Disability awareness all day, every day

We Need to Fix Complaint Procedures for Disabled Litigants

by Thomas F. Coleman

Did you know that October was Disability Awareness Month? That designation provides an opportunity for private-sector businesses to recognize the contributions and needs of workers and customers with disabilities. In terms of the public sector, Disability Awareness Month is a time that judges and attorneys are reminded they may need to take extra steps to provide access to justice to litigants with disabilities.

In keeping with the spirit of that month, I sent a letter to the State Bar of California in October 2015 to bring to its attention deficiencies in legal services provided by court-appointed attorneys representing clients with cognitive disabilities in conservatorship proceedings. I sent a similar letter to the California Supreme Court. Now that another Disability Awareness Month has come and gone, I am still waiting for a reply from the bar association and the court.

For judges and attorneys who interact with litigants who have cognitive disabilities, every single day must be disability awareness day. Awareness of the special needs of such litigants is not optional or something that should be considered one month each year. The Americans with Disabilities Act – and its mandate that litigants with disabilities are provided access to justice – require that each day must be disability awareness day for the judiciary and the legal profession.

Attorneys who represent clients with cognitive disabilities are bound by the same rules governing attorney-client relationships as are attorneys who represent clients without disabilities. Rules of professional conduct, promulgated by the Supreme Court and enforced by the State Bar, require attorneys to perform competently, avoid conflicts of interest, and adhere to ethical duties of undivided loyalty and utmost confidentiality. They must also communicate effectively with their clients. A violation of any of these duties – rooted in common law, statutes, and rules of court – may be addressed though a variety of complaint procedures.

In a criminal proceeding, for example, a disgruntled defendant can ask the court to replace a court-appointed attorney who the defendant feels is performing incompetently. This triggers what is known as a "Marsden" hearing where the defendant can air any grievances in a confidential hearing. A "Marsden" procedure is theoretically available to respondents in conservatorship cases. If the complaint is found to have merit, a new attorney is appointed.

A client who has received ineffective assistance of counsel in a legal proceeding has the right to appeal to bring the complaint to the attention of an appellate court. If the appeal is successful, a new trial may be ordered.

A client who has been victimized by an attorney's misconduct or incompetent services can file a complaint with the State Bar. If an investigation shows probable cause that statutes or court rules were violated, an administrative hearing is conducted which may result in discipline to the attorney.

These complaint procedures are theoretically available to all clients, but in reality they are not accessible to litigants with cognitive disabilities. Because

of the nature of such disabilities, litigants in conservatorship proceedings, for example, would not know whether their attorneys are performing incompetently, have a conflict of interest, have been disloyal, or have violated the duty of confidentiality. This type of a disability also makes them unaware that complaint procedures are available or to understand how to go about filing such a complaint.

Clients with cognitive disabilities are, in a practical sense, unable to make a Marsden motion, file an appeal, or lodge a complaint with the bar association. Unless the judiciary and the legal profession take affirmative measures to provide such clients meaningful access to these complaint procedures, litigants with cognitive disabilities will continue to be excluded from this aspect of the administration of justice.

Solutions are available if only they are sought. There are three public entities in California – each of which has obligations under Title II of the ADA – that should seek solutions so that litigants with cognitive disabilities have access to these attorney complaint procedures.

The Judicial Council of California adopts rules governing trial and appellate court procedures. It should consider a new rule to give "next friend" standing to a third party to make a Marsden motion on behalf of a respondent in a conservatorship proceeding. A more liberal rule on standing should also be adopted to allow a third party to file an appeal when the rights of a litigant with a cognitive disability have been violated due to attorney misconduct or judicial error or abuse of discretion.

The State Bar of California has a major role to play. Knowing that clients with cognitive disabilities will generally not be aware of attorney misconduct or incompetent services, the bar association should allow a third party to initiate a complaint against an attorney suspected of violating rules of professional conduct.

The State Bar can also take pro-active measures to minimize deficient legal services to litigants with cognitive disabilities. For example, it can monitor training programs for public defenders and court-appointed attorneys who represent respondents in conservatorship proceedings to ensure they are ADA-compliant and that they make the attorneys qualified to handle such cases. MCLE credits should only be allowed for ADA-certified educational programs.

The State Bar also can annually audit a sample of conservatorship cases throughout the state to verify, after the fact, that the attorneys truly provided the clients effective advocacy services. Knowing that his or her case might be selected for an audit could have a positive effect on attorney performance.

In addition to its adjudicative role in litigation, the California Supreme Court has an administrative function as well. It is a "public entity" with responsibilities under Title II of the ADA to ensure access to justice for litigants with disabilities. It should exercise its administrative responsibilities by convening, or instructing the State Bar to convene, a Task Force on Access to Attorney Complaint Procedures. Such a task force – composed of attorneys, judges, and representatives of organizations advocating for seniors and people with intellectual disabilities – would delve deeper into how to give clients with cognitive disabilities better access to justice if and when their attorneys fail them.

If the state judiciary and the legal profession heed this call to action, perhaps when Disability Awareness Month rolls around in October 2017, the Supreme Court, the State Bar, and the Judicial Council will have found some viable methods of providing meaningful access to these complaint procedures for litigants with intellectual disabilities. ◊◊◊

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