How California’s Limited Conservatorship System Is Violating the Voting Rights of People with Developmental Disabilities

Materials for a Conference on Voting Rights of Limited Conservatees in California sponsored by Spectrum Institute

Pre-Conference Report

June 20, 2014
www.disabilityandabuse.org
June 20, 2014

Dear Conference Participant:

Thank you for coming to this conference on voting rights of limited conservatees.

We are in the midst of an election season, with voters thinking about and discussing who to vote for in various races for state and federal offices. Some people choose never to vote, while others vote occasionally, and yet others vote faithfully in each election. Regardless of the frequency of their voting practices, to vote or not to vote is their choice. The same should hold true for people with developmental disabilities.

We are grateful that one specific case involving voting rights violations came to our attention a few months ago. It was a real eye opener, giving us a glimpse of how someone can be improperly stripped of their voting rights because court-appointed attorneys and probate judges have not been educated about federal voting laws. That one case caused us to dig deeper, only to find a pattern of apparent voting rights violations in scores of other cases.

California law is not the ultimate authority on the voting rights of people with developmental disabilities. Due to the Supremacy Clause of the United States Constitution, when federal laws grant more protections to voters than state laws, it is federal laws that prevail. That is the situation regarding the conflict between California elections and probate codes versus federal voting rights laws.

There is also a conflict between these elections and probate codes and the state’s Lanterman Act which clearly declares that people with developmental disabilities have the same rights as any other citizen of the United States. That should include the right to register to vote, and the right to cast a ballot in an election.

This conference is focusing on how to prevent voting rights violations going forward, and what to do about the violations that have occurred in the past. The Disability and Abuse Project has identified specific actions that can be taken by state and local agencies, judges, attorneys, and nonprofit organizations to better protect the voting rights of people with developmental disabilities, and to correct past injustices as well.

If each of us takes some action, within our area of involvement in the Limited Conservatorship System, things will improve. We hope that by the end of the conference, or soon thereafter, each individual or agency participating in the conference will identify some action they will take to help make things better.

Again, thank you for taking the time out of your busy schedule to be a part of this effort to protect and advance the rights of this deserving and significant segment of the American population.

Sincerely,

Nora J. Baladerian, Ph.D.
Conference Co-Chair

Thomas F. Coleman, J.D.
Conference Co-Chair
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Letter to Conference Participants</td>
<td>1</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>2</td>
</tr>
<tr>
<td>About the Conservatorship Reform Project</td>
<td>3</td>
</tr>
<tr>
<td>About the Second Conference and Link to Pre-Conference Materials</td>
<td>4</td>
</tr>
<tr>
<td>Agenda for Conference Two</td>
<td>5</td>
</tr>
<tr>
<td>Participants at Conference Two</td>
<td>6</td>
</tr>
<tr>
<td>Requested Actions</td>
<td>7</td>
</tr>
<tr>
<td>Statement of Rights: Lanterman Act</td>
<td>9</td>
</tr>
<tr>
<td>Essay: Voting Rights of People with Developmental Disabilities</td>
<td>10</td>
</tr>
<tr>
<td>Essay: If a Person Can Communicate a Desire to Vote</td>
<td>17</td>
</tr>
<tr>
<td>Essay: An Individual Victory for One Voter in Arizona</td>
<td>19</td>
</tr>
<tr>
<td>Biographical Information</td>
<td>21</td>
</tr>
</tbody>
</table>
Conservatorship Reform Project

Conferences Focus on the Rights of People with Developmental Disabilities

The Disability and Abuse Project has conducted an audit of limited conservatorship procedures and cases processed through the Probate Court in Los Angeles County. What we have found is very disturbing. Los Angeles may be symptomatic of a much larger problem of personal and constitutional rights violations occurring throughout California, indeed, throughout the nation.

About 30 years ago, the California Legislature established a new system of protection for adults with developmental disabilities. We call it the "Limited Conservatorship System." It was a new form of conservatorship (adult guardianship) that provides a delicate balance between protecting vulnerable adults from harm and granting such adults as many rights as possible. A blend of semi-independence and semi-protection was the goal. Hence the term "limited" conservatorship since the conservator only receives limited powers over the conservatee.

The procedure for establishing limited conservatorships is supposed to have a built-in set of checks and balances to make sure that a conservatorship is needed, that the right person becomes the conservator, and that the conservatee retains as many rights as possible. Alternatives to conservatorship, including less intrusive forms of supportive decisionmaking, should be explored.

There should be a screening out of potentially bad conservators. A court investigator should interview all parties to the case and close relatives. A lawyer appointed for the conservatee should do an independent investigation and defend the rights of the conservatee from erosion. The Regional Center should do its own assessment and should make recommendations to the court.

This all sounds so good on paper. But what we found are practices that do not match this ideal scenario. We saw negligence, indifference, and systematic violations of rights. Courts are not narrowly tailoring their orders so that proposed conservatees retain as many rights as possible.

We are sponsoring a series of conferences to bring interested parties and agencies together to review our findings. We are "whistle blowers" who hope to shake up the status quo. We are offering solutions and seeking ideas from others for major reforms in the Limited Conservatorship System.

This system needs legislative oversight and more funding. The judicial branch needs to take an honest look at the dysfunctional process it is presiding over. The executive branch needs to get involved instead of ignoring the ongoing violations of the rights of people with developmental disabilities.

Disability rights organizations need to find time for this issue, even though their current priorities are focused on other areas. Bar associations and ethics professors need to take a look at the various violations of professional standards that are built into the court-appointed attorney aspect of this system.

Regional Centers need to play a greater role in protecting their clients when they are scheduled to become limited conservates.

Please take the time to visit our Conservatorship Reform Webpage to learn more about the problems with this system and the solutions we are recommending. This is a reform effort that we believe will eventually spread throughout the nation.

Sponsored by the Disability and Abuse Project of Spectrum Institute
Limited Conservatorship Reform in California

Roundtable Conference Two:
Protecting Voting Rights

Date: June 20, 2014
Time: 9:30 a.m. to 12:30 p.m.
Place: The Olympic Collection
11301 Olympic Blvd.
Los Angeles, CA 90025
By Invitation Only
tomcoelman@earthlink.net

Participants at Conference Two will review policies and practices in the Limited Conservatorship System that have an adverse effect on the voting rights of people with developmental disabilities. Special focus will be placed on how to ensure that participants in the system comply with federal voting rights laws that protect people with disabilities.

Solutions to be discussed will look forward (protecting voting rights of limited conservatees in the future) and backward (correcting past injustices).

Conference Materials
Description of Voting Rights Conference
Essay: Correcting Flaws in the System
Essay: Criteria for the Right to Vote
Essay: Arizona Case is Instructive

A Special Report on Limited Conservatorships
(Includes Materials for Both Conferences)

Link to Conference One

Sponsored by the Disability and Abuse Project of Spectrum Institute
Nora J. Baladerian, Ph.D. and Thomas F. Coleman, J.D., Conference Co-Chairs

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." -- Justice Louis Brandeis (Olmstead v. United States, 277 U.S. 438, 479 (1928))

Home Page
Voting Rights Conference

Agenda

9:00 - 9:30  
Registration and Coffee/Tea

9:30 - 9:40  
Welcoming Remarks by Dr. Nora J. Baladerian

9:40 - 10:00  
Overview of the Situation by Thomas F. Coleman

10:00 - 10:30  
Real Life Example: A Mother Explains Her Son’s Case (and questions)

10:30 - 10:45  
Corrections: An Opportunity for Participants to Identify Any Inaccuracies

10:45 - 11:00  
Questions: An Opportunity for Participants to Ask Any Questions

11:00 - 12:15  
Suggestions: An Opportunity to Offer Solutions / Respond to Suggestions

12:15 - 12:30  
Closing Remarks by Tom Coleman and Nora Baladerian

Lunch (Optional)  
Participants are welcome to join us for a no-host lunch at a local restaurant
Roundtable Conference on
Voting Rights of Limited Conservatee

Sponsored by Spectrum Institute
Disability and Abuse Project

June 20, 2014 – 9:30 a.m. to 12:30 p.m.
Olympic Collection • 11301 Olympic Blvd. • Los Angeles, California

Confirmed Participants

Nora J. Baladerian, Ph.D.
Clinical Psychologist
Disability and Abuse Project

Thomas F. Coleman, J.D.
Legal Director
Disability and Abuse Project

Teresa Thompson, Ph.D.
Parent of Conservatee

Angela Kaufman
ADA Compliance Officer
Los Angeles City Department on Disability

Greg de Giere
Public Policy Director
The Arc of California

Arlene Pinzler
Voter Education and Outreach Services
Office of the California Secretary of State

Julia Keh
Special Services Liaison
Los Angeles County Registrar-Recorder

Nelson Fernandez
Voter Educational Community Outreach
Los Angeles County Registrar-Recorder

Greg Byers
Documentary Filmmaker

Prof. Andrew Granite
Chapman University
CalTASH

Claudia Center
Staff Attorney
American Civil Liberties Union

Rick Ingraham
Manager
Quality Management/Development
Department of Developmental Services

Carmine Manicone
Assistant Director of Client Services
Westside Regional Center

Jenice Turner, MBA
Program Manager II
South Central Regional Center

Johanna Arias-Bhatia
Government Affairs Manager
South Central Regional Center

Yolande Erickson
Attorney
Bet Tzedek Legal Services
Requested Actions

Going forward

Judicial Council:
The Judicial Council and Superior Court should remove items about voting from the petition for limited conservatorship and from the PVP report.

Self-Help Clinics:
Bet Tzedek staff should stop suggesting that petitioners indicate a lack of voting ability on petitions and instead should explain the option of not answering the question on voting ability or of checking off “is able” and clarifying “with assistance.”

Regional Centers:
When Regional Centers file their letter with the court about client capacities, they should advise the court not to disqualify their client from voting unless there is evidentiary proof that the client, with proper ADA accommodations, cannot indicate a desire to vote.

PVP Attorneys:
Court-appointed attorneys should decline to advise the court that their client “is unable” to complete a voter registration affidavit, and should indicate opposition to any proposed action to disqualify their client from voting.

County Bar Association:
Trainings for PVP attorneys should always include a segment on relevant federal laws that protect the voting rights of people with developmental disabilities and their right to ADA accommodations (explaining in detail what those accommodations should include).

Probate Investigations:
Due to past systemic failures, probate Investigators should routinely petition the court, during biennial reviews, to vacate prior orders disqualifying conservatees from voting.

Secretary of State:
The current Secretary of State should ask the Attorney General for a formal opinion on how state policies and practices on voting disqualification standards for conservatees should be interpreted in light of federal voting laws that protect the rights of people with cognitive and communication disabilities, including their right to proper ADA accommodations.

Attorney General:
The Attorney General should render an opinion as requested by the Secretary of State, Registrar of Voters, or other state officials on the voting rights of people with developmental disabilities, including limited conservatees. The Department of Justice should update its booklet on "Rights of People with Disabilities" to include a section on the voting rights of people with disabilities, with a specific focus on people with developmental disabilities.
Department of Developmental Services:

The Department of Developmental Services should conduct an audit of the policies and practices of participants of a representative sample of cases processed in the past five years in the Limited Conservatorship System in Los Angeles County to determine the percent of limited conservatees who have been disqualified from voting, and the percent of these cases in which PVP attorneys advised the court that their client “is unable” to complete a voter registration affidavit. The results of that survey should be made available to the Los Angeles County Probate Court, the Judicial Council, the Los Angeles County Bar Association, and any advocacy groups that request this information.

Looking Back

Regional Centers:

Regional Centers should check their client records to determine how many clients in conservatorship have been disqualified from voting. They should send the list to the Probate Court with a request that the court vacate the order of disqualification, due to systemic failures of mistake or neglect by the court or PVP attorneys, and that the court should notify the County Registrar of the new order.

Registrar of Voters:

The Registrar of Voters should compile a list of all conservatees who have been ordered “disqualified” from voting by the Probate Court in the last eight years and ask the court for clarification of their current status. The list should be made available to Regional Centers and any advocacy organizations that ask for it.

Los Angeles Probate Court:

Due to systemic failures resulting in mistake or neglect of judges or PVP attorneys, the Probate Court should issue a blanket order, on its own motion, vacating all orders issued during the past eight years disqualifying limited conservatees from voting. The names of the conservatees whose voting rights are thereby reinstated should be transmitted to the Registrar of Voters.

Department of Developmental Services:

In the absence of sua sponte action by the Probate Court in Los Angeles County, the Department should contract with Disability Rights California to file petitions to vacate orders disqualifying limited conservatees from voting in the past eight years due to systemic failures resulting from mistake or neglect. Sufficient funding should be provided for this service.
Lanterman Developmental Disabilities Services Act

California Welfare and Institutions Code

Statement of Rights

4502. Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California.

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.

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following: (a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports. (b) A right to dignity, privacy, and humane care. To the maximum extent possible, treatment, services, and supports shall be provided in natural community settings. (c) A right to participate in an appropriate program of publicly supported education, regardless of degree of disability. (d) A right to prompt medical care and treatment. (e) A right to religious freedom and practice. (f) A right to social interaction and participation in community activities. (g) A right to physical exercise and recreational opportunities. (h) A right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect. (i) A right to be free from hazardous procedures. (j) A right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.

4502.1. The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities, including, but not limited to, regional centers, shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator. Those public or private agencies shall provide consumers with opportunities to exercise decisionmaking skills in any aspect of day-to-day living and shall provide consumers with relevant information in an understandable form to aid the consumer in making his or her choice.

Spectrum Institute
Disability and Abuse Project
www.disabilityandabuse.org
Voting Rights of People with Developmental Disabilities: Correcting Flaws in the Limited Conservatorship System

Voting Rights are Violated Because Judges and Attorneys are Unaware of Federal Laws

by Thomas F. Coleman

People think of voting as a fundamental constitutional right. However, the right to vote is not found anywhere in the United States Constitution.

The California Constitution, on the other hand, does specifically declare: “Any United States citizen 18 years of age and resident in this state may vote.” (Cal. Const. Art. 2, Sec. 2.)

The California Constitution also states: “The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony.” (Cal. Const. Art. 2, Sec. 4.)

The Legislature has passed statutes on competency for voting. Mental incompetency is mentioned in the Elections Code and in the Probate Code.

Elections Code Section 2208 states: “A person shall be deemed mentally incompetent, and therefore disqualified from voting if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 2150 and [if the following applies]: (1) a conservator of the person or the person and estate is appointed pursuant to Division 4 (commencing with Section 1400) of the Probate Code.”

Probate Code Section 1823 (b) (3) states: “The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration.”

Probate Code Section 1910 says that if the judge determines that the conservatee is not capable of completing the affidavit, “the court shall by order disqualify the conservatee from voting.”

If these were the only laws involved in determining the voting rights of people with developmental disabilities, the analysis would end here. However, that is not the case. Federal law is also involved.

Federal Voting Rights Laws

Because of the “supremacy” provision of the United States Constitution, state statutes and constitutions are superseded by federal statutes that govern the same subject matter. Congress has passed several statutes that apply to voting. Some of them pertain to voting rights for people with disabilities.

The National Voter Registration Act permits, but does not mandate, states to remove voters from registration rolls based on “mental incapacity.” (42 U.S.C. Sec. 1973gg-6(a)(b)(3).) However, another provision of the Act requires that such provisions must be in compliance with the Voting Rights Act of 1965. (42 U.S.C. Sec. 1973gg-6(b)(1).)

Section 208 of the Voting Rights Act allows people who can’t read or write, or who have any disability, to receive assistance in voting from any person of their choice. (42 U.S.C. Sec. 1973-aa-6.)

Also relevant to the rights of people with developmental disabilities is Section 201 of the Voting Rights Act. That section declares that “No person shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.” (42 U.S.C. Sec. 1973-aa.)
The term “test or device” means any requirement that a person as a prerequisite for voting “demonstrate the ability to read, write, understand, or interpret any matter.” (42 U.S.C. Sec. 1973-aa.)

California’s requirement that conservatees shall be disqualified from voting if they cannot complete an affidavit for voter registration is a “test or device” as defined by federal law. The Voting Rights Act allows people with disabilities to have help in completing the registration form. It also prohibits states from requiring them to show an understanding of the contents of the voter registration form.

With these federal statutes in mind, and knowing that the California Constitution and state statutes are superceded by these federal statutes, it would appear that California’s requirement concerning the ability of a voter to complete the registration application is a “test or device” prohibited by federal law.

Although there is no state or federal court case declaring this California requirement to be invalid because it violates federal law, a federal district court has declared a Maine statute to be invalid because it conflicted with federal law. (Doe v. Rowe, 156 F. Supp. 2d 35 (2001).) The Maine statute stated that persons under guardianship due to a mental illness were ineligible to vote.

Furthermore, assuming for the sake of argument that California’s statute is not unconstitutional, the court would be required to find, by clear and convincing evidence, that the conservatee cannot complete the voter registration application with the help of another person.

Who is going to prove that? And how? What standard would apply as to how much help the other person can give?

The loss of voting rights for limited conservatees is not academic. Evidence suggests that it may happen quite frequently – perhaps in a majority of cases.

Let’s look at how the voting rights issue arises in limited conservatorship cases in Los Angeles.

An Actual Case

Consider the real-life case of Roy L. (a fictitious name for an actual case that came to the attention of the Disability and Abuse Project in 2013).

Roy, who has autism, is a client of a Regional Center. He lives with his mother in Los Angeles County. His father lives in another state. The parents are divorced.

His mother realized that she needed to file for a limited conservatorship. She went to a group workshop for such parents. The workshop was conducted by Bet Tzedek Legal Services.

In the group setting, following instructions on how to fill out the necessary paperwork, the mother checked a box stating that Roy was not able to complete a voter registration form. At the time, she did not know that by making such a statement, she was setting in motion a process whereby Roy would be disqualified from voting. No one told her that.

The petition and other paperwork were filed with the Probate Court. The judge assigned an attorney to represent Roy.

Before the attorney came to the home to talk to her and to meet Roy, the mother had a conversation with Roy about voting. He indicated that in the next election for President, he wanted to vote for Hillary.

The mother wondered whether Roy would retain the right to vote, so she asked the court-appointed attorney about this and told him about Roy’s desire to vote. The attorney told her that the concept of Roy voting would be inconsistent with the entire purpose of a conservatorship.

When the attorney filed a report with the court about his opinions on Roy’s capacities, he stated that Roy was not able to complete an affidavit for voter registration. This was done despite his knowledge that Roy wanted to vote.

Several weeks later, when the mother came to our
Project for help on another aspect of the case, she asked me about Roy having the right to vote. This prompted me to investigate the law, the result of which is the legal analysis which you have just read.

It appears to me that the attorney had not received any training about voting rights for people with developmental disabilities. It also seems that, by the way he dismissed the issue without giving it any thought, he considered it of no importance.

The issue of voting comes up in every limited conservatorship case. Court investigators, to the extent they play a role in a case, are supposed to render an opinion as to whether the proposed conservatee can complete an affidavit of voter registration. The court-appointed attorney is asked to do the same. The judge then generally makes a factual finding and enters an order.

The form used by the judge in each case has a place on it where the judge can check a box before the sentence: “The conservatee is not capable of completing an affidavit of voter registration.” There is also a place on the form where the court can check a box entering an order that: “The conservatee is disqualified from voting.”

Self Help Clinics

The issue of voting came to my attention during a presentation at the Beverly Hills Bar Association. An attorney who works for Bet Tzedek Legal Services, and who is the coordinator of the Self Help Conservatorship Clinic, used a slide show during his talk. The screen displayed forms that are used when parents attend workshops to fill out court forms.

Places on the form that are routinely checked off with an X were checked off on the forms appearing on the screen during the presentation. An X appeared in the box stating that the proposed conservatee was not capable of completing an affidavit for voter registration.

Parents and family members are generally the people who attend these Self Help Clinics. They are the ones who are filing petitions to initiate a limited conservatorship. Unfortunately, prior to attending the Self Help Clinics, such petitioners are not attending educational seminars or receiving legal advice on the implications of which boxes they check on the petition or what assertions they make in them. Thus, they are relying on prompts from the people who operate the Self Help Clinics.

Because the visual prompts have tended to suggest that the proper box to check is that which states the limited conservatee “is not able” to complete the voter registration form, these petitioners are, in effect, asking the court to disqualify the proposed conservatee from voting. Most petitioners probably are not aware that disability accommodation laws allow others to assist a person with a disability in the voting process, including the registration process.

Review of Court Records

I recently examined a sample of 61 limited conservatorship cases at the downtown courthouse to determine which conservatees had their right to vote eliminated and which did not. I also examined what role the PVP attorney played in the voting rights determination.

The sample I reviewed included all limited conservatorship cases filed in the downtown court during the last four months of 2012.

Out of the 61 cases I examined, 54 limited conservatees had their right to vote taken away by the court. In all but two of these cases, the order of the court was entered after the court reviewed a PVP report in which the attorney informed the court that the client was unable to complete an affidavit of voter registration. How the attorney reached such a conclusion is unknown.

Based on Roy’s case, the presentation by the Bet Tzedek attorney, and my sampling of cases in the downtown court, it is reasonable to conclude that as many as 90 percent of proposed limited conservatees in Los Angeles County may be unnecessarily and improperly losing their right to vote.
More conservatees would retain their right to vote if their court-appointed attorneys were aware of relevant federal laws that protect the right to vote of people with developmental disabilities. The same would be true if their attorneys refused to share potentially adverse information with the court, citing their ethical duties of loyalty and confidentiality.

Attorneys have a duty of loyalty to their clients. The principle of confidentiality applies to information gathered by attorneys during their representation of clients, including information obtained directly from clients as well as from others during interviews and reviews of records.

The duties of loyalty and confidentiality are violated when attorneys file PVP reports with the court to advise the court that their investigation revealed that the client lacks the ability to complete an affidavit of voter registration. Such a disclosure by the client’s own attorney is likely to result in the court stripping the client of his or her voting rights. PVP attorneys know that, but despite this knowledge they routinely share information with the court, in a public record, that they know is adverse to the rights of the client.

Proposed conservatees are constitutionally entitled to effective assistance of counsel. Their court-appointed attorneys have a duty to act as diligent and conscientious advocates to protect and defend the rights of the client. This includes the right to vote.

To fulfill this duty, attorneys must be aware of statutes and judicial decisions relevant to the issues that are likely to arise in the case at hand. Legal standards for voting eligibility or disqualification are relevant to limited conservatorship cases.

Attorneys and judges in conservatorship cases should know that eligibility to vote is not only governed by California law but that a variety of federal statutes also must be considered when judicial decisions are being made on the voting rights of American citizens. They should know this, but apparently they do not.

In fact, there is reason to believe that court-appointed attorneys are being misinformed about the right of voters with disabilities to have assistance in the voting process. Registering to vote is part of that process.

**PVP Attorney Trainings**

I recently attended a court-mandated training session for PVP attorneys in Los Angeles. One of the presenters at the training was a judge who decides limited conservatorship cases on a daily basis. He mentioned the issue of voting eligibility of proposed conservatees.

The judge told the audience of some 200 PVP attorneys that a proposed conservatee is only qualified to vote if he or she “is able to complete an affidavit of voter registration.”

The judge said that the mother of a proposed conservatee once told him in court that her son could satisfy that standard because she could fill out a voter registration form for him. The judge then laughed as he was telling the story which prompted many lawyers in the audience to laugh.

The judge’s punch line to the story was: “That’s not how it works.” No further comment or explanation was made. The judge moved on to discuss other issues not related to voting.

I was shocked at the judge’s remarks about voting eligibility. They showed a complete lack of awareness of federal voting rights laws that protect the rights of people with cognitive or communication disabilities.

The audience was left with the impression that unless proposed conservatees can complete a voter registration affidavit by themselves, they are not qualified to vote. This misinformation will no doubt be used by these court-appointed attorneys in future cases. Their clients will lack the benefit of effective assistance of counsel since their attorneys will not be aware that several federal laws protect the voting rights of people with developmental disabilities.
A person with a disability can have someone help them in the registration process. This would include the right of people who cannot read or write to have someone fill out the form for them, despite the judge's statement to the contrary.

Federal law prohibits California or any other state from using any test or device to establish whether a potential voter can read, write, interpret, or understand any matter. Reasonably competent attorneys acting as diligent and conscientious advocates would know this and would therefore refuse to disclose to the court whether their clients are or are not able to complete an affidavit of voter registration.

**Finding Remedies for Past Injustices**

Proposed conservatees, perhaps thousands of them, have been ruled "disqualified" to vote by judges who have relied on adverse public statements of court-appointed attorneys in this regard. These rulings could be challenged as unconstitutional for a variety of reasons, including that the attorney who checked off the "is not able" box in a PVP report was not providing effective assistance of counsel.

Effective assistance is undermined when attorneys lack knowledge of federal voting laws. The constitutional right to counsel is also violated when attorneys violate their duties of loyalty to the client and confidentiality of the lawyer's work product.

Petitions for reconsideration for these limited conservatees, perhaps thousands of them who have been stripped of the right to vote over the years, could be filed. Such petitions would ask that the order disqualifying them from voting be vacated and that the Registrar of Voters be notified of the new ruling.

But who will file such petitions? People with developmental disabilities generally would lack the ability to file such petitions on their own. The role of PVP attorneys generally ends when the court enters an order granting a conservatorship. At that time the court usually enters an order relieving the attorney as counsel for the conservatee.

There must be a remedy for this ongoing violation of the voting rights of limited conservatees. Perhaps the court could enter a general order vacating the voter disqualification orders for the past several years on the ground that the judges and the attorneys were unaware of the applicability of relevant federal laws protecting the voting rights of people with developmental disabilities.

Another remedy in individual cases would be for a conservatee to file a petition for writ of habeas corpus with the Court of Appeal and to ask the court to appoint an attorney to represent him or her in the proceeding. This would be one way to get the issue before the appellate judges, thereby giving them the opportunity to write a published decision that would provide guidance to judges and attorneys who handle conservatorship cases in the Probate Court.

There is also an option for a federal civil rights lawsuit to be filed, under 42 U.S.C. §1983. Such a lawsuit could be initiated by the United States Department of Justice or it could be filed as a class action lawsuit by a private law firm. Of course, such actions would not be necessary if state and local officials in California take steps to reinstate the voting rights of limited conservatees who were improperly disqualified due to the mistake or neglect of state judges or court-appointed attorneys.

Under section 1983, every person who deprives any citizen or other person rights guaranteed by the United States Constitution or federal laws is liable to the injured party. The victim of such civil rights violations may seek damages or injunctive relief or both, except that when the perpetrator of the civil rights violation is a judge, only injunctive relief may be sought.

People whose rights under federal voting laws may also file complaints with the United States Department of Justice. The Department has jurisdiction to investigate such complaints and to enforce the voting rights laws.

In addition to deficiencies in the performance of judges and court-appointed attorneys, there may be
problems with the performance of court investigators, if and when they are involved in limited conservatorship proceedings. It is unlikely that they have received training about the Voting Rights Act or other federal protections that would apply to the voting rights of people with developmental disabilities.

Regional Centers are required to assess seven areas of capacity of the proposed conservatee to make decisions and file a report with the court regarding a counselor’s opinion on these issues. Capacity to vote is not an area addressed by the Regional Center.

There are probably 50,000 or more limited conservatees in California, with at least 5,000 being added to what administrators call “active inventory” each year. Who knows how many of them have been or will be unnecessarily and improperly denied the right to vote?

Considering the way this issue seems to routinely be handled by those who operate the Limited Conservatorship System in Los Angeles County, and based on the results of the sample of cases that I examined, it is reasonable to conclude that retention of voting rights is an exception to the rule of disqualification.

Based on all of the above, these are my preliminary findings, and my recommendations on how to better protect the right to vote of limited conservatees.

**Preliminary Findings**

1. Voting is a fundamental right for everyone, including people with developmental disabilities.

2. California law uses a capacity “test or device” to determine whether a conservatee will be allowed to vote. The test is whether the conservatee is capable of completing the voter registration form.

3. California’s voting rights test for conservatees appears to violate federal voting rights laws.

4. Court-appointed attorneys who represent proposed conservatees are not being educated by training programs of the Los Angeles County Bar Association about federal voting rights laws and the voting rights of people with developmental disabilities. These attorneys are not advocating in court for their clients to retain the right to vote.

5. PVP attorneys are setting in motion the disqualification of their clients from voting by submitting reports that advise the court about the client’s inability to complete a voter registration affidavit. PVP attorneys could leave this statement blank when they submit their form. They could decline to take any action that would be adverse to the voting rights of their clients. If an attorney can’t say something to affirm a client’s right to vote, the attorney has the option to say nothing at all. “Do no harm.”

6. Regional Centers are not educating parents about the federal voting rights of people with developmental disabilities. Regional Centers currently do not make recommendations to the Probate Court about the voting rights of proposed conservatees.

7. The Self Help Conservatorship Clinic operated by Bet Tzedek does not educate parents about the voting rights of proposed conservatees. It does not provide legal education about any aspect of the conservatorship process. It plays an important role in helping parents with the court process, but this role is strictly administrative (filling out forms) and does not get into criteria about capacity for voting.

8. Bet Tzedek could advise parents of the option of leaving the line in the form about voting blank. They do not have to render an opinion about whether a conservatee can or cannot complete a voter registration form. Petitioners can take the position that because they have not been educated about federal voting rights laws and ADA accommodation laws, they decline to venture an opinion on this issue.

9. Parents are not given educational materials by the courts or from any other source about the voting rights of proposed conservatees.

10. Court investigators are rendering opinions as to whether a proposed conservatee is or is not capable
11. It is unknown how many of the 50,000 or more people with developmental disabilities who are currently under limited conservatorship in California have been disqualified to vote. There is a similar lack of information about the tens of thousands of limited conservatees in Los Angeles County.

12. Area Boards of the State Council on Developmental Disabilities have a legislative mandate to advocate for the civil rights of people with developmental disabilities. Protecting the voting rights of this population does not appear to be on the agenda of Area Boards or the State Council at this time.

13. The Client’s Rights Advocates at Disability Rights California (operating under a contract with the State Department of Developmental Services) are not educating Regional Center clients about their voting rights. The Office of Client’s Rights is not monitoring the actions of the Probate Court which is taking away the voting rights of Regional Center clients in a routine manner. It appears that voting rights is not an issue monitored by the State Department of Developmental Services.

**Preliminary Recommendations**

1. The California Secretary of State should issue an opinion on the right of limited conservatees to vote, including their right to assistance from someone in filling out a voter registration form.

2. The California Department of Justice should update its handbook on The Rights of Persons with Disabilities (2003) to include a section on the voting rights of persons with intellectual and developmental disabilities, including limited conservatees.

3. Regional Centers, perhaps through the Association of Regional Center Agencies (ARCA) should create educational booklets for parents, and a separate brochure for clients, about the voting rights of people with developmental disabilities. This booklet and brochure should be distributed to parents and clients at Regional Centers when the client turns 18.

4. The Department of Developmental Services should update its contract with Disability Rights California to require their Office of Clients Rights, and the Client’s Rights Advocates (CRA), to monitor probate cases in which a petition for conservatorship, or a report filed by an attorney or investigator, states that the proposed conservatee is unable to complete an affidavit of voter registration.

5. Bar Association programs that train attorneys who represent limited conservatees should include information about federal laws protecting the voting rights of people with developmental disabilities. Attorneys who represent such clients should advocate that their clients retain voting rights.

6. Judges should not declare a limited conservatee disqualified to vote without clear and convincing evidence, at a hearing, to support a finding that the conservatee is unable, with assistance from a person of their choice, to complete a voter registration form. Any ruling should take into consideration the provisions of federal law that prohibit the state from requiring conservatees to show that they can read, write, or understand any matter, and the provision that gives them the right to have assistance in voting.

7. Remedies should be developed by the California Attorney General, the Judicial Council, and the Secretary of State to reinstate the voting rights of limited conservatees whose voting rights were taken away in the past due to the mistake or neglect of Probate Court judges or court appointed attorneys.

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If a Person Can Communicate a Desire to Vote
Then the Person Has a Right to Vote

by Thomas F. Coleman

States are not required to disqualify people from voting on the ground they lack competency to vote. Each state makes its own policy decision on whether to disqualify someone from voting on the basis of his or her "incompetency."

Twelve states have decided that everyone has a right to vote, including those who have intellectual or cognitive disabilities. In these states, people are not disqualified from voting because they lack capacity.

In other states, such as California, a judge can disqualify a person from voting if the judge determines that he or she lacks the capacity to vote. The criteria for such a decision vary from state to state.

In California, a person is presumed competent to vote when the person reaches the age of 18. A Probate Court may only disqualify the person from voting if proof is provided by a party, or an admission is made by a conservatee, that the conservatee is unable to complete an affidavit of voter registration. Although the burden of proof is supposed to be heavy – clear and convincing evidence of inability – judges in California are disqualifying conservatees from voting as a matter of routine, often based on information supplied by attorneys appointed to represent conservatees.

Arizona has a different system. There, a person placed under an adult guardianship is automatically disqualified from voting by reason of the guardianship itself. However, recently enacted legislation allows people under guardianship to regain the right to vote if they can prove to a judge, by clear and convincing evidence, that they have sufficient capacity. The level of capacity is not defined.

But whether a conservatee lives in California, or Arizona, or any other state that disqualifies people from voting for lack of capacity, should not matter. That is because federal voting rights laws protect the rights of people with developmental and intellectual disabilities to participate in the electoral process. When state laws on voting capacity conflict with federal voting rights laws, federal laws prevail.

As explained in a companion essay, various federal statutes protect the right of people with disabilities to vote. (Coleman, “Voting Rights of People with Developmental Disabilities: Correcting Flaws in the Limited Conservatorship System,” Spectrum Institute, May 24, 2014.) Among them are statutes that prohibit states from using any test or device to determine if a person can read, write, interpret, or understand any matter. There are additional federal laws that allow people with disabilities to have someone assist them in exercising their right to vote.

Federal law, however, does not define how much help someone may give to the person with a disability, or the extent of mental incapacity that would preclude someone from exercising the right to vote.

Clearly, a person who is in a coma cannot exercise the right to vote because such a person cannot communicate his or her intentions. But for people who have some ability to communicate, with or without the use of assistive technology, what should be the test for demonstrating that a person does or does not have a minimum level of capacity to vote?

Without a federal court decision on this subject, we must seek guidance from other authoritative sources. One such source is the American Bar Association.

The House of Delegates of this national legal organization adopted a resolution a few years ago recommending that anyone who can communicate a desire to vote, with or without accommodations, should be allowed to vote. (ABA Commission on Law and
Aging et al., Report to the House of Delegates (Aug. 13, 2007)). Two states, Maryland and Nevada, have adopted this standard.

The ABA standard on capacity to vote was also adopted as a recommendation at a symposium held in 2006 at the Pacific McGeorge School of Law. The symposium was titled “Facilitating Voting As People Age: Implications of Cognitive Impairment.”

The recommendation emphasized that capacity to vote should be presumed, regardless of guardianship status. It added: “If state law permits exclusion of a person from voting on the basis of incapacity, a person should be determined to lack capacity only if the person cannot communicate with or without accommodations a specific desire to participating in the voting process.” (“Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists,” ABA/APA Assessment of Capacity in Older Adults Working Group (2008), pp. 134-135.)

Other sources may also inform judges who interpret federal laws that protect the voting rights of people with developmental and intellectual disabilities. One such source is the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which was adopted in 2006 and became operative in 2008. Although the United States is not yet a signatory to the Convention, its principles are nonetheless informative.

The UN Committee that enforces the CRPD indicated last year that implementation of the human right to political participation requires the repeal of laws excluding persons with disabilities from voting on the basis of perceived or actual mental disability. (Janet Lord et al., “Facilitating an Equal Right to Vote for Persons with Disabilities,” 6 Journal of Human Rights Practice 115 (March 2014)

California has generally been a leader when it comes to the enactment and implementation of legislation protecting human rights. Unfortunately, the Golden State has been lagging behind when it comes to protecting the voting rights of people with developmental and intellectual disabilities.

The Legislature should reconsider the voting disqualification of people who are not capable of completing an affidavit of voter registration. This standard was adopted prior to passage of the Americans with Disabilities Act and growing societal support for equal rights for people with disabilities.

The California Legislature could certainly join the ranks of the 12 states that do not disqualify people from voting on the basis of “incompetency.” However, even without such legislative action, there are other steps that can be taken to correct the current practice of Probate Court judges unnecessarily disqualifying conservatees from voting.

The Secretary of State could affirm the voting rights of people with developmental disabilities by clarifying that state standards for competency must be interpreted in light of federal laws that allow for accommodation and that prohibit the use of tests or devices to determine whether someone can read, write, interpret, or understand any matter. Another option would be for a state official to ask the Attorney General for an opinion on the constitutionality of state standards on competency in view of more protective federal voting rights laws.

Citing professional standards on loyalty and confidentiality, court-appointed attorneys could decline to provide information to the court that is adverse to their client’s right to vote. They could also defend that right when anyone tries to take it away, perhaps by arguing that state law violates federal voting rights laws and is therefore unconstitutional.

Those who petition a court to initiate a conservatorship could also decline to supply information to the court that may result in the conservatee from losing the right to vote. Petitioners could simply state that they do not know whether or not the conservatee is able to complete the voter registration affidavit.

Limited conservatee, as individuals and as a class, may be unable to challenge state voting restrictions, but they should have plenty of allies who are ready and willing to press for change on their behalf.

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An Individual Victory for One Voter in Arizona Creates Barriers for Others with Disabilities

Voting Rights Violations Are a National Disgrace

by Thomas F. Coleman

As I read a newspaper story the other day, I was touched by the determination of a young man in Arizona who wanted to vote when he turned 18. Clinton Goode has Down syndrome.

Wanting to vote in a political election came naturally to Clinton. He had been voting in various ways all of his life.

Clinton voted at home. “Hands in the air if you want spaghetti for dinner,” his Dad would shout out from the kitchen. Clinton would respond.

The family would talk about community events at dinner, and Clinton would share his views. Clinton helped elect class representatives at school. He ran for sergeant-at-arms at his local 4-H club and won.

So it was no surprise to his parents when he expected to vote in Arizona state elections when he came of age. The surprise to Clinton and his parents occurred when they initiated an adult guardianship proceeding as Clinton turned 18. The petition was filed because, despite his many abilities, Clinton’s parents felt he lacked the capacity to make medical and financial decisions.

Arizona law stated that if someone cannot handle their own affairs — and a guardian is appointed to make decisions for them — then they are automatically disqualified from voting.

Clinton’s father said that it was really hard for him to explain this to his son. “I want the right to vote,” Clinton replied.

Thus began a campaign by Clinton, his parents, and supporters in the community to change the law. For Clinton, “voting was about more than a ballot,” the newspaper story explained. “It would mean he was a participant in his community, that his voice mattered, just like everyone else.”

Arizona law has been slowly evolving on the voting rights of people with developmental disabilities.

In 2000, the state Constitution was amended to remove an automatic bar to voting for people who had a guardian because of a disability. But state statutes needed to be amended in order for people with guardians to have the right to vote.

In 2003, lawmakers passed a “limited guardianship” system, much like California’s longstanding system for limited conservatorships which recognizes that some protections could be given to people who may lack capacity in some areas, without depriving them of other rights. This new system set the stage for attempts in 2004 and 2005 to revise voting restrictions for people in a limited guardianship.

Unfortunately, one conservative Republican legislator, Rep. Eddie Farnsworth (R-Gilbert), had enough clout to block bills protecting the voting rights of people with guardians. The bills had passed the Senate, but he stood firm in his opposition, and had sufficient political power in the House to get his way.

So various disability rights groups in Arizona were in a bind. Do they hold out for a clean bill that gives voting rights to all people in limited guardianships, or do they give in to the demands of Farnsworth? They agreed to give him what he wanted.

Under the “compromise” bill, automatic disqualification from voting still occurs in Arizona whenever a court order places a person in a limited guardianship. However, House Bill 2377 allows people to retain the right to vote, but only if they file a petition with the court on this issue. A hearing must be held, at which a petitioner must prove to a judge, by clear and convincing evidence, that he or she “has sufficient understanding to exercise the right to vote.”

The bill became law in 2012.
With the help of his parents, Clinton, who was 25 years old that year, filed a petition with the court to regain the voting rights he had lost when he was 18. The process required him to undergo more than 30 minutes of questioning by the judge about voting and politics. Apparently, he passed the “test” because his voting rights were reinstated.

The Arizona Republic story was published in November 2012. It called the bill a victory for people with disabilities, and the reinstatement of Clinton’s voting rights a personal victory for him. A companion story described how Clinton cast his first vote – selecting Barrack Obama as his choice for President.

When I read these two stories, I felt really good for Clinton and his family, and proud of them for standing up for Clinton’s right to vote. At the same time, however, I felt bad for others with developmental disabilities who may not have the same level of family support or the same ability as Clinton to deliberate and communicate.

Clinton’s personal victory is a success story for one individual. But it is a sad commentary on the state of voting rights for people with developmental disabilities as a class – in Arizona and other states.

States have a choice about whether or not to pass laws that recognize the right to vote of people with developmental disabilities. Some 12 states allow all people with developmental disabilities to vote.

Lawmakers also can enact laws that place the burden of proof on those who seek to take away voting rights rather than putting the burden on those who want to retain their rights. Arizona decided to place a heavy burden on vulnerable and often low-income people to fight for their rights, rather than on the well-funded and powerful government that seeks to remove rights.

The story also highlights a lack of awareness by lawmakers, attorneys, judges, and disability rights groups about federal laws protecting the voting rights of people with developmental disabilities.

Section 201 of the Voting Rights Act declares that “No person shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.” (42 U.S.C. Sec. 1973-aa.)

The term “test or device” means any requirement that a person as a prerequisite for voting “demonstrate the ability to read, write, understand, or interpret any matter.” (42 U.S.C. Sec. 1973-aa.)

The Arizona statute conflicts with Section 201 of the Voting Rights Act because it requires a person in a limited guardianship to prove, by clear and convincing evidence, that he or she “retains sufficient understanding to exercise the right to vote.”

Clinton was clearly required, by Arizona law, to demonstrate “sufficient understanding” – a test which is prohibited by the Voting Rights Act.

Arizona’s new law should be brought to the attention of the U.S. Department of Justice, perhaps by the Arizona Center for Disability Law and The Arc of Arizona – groups that helped craft the new law.

The Arizona Secretary of State should refer to federal voting rights laws in educational materials explaining the voting rights of people with disabilities.

What’s happening in Arizona – the disenfranchisement of large numbers of people with developmental disabilities – is also happening in California. Although California law places the burden of proof on those who would deny voting rights of limited conservatees, that distinction makes little difference when judges and attorneys ignore federal laws and routinely strip people of voting rights by stipulation and without an evidentiary hearing.

The manner in which voting rights of people with disabilities are being routinely and systematically violated is a national disgrace. It is time for federal laws to be enforced. Delay is not acceptable.

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May 28, 2014
Executive Committee

Tom Coleman, Jim Stream, and Nora Baladerian

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 and Website Editor. 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 nearly 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 address this problem more effectively.

For more information about Nora J. Baladerian, click here. For more information about Thomas F. Coleman, click here. For more information about Jim Stream and The Arc of Riverside County, click here.
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 subjects 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 an ambitious Conservatorship Reform Project, which seeks to better protect the rights of adults with developmental disabilities who become conservatees.
Nora Baladerian, Ph.D., is a licensed psychologist in Los Angeles, California, practicing both clinical and forensic psychology.

Since 1971, long before the crime victimization field as a whole focused attention on the needs of persons with disabilities, she has specialized in working with individuals with developmental disabilities.

With an expertise in serving crime victims with disabilities and people charged with victimless sex crimes, she has successfully rallied victim/witness organization leaders, crime victims' rights advocates, social service professionals, forensic psychologists, law enforcement, attorneys, members of the judiciary, and others to take up the cause of ensuring that the needs of society's most vulnerable are not overlooked or otherwise forgotten.

In 1986, as a proactive way both to bring together the growing number of those dedicated to this work and promoting greater cross-disciplinary dialog, she began convening national conferences on abuse of individuals with disabilities, hosting the 10th in 2005 with The Arc of Riverside County, and the First Online Professional Conference of its kind that same year.

In 2008, the Attorney General of the United States (see photo above) presented her with the National Crime Victims Service Award in recognition of her pioneering efforts on behalf of persons with disabilities and in advancement of the mission of the Office for Victims of Crime of the U.S. Department of Justice.

Resumé of Dr. Baladerian