

Access to Justice for Limited Conservatees: The Buck Stops with the California Supreme Court

by Thomas F. Coleman

The Americans with Disabilities Act requires state courts to make modifications and provide accommodations to ensure that litigants with disabilities have access to justice. Section 504 of the Rehabilitation Act of 1973 has similar requirements.

California courts attempt to comply with this mandate by appointing attorneys to represent adults with developmental disabilities in limited conservatorship cases. These cases are initiated when a petitioner, often a close family member, believes an adult lacks the capacity to make major life decisions. The petitioner asks the court to give authority to another person to make decisions for the adult on medical or financial issues or personal matters such as residence, education, marriage, or sex.

The person with the disability is involuntarily brought before the court to answer the charges that he or she lacks capacity in one or more of these areas. The court knows that, due to a cognitive or communication disability, the involuntary litigant will be unable to challenge the allegations or produce witnesses or evidence in support of retaining his or her decision-making rights.

To give the litigant access to justice, the court appoints an attorney to be a spokesperson, advocate, and defender. The appointment of such an attorney would be an acceptable way for the court to satisfy its duties under Title II of the ADA and Section 504. I say “would be” because whether the access-to-justice requirements of the ADA are satisfied or not depends on whether the attorney is properly trained and whether the attorney in fact provides *effective* assistance to the client. That is a tall order to fill for clients with special needs due to cognitive and communication disabilities.

Research by Spectrum Institute, conducted over the past two years, shows that court-appointed attorneys in Los Angeles County are generally not providing effective assistance to clients in limited conservatorship proceedings. The shortcomings of these

attorneys – often called PVP attorneys because they are appointed from a Probate Volunteer Panel – have been brought to the attention of local, state, and federal officials and agencies.

Audits of many cases show that PVP attorneys are often surrendering rather than defending the rights of their clients. Attorneys are violating ethical requirements of loyalty and confidentiality. Ineffective assistance of counsel is the norm, when the performance of counsel is judged by the requirements of due process and the mandates of the ADA.

The underlying reason for deficient performance can be traced to the lack of training and performance standards – standards that should have been adopted by the Judicial Council and local courts. There are no training standards. Advocacy standards are minimal to nonexistent.

Complaints about the lack of such standards have been filed with the Los Angeles County Superior Court and the Judicial Council of California. The response has been muted. Remedial action has not been taken. Letters were written in 2014 and 2015 to the presidents of the State Bar of California. Neither of them responded.

An informal ADA complaint was filed with the County of Los Angeles since it is the local entity that funds the PVP legal services program and pays the attorneys even if they perform in a deficient manner. The county pays the bills without any oversight. When the county failed to follow its own complaint procedures, Spectrum Institute withdrew the complaint due to lack of confidence that the county would treat the matter seriously.

Getting nowhere with state and local officials, Spectrum Institute filed a complaint with the United States Department of Justice against the Los Angeles County Superior Court. The complaint alleges that the court is responsible for the performance of the attorneys it appoints to represent

limited conservatees. The attorneys are agents of the court for purposes of Title II compliance with the access-to-justice requirements of the ADA and Section 504. That complaint is pending.

Last week, Spectrum Institute decided to give one last shot at remedial action through a state agency. We filed a complaint with the State Bar against the Los Angeles County Bar Association. The State Bar authorizes the county bar to award continuing education credits to attorneys who attend PVP training programs operated by the county bar. These programs are also a function of the Los Angeles County Superior Court because attendance at them by PVP attorneys is mandated by the court.

We have audited many PVP seminars and related educational materials for several years. They have been consistently deficient – by including misinformation on some topics while completely omitting presentations on many topics necessary for these attorneys to give their clients access to justice.

We have asked the State Bar to audit the training programs for the past several years – a process that should confirm the deficiencies we have documented. This is a huge problem for the 40,000 adults currently under a limited conservatorship and the 10,000 adults who have new cases filed against them each year in California.

How the State Bar responds to our complaint is not solely up to its Executive Director or Board of Trustees. The State Bar’s website says it is a public corporation that “serves as an arm of the California Supreme Court.” All members of the State Bar, including PVP attorneys, are officers of the court.

With all of the avoidance, silence, and delays by so many state and local officials, it is time for the California Supreme Court to intervene in this matter. As officers of the court, PVP attorneys are failing to provide clients with developmental disabilities access to justice in limited conservatorship cases. The local court is not correcting the problem. The Judicial Council is dragging its feet. The State Bar has ignored our repeated requests.

When it comes to ensuring access to justice for these involuntary litigants with special needs, the buck stops with the California Supreme Court.

From an administrative perspective, the Supreme Court is the supervisor of the State Bar of California. When the State Bar ignores a serious problem that affects access to justice for a vulnerable class of litigants, the Supreme Court, in its administrative capacity, can and should intervene.

In many types of litigation, problems are resolved through the normal appellate process. An appeal is filed by the affected litigant. The Court of Appeal renders an opinion that, if published, instructs the bench and the bar about whether corrective action should be taken – not only in the specific case but to guarantee justice for the entire class of litigants who may be affected by the erroneous practice. If review is granted in the case, the Supreme Court makes a ruling that corrects the problem statewide.

Surprisingly, the normal appellate process is not available to limited conservatees whose rights are violated due to ineffective assistance of counsel. Because of their disability, they are not able to appeal on their own. Their attorneys will not appeal to challenge their own deficient performance.

When someone else raises the issue on appeal, the appeal is dismissed for lack of “standing” since it is not *their* rights that have been infringed. (Conservatorship of Gregory D. (2013) 214 Cal.App.4th 62) So the problems raised here are never corrected through the normal appellate process.

At this point, the only remedy appears to be through intervention of the Supreme Court in its administrative capacity. If that does not occur, then it would seem that a formal inquiry by the Department of Justice should be opened, investigating *all* of these state and local agencies and why they have failed to take correction action to bring the Judicial Branch into conformity with the ADA and Section 504. ◇

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