

# Limited Conservatorships and the Denial of Access to Justice: Who is Responsible under the ADA?

## A Suggested Focus of Inquiry for the U.S. Department of Justice

By Thomas F. Coleman

### **Limited Conservatorship Proceedings**

1. Limited conservatorships are legal proceedings initiated because someone believes that an adult who has an intellectual or developmental disability is unable to care for his or her basic needs due to an incapacity to make major life decisions.
2. A petition to place the person under a conservatorship is generally filed by a parent or relative who asks the probate court to give them or another designated person the authority to make such decisions for the adult in question.
3. The petition is served on the adult who is then required to respond. The adult becomes an involuntary litigant. Due to cognitive and communication disabilities, the adult is not able to defend himself or herself or to participate in the proceedings in a meaningful way without assistance.

### **The Americans with Disabilities Act**

4. Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 require public agencies, including courts, to take necessary steps to ensure that people with disabilities have meaningful access to the services they offer. The service offered by courts is the administration of justice. Section 504 applies mandates similar to the ADA to public agencies that receive federal funds. Most courts receive some federal funding.
5. Generally a public agency must modify its normal policies or provide an accommodation to a person with a disability *upon request*. However, when the agency knows that the person has a disability and that the nature of the disability precludes or impedes them from making a request for an accommodation, the agency has an affirmative duty to assess the situation and provide an accommodation *without request*.
6. The type of accommodation provided to the person must be sufficient to enable the person to have access to the services and to participate in the services in a meaningful manner. A violation of the ADA and Section 504 occurs when the supports and services provided to someone with a disability are not sufficient to give the person meaningful access to the services of the agency.
7. The only significant accommodation that California courts provide to proposed limited conservatees to give them access to justice in these proceedings is the appointment of an attorney. Since they cannot represent themselves, these involuntary litigants depend on their court-appointed attorney to advocate for their wishes and to defend their rights.
8. The administration of justice in these cases is a process of deciding whether the allegations of the

petition are true, whether they are supported by clear and convincing evidence, whether there are less restrictive alternatives to conservatorship, whether the person nominated to act as conservator is qualified, and whether that person is the best choice for conservator. The adult does not have meaningful access to justice unless the process that is required by law is actually followed. The adult is completely dependent on the court-appointed attorney to ensure that constitutional and statutory requirements for conservatorship proceedings are followed by all participants to the proceedings.

9. Due process of law entitles the adult to *effective* assistance of counsel. To provide effective assistance, the attorney must: (a) have sufficient expertise to deal with issues involving cognitive and communication disabilities, capacity to make decisions, and constitutional and statutory rights of people with developmental disabilities; (b) obey ethical requirements of confidentiality and loyalty, © conduct a thorough investigation of the sufficiency of the allegations and evidence in support of the petition; (d) develop evidence to rebut those allegations or to defend the retention of rights by the client; (e) file appropriate objections; (f) demand an evidentiary hearing when appropriate; and (g) assist the client in filing a notice of appeal to challenge errors by the trial court. If the attorney does not provide effective assistance, the client has been denied meaningful access to justice as required by the ADA and Section 504.

### **Evidence of ADA Violations by Attorneys**

10. Spectrum Institute has conducted a thorough investigation of the limited conservatorship system in California, with a special focus on Los Angeles County. The investigation has yielded significant evidence that court-appointed attorneys are not providing their clients meaningful access to justice as required by federal disability laws. The investigation has also documented that the violations are not isolated instances by a few attorneys. Audits of cases show systematic violations by many attorneys – violations that are known to the court. The denial of access to justice for people with developmental disabilities in limited conservatorship cases is systemic.

11. Three individual cases investigated by Spectrum Institute in depth show the seriousness and wide range of ADA access-to-justice violations. The case of Michael Parisio involved allegations of abuse by his conservators. The court-appointed attorney failed to properly investigate the allegations. Michael eventually died. The case of Gregory Demer involved allegations that his court-appointed attorney failed to protect his social rights – the right to decide for himself who to socialize with and who to avoid. It was alleged that his attorney actually advocated against her client and violated ethical duties of loyalty and confidentiality. As a result of not having someone to advocate for him, Gregory is forced to visit regularly with a parent who he says he does not want to see and of whom he says he is afraid. He has been relegated to a life of social servitude. The case of Stephen Lopate involved allegations of numerous ADA violations by his appointed attorney. The attorney refused to allow Stephen, who was mostly nonverbal, to use his chosen method of communication by typing with partial assistance from a support person. The attorney initially dismissed Stephen's right to vote as "inconsistent with conservatorship." He violated client confidentiality and did not properly advocate for his client's wishes not to visit his father.

12. The ADA violations in these cases are not isolated instances. Spectrum Institute conducted an audit of the performance of court-appointed attorneys in Los Angeles in dozens of other cases. The audit revealed that the attorneys did not conduct proper investigations and generally rushed the cases through the system. Many of them devoted only 4 or 5 hours to a case, from start to finish. They did not object to the failure of the regional centers to file capacity assessment reports on time. They did not object to the failure of the court to appoint an investigator to objectively assess the need for

a conservatorship or whether the proposed conservator was qualified or whether the home in which the conservatee would live was safe. The attorneys did not ask for an expert to be appointed to conduct an evaluation of their client's abilities. They did not use the resources of the regional centers to evaluate whether there were feasible alternatives to conservatorship for their clients.

### **Evidence of Failure to Train Attorneys**

13. Under Section 504 and Title II of the ADA, the court has the responsibility to provide access to justice for litigants with cognitive and communication disabilities. In limited conservatorship cases, the court attempts to fulfill this obligation through the appointment of counsel for the litigant.

14. Having extended an accommodation intended to provide access to justice for involuntary litigants with serious disabilities, the court has an obligation to ensure that the attorneys are qualified to represent clients with special needs. Appointing an unqualified attorney is not providing the litigant access to justice. Whether an attorney is qualified or not should not be left to chance. The court should know, in advance of the appointment, that the attorney has the necessary qualifications and experience to represent a client with cognitive and communication disabilities in a proceeding involving specialized legal, medical, and psychological issues.

15. The Los Angeles County Superior Court purports to satisfy its Title II obligation by limiting appointments to attorneys who are listed on a Probate Volunteer Panel. To get on the PVP list and remain on the list, an attorney needs to attend trainings that are mandated by the court. The mandatory trainings have been delegated by the court to the Los Angeles County Bar Association.

16. Spectrum Institute has audited the mandatory PVP trainings conducted by the bar association for the past several years. The trainings are seriously deficient. Many issues essential to effective assistance of counsel have never been addressed. Some seminars have given misinformation to attorneys. Most of the legal, medical, and psychological issues inherent in effective advocacy have been absent from these trainings. The court is aware of what topics are covered or not, since judges participate in the planning of the trainings and attend the trainings. Thus, the court is responsible for the deficiencies. The court is aware that the attorneys have not received sufficient training to provide effective representation to clients with special needs in limited conservatorship proceedings.

### **Agencies Responsible for These ADA Violations**

#### Los Angeles County Superior Court

17. The Los Angeles County Superior Court has a responsibility to provide litigants with developmental disabilities access to justice in limited conservatorship proceedings. The court has attempted to fulfill this responsibility by appointing an attorney to represent these litigants. Although a public entity can delegate duties, this does not absolve the entity of its supervisory duties to ensure that the agent or contractor provides meaningful access to the services of the public entity.

18. The Superior Court knows that conservatorship respondents cannot participate in the proceedings without the assistance of an attorney. The court knows that these litigants depend entirely on their court-appointed attorneys to ensure that the proceedings are conducted according to the mandates of the law. In other words, the court knows the litigants rely on their attorneys to make sure they are afforded due process. Due process is the service the court provides.

19. The court is aware that these litigants will not know whether or not their attorneys are giving

them access to justice. The court also knows that the litigants are not able to complain about ineffective assistance of counsel or to appeal when they are denied due process. Without effective assistance of counsel, the litigants are not given meaningful access to justice. Therefore, it is the responsibility of the court to adopt procedures to ensure the attorneys are qualified and that they are complying with performance standards that are consistent with ADA requirements.

20. The Los Angeles County Superior Court has not adopted training and performance standards that are ADA compliant. There are no performance standards. The trainings mandated by the court are severely deficient. The deficiencies have been brought to the court's attention and yet the deficiencies have not been corrected.

21. The court knows that the actual performance of the appointed attorneys is deficient. The attorneys submit a report in each case which is reviewed by a judge. An audit of dozens of such reports shows that the judges are aware that the attorneys are not performing activities essential to effective advocacy. The attorneys also submit fee claims in which they detail the services they have performed. The fee claims also alert the court as to services the attorneys did not perform. An audit of dozens of fee claims shows that the court is aware that attorneys are performing deficiently. Despite having such knowledge, the judges reappoint the attorneys with deficient performances over and over again to new cases.

22. The court is also creating a barrier to ADA-compliant performance by these attorneys by having adopted a local court rule that gives the attorneys a dual role. In addition to being an advocate for their clients, the attorneys are expected to "assist the court in the resolution of the matter to be decided." This rule creates a conflict of interest for the attorneys. Based on this secondary duty, attorneys are violating client confidences and acting in a manner that is disloyal to the client. The court has been asked by Spectrum Institute to rescind this rule but has failed to do so.

#### County of Los Angeles

23. The County of Los Angeles funds the legal services program that supplies attorneys for respondents in limited conservatorship proceedings. The court-appointed attorneys submit fee claims for their services, they are approved by the court, and the county then sends a check to the attorneys. The county has no quality assurance controls for the legal services program it funds. It simply pays the fees as ordered by the court. Attorneys with deficient performance are paid. There are no performance audits. The county does not monitor the training programs.

24. The Board of Supervisors has a choice as to the method of providing legal services to conservatorship respondents. It can fund the PVP program operated by the court; or it can designate the Office of the Public Defender to represent these clients; or it can contract with a nonprofit organization to provide such legal services. Quality controls can be included in any of these options.

25. The deficiencies of the PVP legal services program has been brought to the attention of the Board of Supervisors by Spectrum Institute. The supervisors were alerted that the program is violating the ADA rights of conservatorship respondents. The board was advised that the county is itself violating Section 504 and violating the ADA by funding an ADA-noncompliant legal services program with willful indifference to the harm being caused to conservatorship respondents. The Board of Supervisors has failed to take corrective action.

## Judicial Council of California

26. The Judicial Council of California is an agency within the judicial branch of government that was created by the California Constitution. Although the chairperson of the Judicial Council is the Chief Justice of California, the Council is an entity separate and distinct from the Supreme Court of California. It operates independently from the Supreme Court.

27. The Judicial Council is responsible for enacting rules and creating standards governing the performance of attorneys and judges in legal proceedings in the trial and appellate courts. It has the authority to enact rules and standards regarding the training and performance of attorneys.

28. The Judicial Council was alerted by Spectrum Institute of systemic deficiencies in limited conservatorship proceedings. It was informed that these defects violate due process as well as the ADA and Section 504. It was asked to adopt rules for training and performance standards for court-appointed attorneys in these proceedings. Its Probate and Mental Health Advisory Committee is reviewing the proposals of Spectrum Institute. However, since the review process is being conducted in private, there is no way of knowing whether ADA-compliant standards will be recommended until proposals are released for public comment, which may not occur until June 2017 or much later. If the proposed new rules are comprehensive and if they comply with the ADA, there is no way of knowing at this juncture whether they will be approved by the Judicial Council and, if they are, when they would become effective.

29. The Judicial Council is a public entity subject to Section 504 and Title II of the ADA.

## State Bar of California

30. The State Bar of California is a public corporation. All licensed attorneys must be a member in good standing of the State Bar. As a public entity, the State Bar is subject to the mandates of Section 504 and Title II of the ADA.

31. The State Bar has adopted rules of professional conduct that impose ethical and performance standards for licensed attorneys. It has adopted a system whereby clients can complain about violations of these standards. When complaints are filed, the State Bar investigates them, and if a violation is found to occur, it imposes appropriate discipline and requires appropriate corrective action.

32. Because of their cognitive and communication disabilities, clients of court-appointed attorneys in limited conservatorship proceedings are not able to file complaints with the State Bar. This is something the State Bar knows or should know. As a result, the State Bar should have an alternative method of monitoring the performance of attorneys who represent such clients, especially when deficient performance comes to the attention of the State Bar through methods other than specific complaints by clients with special needs.

33. Spectrum Institute has brought the problem of deficient performance of PVP attorneys to the attention of the State Bar on several occasions. The State Bar was asked to convene a task force to investigate the problem and recommend solutions. The State Bar did not respond to these requests. As a result, it is allowing the rights of litigants with developmental disabilities to be violated on a systematic basis without taking correction action, much less even investigating.

34. The State Bar of California requires attorneys to show proof of at least 25 continuing education credits every three years in order to have an active license to practice law. The State Bar decides which continuing education providers are allowed to give credits for seminars and educational programs.

35. The State Bar has authorized the Los Angeles County Bar Association to give continuing education credits to attorneys who attend educational programs sponsored by the County Bar. The County Bar operates the training programs for PVP attorneys who are appointed by the Los Angeles County Superior Court to represent respondents in conservatorship cases. The court mandates that attorneys attend these programs in order to receive appointments to these cases. The court participates in the development of these programs and actively participates in the seminars. Judges show their approval of the seminars by entrusting this function to the County Bar year after year.

36. Spectrum Institute has brought to the attention of the State Bar the deficiencies with these seminars. It has asked for an audit of the seminars that have been given over the past several years.

### Supreme Court of California

37. The State Bar of California is an arm of the Supreme Court of California. The Supreme Court is the supervisory entity to which the State Bar is responsible.

38. Spectrum Institute has brought to the attention of the Supreme Court the deficiencies of the training programs of the Los Angeles County Bar Association. It has alerted the court of its request that the State Bar audit these seminars as well as its previous request that the State Bar convene a Task Force on Access to Justice in Limited Conservatorship Proceedings. The court was asked to encourage the State Bar to convene such a task force and to monitor the response of the State Bar to the request for an audit of the PVP training program operated by the County Bar Association.

### Court-Appointed Attorneys

39. Attorneys who are appointed to represent clients with special needs in limited conservatorship proceedings themselves have a responsibility under the ADA. Since they are agents of the court due to their appointment by the court to represent these clients, the attorneys are subject to Title II of the ADA. Their duties under Title II – as a public agency – also stems from the fact that their services are paid for by public funds. The attorneys may also have ADA duties pursuant to Title III which governs public accommodations, including providers of legal services.

40. The attorneys have a responsibility, under State Bar rules, not to accept a case for which they lack the necessary training or skills. They have a duty, under state law as well as the ADA, to acquire the appropriate skills prior to taking such a case. Evidence shows a pattern that attorneys representing clients in limited conservatorship cases do not have the necessary training and skills.

41. In addition to the complaint filed with the DOJ for the class of limited conservatees, a complaint was also filed on behalf of Mr. Gregory Demer. An inquiry into the performance of Mr. Demer's attorney could serve as the basis for a remedial template to instruct the entire panel of PVP attorneys.

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Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for guardianship and conservatorship reform. Spectrum Institute has filed complaints with the U.S. Department of Justice regarding denial of access to justice for people with developmental disabilities in limited conservatorship proceedings in California. The complaints focus on the systematically deficient performance of court-appointed attorneys in these cases. (10-25-16 rev.)