The Supreme Court of Missouri Has a Duty to Ensure ADA Compliance in Guardianship Proceedings

People with Disabilities Are Entitled to Access to Justice

By Thomas F. Coleman

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I recently gave a keynote presentation at the Fourth Annual Educational Summit of The Arc of Missouri. The conference focused on issues involving abuse of people with intellectual and developmental disabilities.

Dr. Nora J. Baladerian gave attendees a general overview of reducing the risk of abuse and providing improved response when abuse is suspected or reported. My presentation focused on disability and abuse in the specific context of guardianship proceedings.

I engaged in extensive research in preparation for my presentation at the conference. In addition to researching the laws applicable to Missouri guardianship proceedings, I interviewed public administrators, legal advocates, and service providers about disability demographics and state guardianship procedures.

My comparison of these policies and practices with federal statutory and constitutional requirements showed that respondents in guardianship proceedings are not receiving access to justice as required by the Due Process Clause of the United States Constitution. They are also not being afforded meaningful participation in the proceedings as mandated by Title II of the Americans with Disabilities Act.

In addition to sharing many factual findings that my research uncovered, I also presented more than two dozen recommendations on ways the guardianship system could be improved to comply with federal law. These findings, recommendations, and supporting research materials are available online. (http://spectruminstitute.org/Missouri/)

Among the many recommendations are two that should be of great interest to the Supreme Court of Missouri. I suggested that the Chief Justice convene a Guardianship Task Force to identify systemic deficiencies in guardianship proceedings and to recommend ways in which they can be remedied.

Another recommendation was for the Supreme Court to appoint a State Courts Guardianship Coordinator to assess local guardianship policies and practices throughout the state with a view to making the statewide system compliant with access-to-justice requirements of the Americans with Disabilities Act.

During the question-and-answer segment of my presentation, I was reminded of the efforts of a workgroup known as MO-WINGS. This gathering of "stakeholders" in the guardianship system has been meeting and discussing guardianship issues for six years. Some of its individual members have been working for guardianship reform for much longer than that. Unfortunately, the group's recommendations for reform have not yet resulted in significant changes in the guardianship system. The deficiencies I identified at the Educational Summit have existed for decades and, despite the best efforts of many individuals, organizations, and agencies associated with MO-WINGS, they persist.

I suggested to those assembled at the conference that it is time for more aggressive advocacy. The first step would be for a disability rights organization to submit a formal request to the Missouri Supreme Court asking the court to take meaningful steps in furtherance of its duty under Title II of the ADA to ensure access to justice for people with intellectual

and developmental disabilities who become involved in adult guardianship proceedings.

As explained below, state and local courts are public entities with duties under Title II of the ADA. As the entity with oversight of the Judicial Branch, the Supreme Court has the responsibility to ensure that judicial proceedings in the state are ADA compliant. The Supreme Court should exercise its constitutional authority to ensure that judges and attorneys involved in guardianship proceedings are giving litigants with cognitive and communication disabilities the access to justice guaranteed to them by federal laws, including the ADA.

Hopefully, the Supreme Court will heed the call to action and will take remedial steps within a reasonable time frame. If not, a class-action complaint can be filed against the Missouri court system with the United States Department of Justice, asking that agency to conduct a formal investigation of the guardianship system in Missouri – a system over which the Supreme Court of Missouri has administrative and management authority.

The Supreme Court should take steps now, by exercising its supervisory authority over judicial proceedings and over the practice of law, to make such a complaint with the DOJ unnecessary.

The Supreme Court has two types of general jurisdiction over the administration of justice in Missouri. One is its appellate jurisdiction where the court hears appeals involving cases litigated in lower courts. It also has an administrative role where the court exercises its supervisory authority over attorneys licensed to practice law and over procedural aspects of litigation that occurs in the trial and appellate courts of the state.

Appellate Jurisdiction

The appellate jurisdiction of the Supreme Court is derived from Article V, Section 3 of the Missouri Constitution. That provision states: "The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death."

Through the exercise of its appellate jurisdiction, the Supreme Court shapes the law in Missouri by issuing rulings and writing opinions that declare whether the lower court judges committed errors or abused their discretion or not, and whether the attorneys involved in the cases committed errors or engaged in misconduct. The rulings are binding in these cases and the opinions create a body of case law that guides attorneys and judges in future cases.

The case of Mildred Link is an example of the Supreme Court exercising its appellate jurisdiction to shape guardianship law in Missouri. (In re Link, 713 S.W.2d 487 (Mo, 1986)) In that proceeding, Mildred Link appealed from an order of the Probate Division of the Circuit Court declaring her to be incompetent and appointing a guardian of her person and a conservator of her estate. The court reversed those orders and, in doing so, issued an opinion stating that guardianship respondents are entitled to due process of law and to competent and effective representation of counsel in the proceedings.

It was only because Mildred Link filed an appeal that the Supreme Court was able to give direction to judges and attorneys throughout the state about the due process rights of respondents in guardianship proceedings. Unfortunately, appeals by guardianship respondents are rare and appeals by adults with intellectual and developmental disabilities are virtually nonexistent. As a result, there has not been a growing body of case law in Missouri on the procedural and substantive rights of respondents in guardianship proceedings.

Judges and attorneys are more likely to respect the rights of litigants when they know that an appeal is a distinct possibility. They are less likely to adhere to the rule of law when they think that an appeal is only a very remote prospect. People who believe they have the ultimate and final word and who lack supervision act differently than people who believe they are being watched or that they may be audited.

That's human nature. The fact that guardianship respondents almost never appeal stunts the adjudicative growth of guardianship law and allows systemic flaws to go uncorrected indefinitely.

Administrative Jurisdiction

The administrative role of the Supreme Court is derived from Article V, Section 4 of the Missouri Constitution. That provision states: "The supreme court shall have general superintending control over all courts and tribunals." It continues: "Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power."

Court Staff

As supervisor of the Judicial Branch of government in Missouri, the Supreme Court is vested with the authority to appoint staff members to aid the court in fulfilling its administrative duties. Article V, Section 4.2 of the Constitution states: "The supreme court may appoint a state courts administrator and other staff to aid in the administration of the courts, and its shall appoint a clerk of the supreme court and may appoint other staff to aid in the administration of the business of the supreme court."

Pursuant to this constitutional authority, the Supreme Court has appointed a clerk of the court as well as a state courts administrator and other staff. Unfortunately, none of the staff employed by the Supreme Court has the specific responsibility to assist the court in administratively supervising the guardianship system throughout the state. The administration of the guardianship system occurs at the local level, with each Circuit Court processing guardianship cases, appointing advocacy attorneys and guardians ad litem, appointing capacity experts, and adopting local rules as the local court sees fit. There is no administrative guidance from or supervision by the Supreme Court. This lack of oversight allows for inconsistent policies and practices in various parts of the state, thus creating equal protection problems in potential violation of Article I, Section 2 of the Missouri Constitution which guarantees equality under the law to all persons.

Securing Rights

Section 2 also states that to give security to equality under law and other personal rights "is the principal office of government, and that when government does not confer this security, it fails in its chief design." Because securing equal protection of the law has been given such prominence by the Missouri Constitution, and because guardianship respondents often lack the ability to file appeals to complain about violations of this constitutional right, it is essential that the Supreme Court use its administrative jurisdiction to supervise guardianship proceedings and to provide guidance to judges and attorneys in order to protect the personal rights – life, liberty, pursuant of happiness and equal protection of the law – of individuals with disabilities who are involuntary litigants in these legal proceedings.

Court Rules

Article V, Section 5 gives the Supreme Court a duty to establish "rules relating to practice, procedure, and pleading for all courts and administrative tribunals." These rules have the force and effect of law. Although it has the authority to do so, the Supreme Court has not yet established rules governing the practices of judges, attorneys, and guardians ad litem in adult guardianship proceedings.

To reiterate, because there are few appeals by guardianship respondents in these cases, the normal corrective appellate process is generally not operating in these proceedings. As a result, it would be highly beneficial for the Supreme Court to fulfill its duty under Section 5 by promulgating rules to establish procedural protections and to set professional standards for attorneys appointed to represent guardianship respondents whether it is in the role of advocacy lawyers or as guardians ad litem.

State Bar

In furtherance of the court's constitutional authority, the Missouri Bar was created by order of the Supreme Court in 1944. Through the State Bar, the Supreme Court exercises its administrative authority over the practice of law in Missouri. The court must

approve rules of professional conduct issued by the Missouri Bar and approve discipline imposed on attorneys. The bar association, therefore, is an arm of the Supreme Court and all of its policies and practices are subject to the court's approval. The Supreme Court, therefore, is ultimately responsible for the complaint procedure through which clients seek discipline of attorneys who have breached ethical duties or rules of professional conduct.

Neither the Missouri Bar or the Supreme Court has taken steps to issue specific rules to regulate the lawyer-client relationship in guardianship proceedings – whether regardless of whether the attorneys are privately retained or are appointed by a court. Knowing that such special needs clients are generally unable to identify or complain about any deficient performance of their attorneys, it would be most appropriate for the bar and the court to find alternative ways to protect the rights of these clients.

Chief Justice

The Chief Justice of the Supreme Court plays a special role in the administration of justice in Missouri. According to Article V, Section 8: "The chief justice of the supreme court shall be the chief administrative officer of the judicial system and, subject to the supervisory authority of the supreme court, shall supervise the administration of the courts of this state."

ADA Compliance

The Americans with Disabilities Act was passed by Congress more than 25 years ago. The law's constitutionality has been upheld by the United States Supreme Court as a valid exercise of federal authority over the states.

The ADA builds upon and extends beyond the requirements of federal due process. The Due Process Clause of the Fourteenth Amendment requires state courts to protect the procedural and fundamental substantive rights of litigants in state court proceedings. The ADA goes even further than these minimum constitutional guarantees and may require extra accommodations to people with disabilities who are participants in legal proceedings.

The term "Due Process *Plus*" has been coined to describe the duties of judges and court-appointed lawyers who interact with litigants with cognitive and communication disabilities in state guardianship proceedings. (*Due Process Plus: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Proceedings – 2015*) *Due Process Plus* is a White Paper submitted by Spectrum Institute to the U.S. Department of Justice. (http://spectruminstitute.org/white-paper/)

While the Supreme Court of Missouri acknowledged many years ago that due process protections apply in adult guardianship proceedings (In re Link, supra), it has not spoken on the rights of guardianship respondents under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. The court has not used its *adjudicative* authority to address this issue since appeals by guardianship respondents are virtually nonexistent. Neither has the court used its *administrative* authority to address the role of the ADA and in guardianship cases.

Title II of the ADA applies to services provided by public entities. The term "public entity" includes state and local courts. The service provided by the Missouri Courts is the administration of justice.

Under Title II, judges, court-appointed advocacy attorneys, guardians ad litem, and other court-appointed or supervised participants must take affirmative steps to ensure that litigants with cognitive and communication disabilities receive access to justice in guardianship proceedings. Under the concept of Due Process *Plus*, extra steps (modifications of normal policies and practices) may be required to ensure effective communication between the litigant and all participants in the proceedings.

In addition to ensuring effective communication, various supports and services may be necessary to maximize the prospect that a litigant with serious disabilities has meaningful participation in all stages of the proceeding – both in and out of court. The duty to provide such supports and services does not depend on a request from a litigant with disabilities – especially when the court or court-appointed lawyers know that the nature of the disability precludes the litigant from making such a request.

The responsibility of judges to provide, and for court-appointed attorneys to seek, accommodations or modifications is *sua sponte* when it is known that a serious disability may hinder a litigant's ability to have meaningful participation in the case. It is obvious in guardianship proceedings – just by virtue of the allegations made in the petition – that the respondent has serious cognitive disabilities and may have significant communication and other disabilities as well.

The duty of a public entity to provide meaningful access to its services actually pre-dates the passage of the ADA. It is rooted in Section 504 of the Rehabilitation Act of 1974 – a federal law that did, and still does, apply to state and local government entities. Speaking of Section 504, the United States Supreme Court said: [A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." (Alexander v. Choate, 469 U.S. 287, 301 (1985))

The requirement of "meaningful access" to public services is not limited to Section 504. Many federal appellate courts have ruled that the ADA also requires public entities to provide "meaningful access" to people with disabilities so as not to deprive them of the benefits of the services provided. (Ability Center of Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004); Randolph v. Rogers, 170 F.3d 850 858 (8th Cir. 1999); Lee v. City of Los Angeles, 350 F.3d 668, 691 (9th Cir. 2001); Chaffen v. Kansas State Fair Board, 348 F.3d 850, 857 (10th Cir. 2003)).

A subtle point of clarification should be made at this point. ADA terminology makes a distinction between "accommodations" and "modifications." Under Title I of the ADA, a "reasonable accommodation" is only required by employers to avoid discrimination against to employees with disabilities. Under Title II, public entities have an obligation to make "reasonable modifications" of policies and practices to ensure meaningful access to their services.

The two different terms, however, may pose a distinction without a significant difference. For all practical purposes, the two terms are essentially equivalent. (McGary v. City of Portland, 386 F.3d 1259, 1266, n.3 (9th Cir. 2004). Courts often use the terms interchangeably. (Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997)).

Another requirement of the ADA is that a public entity take appropriate steps to ensure that communications with recipients of its services are as effective as communications with others. (Robertson v. Las Animas County Sheriff's Department, 500 F.3d 1185 (10th Cir. 2007)) To fulfill this duty, an entity may need to provide auxiliary aids and services.

The duty to provide accommodations, modifications, and effective communications applies to "known" disabilities. An entity, such as a court, cannot take steps to respond to a disability it does not know about. As the court in Robertson explained: "[T]he entity must have knowledge that the individual is disabled, either because the disability is obvious or because the individual (or someone else) has informed the entity of the disability." In other words, it is the knowledge of the disability, even without a request for accommodation, that triggers the entity's obligation to take reasonable steps to compensate for the disability in order to maximize the possibility of meaningful access to the services.

In the context of guardianship proceedings, the mere filing of a petition should be sufficient to trigger a duty of the court to inquire into the types of modifications or the extent of supports and services that are necessary to give the respondent meaningful access to the legal proceedings. The same is true about the court's duty to ensure effective communications between the respondent and all court participants.

A filing of a guardianship petition predicated on allegations that a respondent has have significant cognitive or other disabilities. The mere filing of a guardianship petition, therefore, puts the court on notice that the respondent has a known disability that may require accommodations. In addition, other

documents submitted with the petition would give the court and attorneys additional information as to the types of disabilities the respondent has.

A recent publication issued by the U.S. Department of Justice explains these issues in the context of criminal justice proceedings involving people with intellectual and developmental disabilities. (https://www.ada.gov/cjta.html) The principles and examples contained in this DOJ publication should be helpful to the Missouri courts as to the types of actions that may be required by the ADA to ensure access to justice in adult guardianship proceedings. (http://disabilityandabuse.org/doj-guidance.pdf)

A review of materials submitted by Spectrum Institute to The Arc of Missouri at the educational summit will help the Supreme Court to understand the need for the court to exercise its administrative authority to ensure access to justice for litigants with disabilities in guardianship proceedings. Many of the "Due Process *Plus*" deficiencies in the guardianship system are identified in those materials.

Whether the Judicial Branch is fulfilling its responsibility to ensure access to justice in guardianship proceedings should be subject to a "pass-fail" test. As things now stand, judges, court-appointed attorneys, and other court-supervised personnel would not pass an ADA compliance test if the Department of Justice were to investigate the guardianship system in Missouri as it currently operates. Compliance with federal law is not "graded on the curve."

Missouri has no access-to-justice performance standards for advocacy attorneys or guardians ad litem. These court-appointed personnel are not receiving meaningful training on legal and medical issues involving litigants with intellectual and developmental disabilities. There is no training on how to maximize effective communication. Nothing on forensic interviewing of clients in this special needs population. No educational programs on the ADA and its application to guardianships.

The Supreme Court should convene an Advisory Committee on Access to Justice in Guardianship Proceedings. In addition to the usual membership of judges and attorneys, the court should appoint disability rights advocates, including self-advocates, to provide input from an experiential perspective.

The Supreme Court of Missouri has had duties under the ADA for more than 25 years, and under Section 504 for even longer. The court should exercise its administrative authority, sua sponte, to ensure that guardianship proceedings comply with access-to-justice requirements of the ADA.

An ADA violation in a legal proceeding may create "structural error" that requires reversal per se. No showing of prejudice is needed because the nature of the error gives rise to a presumption of prejudice.

Some errors in civil cases are reversible per se, "primarily where the error calls into question the very fairness of the trial or hearing itself." (Biscaro v. Stern, 181 Cal.App. 4th 702 (2009)) "Wrongful denial of an [ADA] accommodation is structural error infecting a legal proceeding's reliability, which stands to reason because an accommodation's purpose is to help a party meaningfully participate in a way that enhances our confidence in a proceeding's outcome." (Id, at p. 710)

By failing to even consider ADA accommodations or modifications of normal policies and practices on their own motion at the initial stages of a guardianship proceeding, Circuit Court judges have been engaging in structural error in thousands of cases each year in Missouri. Similarly, structural error is being committed on a regular basis by the inaction of court-appointed advocacy attorneys and guardians ad litem who fail to assess communication needs or identify the supports and services that would enhance access to justice for guardianship respondents.

The Supreme Court should, without delay, create a committee to study the guardianship system with a view to enacting ADA-compliant rules for courts, and standards for attorneys and guardians ad litem in guardianship proceedings. Appropriate training also should be required for judges, attorneys, and guardians ad litem. The ADA requires as much. ◊◊◊

Thomas F. Coleman is the legal director of Spectrum Institute. Email: tomcoleman@spectruminstitute.org
Webpage: www.spectruminstitute.org/Missouri