama, 368 U.S. 52 (1961)

⁴⁰ Gideon v. Wainwright, 372 U.S. 335 (1963)

⁴¹ Argensinger v. Hamlin, 407 U.S. 25 (1972)

⁴² Alabama v. Shelton, 535 U.S. 654 (2002)

⁴³ In re Gault, 387 U.S. 1 (1967)

⁴⁴ 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.⁴⁵

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.⁴⁶

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.⁴⁷

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.⁴⁸ 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.⁴⁹ 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.”⁵⁰

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

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

⁴⁶ [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]

⁴⁷ *Strickland v. Washington*, 466 U.S. 668 (1984)

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

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

⁵⁰ *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.⁵¹ 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.⁵²

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."⁵³

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

⁵¹ 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]

⁵² "[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"

⁵³ [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.”⁵⁴

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.”⁵⁵

The Conference of State Court Administrators has adopted a position favoring the mandatory appointment of counsel in all guardianship cases.⁵⁶ “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.”⁵⁷ This echoes the position taken by the American Bar Association in 1988.⁵⁸

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.”⁵⁹

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

⁵⁴ Ibid.

⁵⁵ Ibid.

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

⁵⁷ Ibid.

⁵⁸ “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)

⁵⁹ [Wingspan](#): Second National Guardianship Conference.

not be deprived of life, liberty or property without due process of law.”⁶⁰ 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.⁶¹

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.”⁶² “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.”⁶³

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.⁶⁴ 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

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

⁶¹ *Ibid.*

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

⁶³ *Ibid.*

⁶⁴ *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.’)”⁶⁵

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

⁶⁵ Ibid.

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

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.”⁶⁷

“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]).”⁶⁸

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.⁶⁹ 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.”⁷⁰

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

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

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

⁶⁹ *In re Link*, 713 S.W.2d 487 (Mo. 1986)

⁷⁰ *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.'"⁷¹

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 2013.⁷²

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.⁷³

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.⁷⁴

The primary source of the right to have meaningful access to justice is the Due Process Clause of the Fourteenth Amendment.⁷⁵ 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

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

⁷² "[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.

⁷³ Ibid.

⁷⁴ 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.

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

proceedings.⁷⁶

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.”⁷⁷

Title II of the Americans with Disabilities Act applies to the operations of state and local governments.⁷⁸ 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.”⁷⁹

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.”⁸⁰

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.⁸¹

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

⁷⁶ Ibid.

⁷⁷ *Tennessee v. Lane*, 541 U.S. 509, 531 (2004)

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

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

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

⁸¹ “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.⁸²

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.⁸³ “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.”⁸⁴ 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.⁸⁵ 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.”⁸⁶ “Risks of inadequate representation increase when the client has cognitive disabilities.”⁸⁷

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

⁸² “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.)

⁸³ “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.)

⁸⁴ Ibid.

⁸⁵ “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.)

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

⁸⁷ Ibid.

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

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.”⁹⁰ 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.⁹¹

DOJ regulations explain that the provisions of Title II may be interpreted by reference to analogous provisions of Title I which regulates employment practices.⁹² 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.”⁹³

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

⁸⁸ “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.)

⁸⁹ “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.)

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

⁹¹ *Ibid.*

⁹² *Ibid.* Title II Regulations, Section 35.103 – Relationship to other laws.

⁹³ *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.⁹⁴ 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.⁹⁵

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.⁹⁶

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.⁹⁷

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

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

⁹⁵ “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.)

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

⁹⁷ 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.⁹⁸ 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

⁹⁸ 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.⁹⁹ 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.”¹⁰⁰

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

⁹⁹ “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)

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