Washington State Recognizes the Appointment of an Advocate as a Necessary ADA Accommodation in Legal Proceedings

by Thomas F. Coleman

Appointment of an attorney or other "suitable representative" soon will become an element of ADA-accommodation law in some Washington legal proceedings. Although the new rule by Office of Administrative Hearings (OAH) is limited to administrative law proceedings in the state, it may signal the need for a similar court rule for judicial proceedings involving litigants with significant disabilities.

The rule, which goes into effect January 1, 2018, was requested by the Fred T. Korematsu Center for Law and Equality and Disability Rights Washington. It was approved by Hon. Lorraine Lee, the state's Chief Administrative Law Judge. The Access to Justice Board, an agency created by the Supreme Court in 1994, supported the new rule.

The rule requires an ADA-accommodation inquiry to occur "If, during any stage of an adjudicative proceeding, the administrative law judge or any party has a reasonable belief that an otherwise unrepresented party may be unable to meaningfully participate in the adjudicative proceeding because of a disability." Once the judge presiding in the case has such a reasonable belief, the judge "shall refer the party to the agency ADA coordinator" for an accommodation assessment.

If the assessment shows that the nature of the party's disability necessitates the assistance of a "suitable representative" to ensure the party has meaningful participation in the case, such a representative shall be appointed by the chief administrative law judge for the duration of the proceedings. Since an advocate for a party in an administrative proceeding is not required to be licensed to practice law, the representative appointed to assist the party in advocating or defending may or may not be a lawyer.

However, lawyer or not, the new rule requires the judge to consider several factors about the potential advocate before appointing him or her as a representative for the litigant. This includes his or her knowledge, skills, and abilities of the procedural rules and the substance at issue in the proceeding, as well as his or her level of experience and training in advocating for people with disabilities.

A network of potential advocates will be established by the agency. To be placed on the list of potential advocates, individuals will be required to receive uniform qualification training or demonstrate equivalent experience and training. Training will also be required of all OAH staff involved with the ADA assessment and appointment process, including training on the requirements of the ADA and equivalent state law on disability discrimination. Part of the staff training includes a requirement for learning "the process for assessing and determining accommodations necessary to ensure meaningful participation in the adjudicative proceeding."

A monitoring component has been built into this new ADA-accommodation program. Performance and outcomes will occur two years after the program starts to determine its effectiveness. Feedback from parties, staff, suitable representatives, judges, and others will be included in the monitoring process.

The Supreme Court should review this rule and agency comments in developing a court rule requiring appointment of counsel as an ADA requirement in some court proceedings. In addition to the ADA, federal due process requires appointment of counsel when a court knows a litigant has a disability that precludes the person from meaningful participation in his or her case. Virtually all respondents in adult guardianship proceedings meet that test.

In November 2017 Spectrum Institute filed an ADA complaint with the Supreme Court that attorneys are not being appointed for respondents in *all* guardianship cases and that performance standards and training are not required when they are appointed. Spectrum Institute issued a report to the court – The Justice Gap – in March 2016 on the same subject.