Dear Workgroup Members,

It has been some time since I emailed you with reading materials. I thought a summer break was appropriate. Plus I have been busy advocating for conservatorship reform on a variety of fronts.

Spectrum Institute recently submitted an *amicus curiae* brief to the Supreme Court to educate the justices about serious systemic flaws in the probate conservatorship system. http://www.disabilityandabuse.org/amicus-brief-final.pdf The brief provides good background material for our study, although it is not directly pertinent to the issue of capacity assessments.

More direct and more pertinent to our study is a presentation I will make on Tuesday at the meeting of the Judicial Council in Sacramento. The council will be approving new training requirements for court-appointed attorneys in probate conservatorship proceedings. Among the new topics on which these attorneys must receive training are the issues of capacity assessments and less restrictive alternatives to conservatorship (such as supported decision-making).

Our research shows that other than a the submission of a perfunctory medical capacity assessment declaration submitted by petitioners when a case is filed, capacity assessments on a wide range of decision-making issues are not being done in most cases. Court-appointed attorneys are generally not challenging medical-capacity declarations and almost never ask for experts to be appointed to assess their client's mental capacities or to explore the viability of less restrictive alternatives. These attorneys need to receive major education on these topics.

Now that such training will be mandatory, the focus of Spectrum Institute is shifting to effective implementation of the new training requirement. Who will do the educating? What materials will be used? The adoption of the new training requirements makes the efforts of the Capacity Assessment Workgroup even more important.

The requirements of the Americans with Disabilities act in connection with conservatorship proceedings is another topic covered by the new training rule. Conservatorship attorneys know virtually nothing about the ADA as it applies to clients with cognitive or developmental disabilities. There is a lack of information on this topic. In fact, the Judicial Council itself is guilty of disseminating misinformation about the ADA. The Judicial Council is not telling judges that disability accommodations are required, even without request, to ensure that

respondents in conservatorship proceedings have effective communications and meaningful participation in the proceedings – and not just inside the courtroom. ADA requirements apply to all ancillary aspects of conservatorship proceedings, including the capacity assessment process.

I am attaching a copy of the materials I have submitted to the Judicial Council in connection with my upcoming presentation. They are only a few pages in length, so please take the time to read them. In the materials you will find links to an op-ed article I wrote for the Daily Journal legal newspaper and to a report to the Judicial Council on the need for it to take action to correct the misinformation it has been disseminating about the ADA.

I hope to send you some additional materials to read on the issue of capacity assessments in October. The conservatorship system is so messed up, and the issue of capacity has been so neglected, that it will take quite some time for us to fully explore all relevant issues and to read the necessary reference materials that will inform the report and recommendations we will eventually issue.

Thank you for your participation in this important project.

Tom Coleman
Spectrum Institute

Judicial Council of California

Sacramento Meeting on September 24, 2019

Remarks of
Thomas F. Coleman

Legal Director, Spectrum Institute

MCLE Approval Process • Performance Standards
Accessible Complaint Procedures • ADA Non-Compliance

Seniors and people with disabilities may benefit from the new rule on mandatory training requirements for court-appointed attorneys in probate conservatorship proceedings. I say may benefit because the value of seminars on the topics covered by the new rule depends on several conditions that currently do not exist.

Seminars are only valuable if the presenters are qualified and if the materials are accurate and complete. Our audits of training programs for appointed attorneys in Los Angeles have revealed the omission of important topics, misinformation on others, and the use of unqualified presenters.

MCLE Approval Process. To ensure quality training programs under the new rule, the State Bar should require providers to seek permission for MCLE credits in advance. The current practice of granting blanket pre-approval to bar association providers should not be used for this new rule.

Performance Standards. The Supreme Court should direct the State Bar to develop performance standards for court-appointed conservatorship attorneys. Effective representation of clients with cognitive disabilities should not be left to chance. Chance is not an acceptable method to ensure access to justice for people with disabilities as required by the Americans with Disabilities Act.

Accessible Complaint Procedures. The State Bar should make its complaint procedure accessible to clients with cognitive disabilities – clients who generally are unable to file complaints against their attorneys because they don't know they are being shortchanged even that is occurring.

A commentary published last week by the Daily Journal legal newspaper explains further why these three steps are necessary to ensure access to justice for seniors and people with disabilities in probate conservatorship proceedings. (http://spectruminstitute.org/op-ed-sept-18-2019.pdf)

ADA Non-Compliance. There is a big problem with Court Rule 1.100 and with educational materials published by the Judicial Council regarding the duties of courts to provide ADA accommodations. The rule and these materials misstate the law. They are premised on the need for a request in order for accommodations to be provided. That is not true. The ADA requires courts to provide accommodations for known disabilities that may interfere with access to justice, even without a request. We are submitting a report to the Judicial Council explaining why its rule-making and educational services on this topic violate federal law. We are requesting the Judicial Council to take effective measures to correct this serious problem. Remedial actions should be initiated *with all deliberate speed*. (http://spectruminstitute.org/ada-compliance.pdf)

World Congress on Adult Guardianship

Seoul, Korea / October 23-26, 2018

California Judicial Branch Gains Attention at Global Forum

Thomas F. Coleman spoke at a plenary session of the World Congress on Adult Guardianship attended by more than 400 delegates from five continents. Presenters included judges, administrators, professors, and advocates from 20 nations. The forum was hosted by the Supreme Court of Korea, the Korean Ministry of Justice, and the International Guardianship Network.

Coleman focused on serious deficiencies in the conservatorship system in California and the need for the judiciary to support significant reforms to protect the rights of people with cognitive disabilities. So far, the Supreme Court and the Judicial Council have declined requests to create a task force to review deficiencies in the conservatorship system and to conduct a statewide survey of probate court practices in conservatorships.

Coleman highlighted the pending case of Theresa Jankowski, an 84 year-old woman whose rights are being violated by a judge and a court-appointed attorney in Los Angeles. With approval of the judge, the attorney is arguing in favor of a conservatorship, ignoring Theresa's wishes, and actively promoting the denial of her rights. Coleman also focused on the refusal of the Sacramento court to appoint attorneys for many conservatorship respondents, thus requiring people with significant cognitive and communication disabilities to represent themselves in these complicated proceedings.

Coleman informed the delegates that a complaint against the Los Angeles court for violating the Americans with Disabilities Act (ADA) is pending with the United States Department of Justice. He also advised them that a separate ADA complaint is in the process of being filed against the Sacramento court with the California Department of Fair Employment and Housing – the state civil rights agency with jurisdiction to investigate, conciliate, and prosecute alleged ADA violations by public entities, including state courts.

Pursuit of Justice, a documentary film by Spectrum Institute, was also shown at the World Congress.

www.pursuitofjusticefilm.com

New Training Rules for California Conservatorship Attorneys

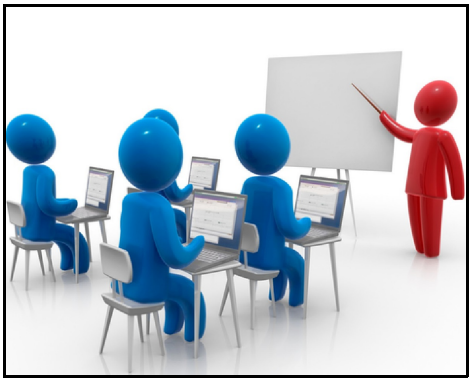
One Step on a Long Path to Reform

By Thomas F. Coleman
September 18, 2019

The California Judicial Council is scheduled to adopt new rules requiring conservatorship attorneys to receive education on a wide range of topics not mandated under current law. The changes will affect public defenders and private attorneys who are appointed to represent seniors and people with disabilities in probate conservatorship proceedings.

The matter is Item 19-220 on the consent agenda for the Judicial Council's meeting on Sept. 24.

The Probate and Mental Health Advisory Committee is including several crucial topics in the training requirements. For too long important issues have been ignored or misrepresented in seminars sponsored by some local bar associations. An investigation into faulty trainings is being considered by the Civil Rights Division of the United States Department of Justice.



Under the new rules, conservatorship attorneys will be required to gain knowledge about: (1) state and federal statutes including the ADA, rules of court, and case law governing probate conservatorship proceedings, capacity determinations, and the legal rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities; (2) ethical duties to a client under Rules of Professional Conduct and other applicable law; (3) special considerations for representing seniors and people with disabilities, including individualized communication methods; and (4) less restrictive alternatives to conservatorships, including the use of non-judicial supported decision-making arrangements.

But this new training framework is just the first step in a much needed and multi-faceted process to reform the dysfunctional probate conservatorship system. Structural flaws in this system have been brought to the attention of the chief justice, Judicial Council, Supreme Court, State Bar, attorney general, governor, and other state and local officials on many occasions during the last 15 years. And yet, despite some minor tinkering around the edges, the failure of officials to institute fundamental changes has resulted in the unnecessary victimization of thousands of seniors and people with disabilities who have been treated unfairly in these proceedings.

The next step leading to reform is to ensure that the training materials used in new educational programs are both accurate and complete. Quality education cannot be left to chance. There is a crucial need for the State Bar to approve only those trainings that meet specific standards. Training providers should submit the content of seminars and qualifications of presenters to the State Bar for pre-approval. Providers should not be given carte blanche like they are now.

New educational standards sound good in theory, but without the adoption of performance standards, conservatorship attorneys are free to use or ignore what they learn. Attorneys are often not providing their clients with effective representation. The pattern of deficient advocacy is also

part of a pending ADA complaint with the Department of Justice (filed by my organization, Spectrum Institute). Adherence to performance standards should be mandatory, not optional.

The California Supreme Court has the authority to direct the State Bar to develop performance standards for attorneys appointed to represent clients in conservatorship proceedings. In developing such standards, the State Bar will not have to start from scratch. Excellent standards have been adopted in Massachusetts and Maryland. The State Bar can also consider the ADA-compliant performance standards submitted to the DOJ.

Once standards are developed by the State Bar and approved by the Supreme Court, then a method to monitor compliance will need to be developed. Due to the nature of cognitive disabilities, respondents in conservatorship proceedings generally lack the ability to complain about the deficient performance of their attorneys. As a result, they lack meaningful access to the complaint procedures of the State Bar.

To meet its ADA responsibilities to make its services accessible, the State Bar will need to find ways to address this problem. Perhaps performance audits of a representative sample of cases handled by these attorneys can help fill this access-to-justice gap. The State Bar could also require public defender offices to routinely conduct performance audits of staff attorneys who represent clients in probate conservatorship proceedings.

Each of these steps will help ensure that seniors and people with disabilities receive due process in legal proceedings in which their fundamental freedoms are placed at risk. But none of these measures will do anything to help litigants who do not receive an appointed attorney and are therefore required to represent themselves in complex legal proceedings.

As hard as it is to believe, some people with serious cognitive disabilities are not receiving court-appointed counsel in these cases. An audit of cases in the Sacramento County Superior Court confirmed that judges there do not appoint attorneys in a significant number of cases.

Disability and seniors organizations filed a complaint with that court arguing that the failure to appoint counsel for probate conservatees violated the ADA. The court's response was a shameful denial that people with cognitive disabilities are entitled to an appointed attorney as an ADA accommodation. A state civil rights agency declined to open an investigation into the matter. As a result, it appears that the court's denial of access to justice for seniors and people with disabilities is a problem that will have to be addressed by the Legislature or by the DOJ.

It has been said that a journey of a thousand miles begins with a single step. The Judicial Council is about to take a step on a long journey toward comprehensive conservatorship reform.

This is an important step, to be sure, but one that may lead nowhere unless the Supreme Court, State Bar, and Legislature adopt additional reform measures. The question now is whether the justices, bar association officials, and state legislators have the will to do so.

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for guardianship and conservatorship reform.

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This commentary was published in the Daily Journal – California's premier legal newspaper.

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September 24, 2019

Honorable Tani Cantil-Sakauye
Judicial Council of California
350 McAllister Street
San Francisco, CA 94102

Re: Request to Add Court Rule to Clarify the *Sua Sponte* ADA Duties of California Courts

To the Judicial Council:

On July 28, 2017, the Judicial Council adopted a grievance procedure for use "by anyone who wishes to file a complaint alleging discrimination on the basis of disability in the provision of services, activities, programs, or benefits by the Judicial Council." The procedure was adopted in response to communications from Spectrum Institute inquiring whether the Council had a grievance procedure as required by Department of Justice regulations implementing the Americans with Disabilities Act.

Spectrum Institute believes that the Judicial Council has engaged in unlawful discrimination by indicating that the duty of courts to offer disability accommodations is dependent on a request. Rule 1.100, educational presentations by Judicial Council staff, and materials developed for attorneys, court staff, and the public all convey such an impression. For example, a recently published benchguide is conspicuously silent regarding the duties of judges when a self-represented litigant with obvious disabilities fails to make an ADA accommodation request. ("Handling Cases Involving Self-Represented Litigants," Judicial Council (April 2019)" There are no court rules, webpages, or educational materials clarifying that local courts do have *sua sponte* ADA duties even when no request is made. This misleading omission is causing actual and potential harm to disabled litigants.

The Judicial Council has not issued any rules or produced any materials explaining that courts do have a duty to make modifications or provide accommodations when they become aware, through sources other than a request, that a litigant has a disability that may interfere with effective communication or meaningful participation in legal proceedings. This omission adversely affects litigants with disabilities who are unable to make requests for accommodations. This is especially true for thousands of litigants with disabilities in conservatorship and mental health proceedings.

The failure of the Judicial Council to promulgate a rule and develop educational materials to inform judges, court staff, attorneys, litigants, and the public of the *sua sponte* duties of courts to provide accommodations for known disabilities that may impair meaningful participation in court proceedings – even when a request is not made – is a violation of the Judicial Council's duties under federal and state nondiscrimination laws and regulations. Such laws include Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Section 11135 of the California Government Code – a statute which incorporates Title II of the ADA into state law. This omission suggests that, absent an ADA request, there is no duty to accommodate. As a result, misinformed judges are not providing accommodations to thousands of litigants who need them.

Under these statutes, and cases interpreting them, the duties of courts and judicial branch agencies are not dependent upon requests from litigants with a disabilities. The duties arise when a judicial officer, employee or appointed agent of the court becomes aware that a litigant has a disability that may impair participation in a legal proceeding. This is so even if such knowledge is gained without a request being made. In conservatorship and mental health proceedings, for example, knowledge that the target of the proceeding has significant cognitive or communication disabilities is revealed when the case is first initiated. The petition and supporting materials so inform the court.

Federal judicial precedents make it abundantly clear that the ADA and Section 504 apply to any and all services provided by public entities, including state courts. These cases clarify that the duty to ensure effective communications and meaningful participation in court services is not dependent upon a request. Rule 1.100 and various Judicial Council materials suggest otherwise.

Spectrum Institute has conducted considerable research into the ADA and related federal and state statutes and their application to state judicial proceedings. We have thoroughly studied the probate conservatorship system in California, including policies and practices of the judges and court-appointed attorneys involved in these proceedings. Rather than filing a formal complaint under the available grievance procedure, we have decided to share the results of our research with the Judicial Council pursuant to an administrative request to expand the Rules of Court to fill this gap. We are attaching a compendium of reference materials that will help the Judicial Council bring the Rules of Court and judicial branch educational materials into compliance with the requirements of Section 504, the ADA, and Section 11135.

The Judicial Council has the ability to act expeditiously. The recent adoption of the ADA grievance procedure in just a few months is an example of judicial expediency. In contrast, rule changes sometimes can take years. The formulation of the new rule on qualifications and training for court-appointed conservatorship attorneys is an example of extended delay. Our request for new training requirements was made verbally to the Probate and Mental Health Advisory Committee in November 2014 and was followed by a written proposed in June 2015. It has taken nearly five years for this new rule to appear on the consent agenda of the Judicial Council's meeting today.

We are asking the Chairperson of the Judicial Council, the Executive Committee, and the Rules and Project Committee to "fast track" this request. The foundational research for a new court rule has already been done. More than 80 documents are being provided to the Council, along with appropriate commentary on how each document is relevant to this request.

We look forward to learning when corrective action will be taken by the Judicial Council.

Respectfully,

Thomas F. Coleman
Legal Director
tomcoleman@spectruminstitute.org

cc: Hon. Douglas P. Miller – Executive Committee
Hon. Harry E. Hull – Rules Committee
Hon. Kevin C. Brazile – Access and Fairness Advisory Committee
Ms. Amber Lee Barnett – Leadership Services Division

Any program or activity that is funded by the state shall meet the protections and prohibitions of Title II of the ADA and federal rules and regulations implementing the ADA. (Cal. Gvt. Code Sec. 11135)

A public entity must offer accommodations for *known* physical or mental limitations. (Title II Technical Assistance Manual of DOJ)

Even without a request, an entity has an obligation to provide an accommodation when it knows or reasonably should know that a person has a disability and needs a modification. (DOJ Guidance Memo to Criminal Justice Agencies, January 2017)

Some people with disabilities are not able to make an ADA accommodation request. A public entity's duty to look into and provide accommodations may be triggered when the need for accommodation is obvious. (*Updike v. Multnomah County* (9th Cir 2017) 930 F.3d 939)

"If no request for an accommodation is made, the court need not provide one."

– *Judicial Council* 2017 Brochure *

VS

It is the knowledge of a disability and the need for accommodation that gives rise to a legal duty, not a request. (*Pierce v. District of Columbia* (D.D.C. 2015) 128 F.Supp.3d 250)

A request for accommodation is not necessary if a public entity has knowledge that a person has a disability that may require an accommodation in order to participate fully in the services. Sometimes the disability and need are obvious. (*Robertson v. Las Animas* (10th Cir. 2007) 500 F.3d 1185)

The failure to expressly request an accommodation is not fatal to an ADA claim where an entity otherwise had knowledge of an individual's disability and needs but took no action. (*A.G. v. Paradise Valley* (9th Cir. 2016) 815 F.3d 1195)

The import of the ADA is that a covered entity should provide an accommodation for *known* disabilities. A request is one way, but not the only way, an entity gains such knowledge. To require a request from those who are unable to make a request would eliminate an entire class of disabled persons from the protection of the ADA. (*Brady v. Walmart* (2nd Cir. 2008) 531 F.3d 127)

* Rule 1.100 and all Judicial Council educational materials are erroneously premised on the need for a request.