Compliance with the ADA Requires the Sacramento County Superior Court to Appoint Lawyers for *All* Proposed Conservatees

By Thomas F. Coleman
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This commentary is written to explain how the failure of the Sacramento County Superior Court to appoint attorneys to represent proposed conservatees violates the due process rights of these involuntary litigants, as well as their rights under applicable federal nondiscrimination laws.

These federal civil rights statutes preempt provisions of the California Probate Code which appear to make the appointment of counsel discretionary. Because people with serious cognitive and communication disabilities will not receive access to justice without the assistance of counsel in these cases, proceeding to judgment without appointed counsel creates structural error that should invalidate an order of conservatorship as a matter of law.

Hundreds of new petitions for conservatorship are filed each year in the Sacramento County Superior Court. In each of these new cases, a judge must decide whether an individual will retain any of his or her decision-making rights – in matters such as health, finances, residence, sex, marriage, education, vocation, or social and recreational opportunities – or whether control over these matters will be transferred to another person. Fundamental liberties are at stake in what the court decides.

Most of the proposed conservatees lack the ability to understand complex legal proceedings or to advocate for or defend themselves. As explained herein, due process requires that a lawyer should be appointed to advocate for the rights of these individuals and to help them navigate through the legal process to make sure that all participants in the proceedings are following the law.

Because the nature of their disabilities prevents them from representing themselves in these proceedings, the Americans with Disabilities Act requires the court to appoint an attorney as a way to ensure they have effective communications and access to justice in their cases. These involuntary litigants cannot have meaningful participation in the proceedings without an advocacy attorney bound by ethical obligations of loyalty and confidentiality and who is obligated to provide effective representation.

Because the superior court receives federal funding for some of its programs and services, the court is also subject to the requirements of Section 504 of the Rehabilitation Act of 1973 – a disability rights law that pre-dates the ADA. Section 504 is similar to the ADA in its scope.

The Americans with Disabilities Act and Section 504 require the superior court to use pro-active measures to ensure that litigants with known disabilities have meaningful participation in their cases.

Even without a request, a public entity must provide the necessary support to maximize the possibility that someone with a known disability is able to have meaningful participation in the service being provided. Appointing an attorney is one such step in a conservatorship proceeding. Failure to appoint an attorney for proposed conservatees also violates state law. Government

Code Section 11135 requires state-funded public entities to obey the ADA. Violations of the ADA are violations of Section 11135 – a civil rights statute that is enforced by the California Department of Fair Employment and Housing.

ADA Compliance Duties of the Court

The Americans with Disabilities Act was passed by Congress more than 27 years ago. The law's constitutionality has been upheld by the United States Supreme Court as proper implementation of the Fourteenth Amendment.

The ADA builds upon and extends beyond the requirements of federal due process. The Due Process Clause of the Fourteenth Amendment requires state courts to protect the procedural and substantive rights of litigants in state proceedings. The ADA goes even further and may require extra accommodations to people with disabilities involved in legal proceedings.

The term "Due Process *Plus*" describes the duties of judges who interact with litigants with cognitive and communication disabilities in state guardianship and conservatorship proceedings. (*Due Process Plus: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Proceedings – 2015*) Due Process *Plus* is a White Paper submitted by Spectrum Institute to the United States Dept. of Justice. (http://spectruminstitute.org/white-paper/)

While no one would seriously doubt that the ADA applies to conservatorship proceedings, the Sacramento County Superior Court is acting as though it has no ADA duties in these cases. It does – and the duties are significant.

Title II of the ADA applies to services provided by public entities. The term "public entity" includes state and local courts. The service provided by the superior court in conservatorship proceedings is the administration of justice.

Under Title II, judges must take affirmative steps to ensure that litigants with cognitive and communication disabilities receive access to justice in conservatorship proceedings. Under the concept of Due Process *Plus*, extra steps (modifications of normal policies and practices) may be required to ensure effective communication between the litigant and all participants in the proceedings.

In addition to ensuring effective communication, various supports and services may be necessary to maximize the prospect that a litigant with serious disabilities has meaningful participation in all stages of the proceeding – both in and out of court. The duty to provide such supports and services does not depend on a request from a litigant with disabilities – especially when the court knows that the nature of the disability precludes the litigant from making such a request.

The responsibility of judges to provide accommodations or modifications is *sua sponte* when it is known that a serious disability may hinder a litigant's ability to have meaningful participation in the case. It is obvious in conservatorship proceedings – just by virtue of the allegations made in the petition and evidence supporting those allegations – that the respondent has serious cognitive disabilities and may have significant communication and other disabilities as well.

The duty of a public entity to provide meaningful access to its services actually pre-dates the passage of the ADA. It is rooted in Section 504 of the Rehabilitation Act of 1973 – a federal law that did, and still does, apply to state and local government entities. Speaking of Section 504, the United States Supreme Court said: "[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." (Alexander v. Choate, 469 U.S. 287, 301 (1985))

The requirement of "meaningful access" to public services is not limited to Section 504. Many federal appellate courts have ruled that the ADA also requires public entities to provide "meaningful access" to people with disabilities so as not to deprive them of the benefits of the services provided. (Ability Center of Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004); Randolph v. Rogers, 170 F.3d 850 858 (8th Cir. 1999); Lee v. City of Los Angeles, 350 F.3d 668, 691 (9th Cir. 2001); Chaffen v. Kansas State Fair Board, 348 F.3d 850, 857 (10th Cir. 2003)).

A subtle clarification should be made at this point. ADA terminology makes a distinction between "accommodations" and "modifications." Under Title I of the ADA, a "reasonable accommodation" is only required by employers to avoid discrimination against employees with disabilities. Under Title II, public entities have an obligation to make "reasonable modifications" of policies and practices to ensure meaningful access to their services.

The two terms, however, may pose a distinction without a difference. For all practical purposes, the two terms are essentially equivalent. (McGary v. City of Portland, 386 F.3d 1259, 1266, n.3 (9th Cir. 2004). Courts often use the terms interchangeably. (Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997)).

Another requirement of the ADA is that a public entity take appropriate steps to ensure that communications with recipients of its services are as effective as communications with others. (Robertson v. Las Animas County Sheriff's Department, 500 F.3d 1185 (10th Cir. 2007)) To fulfill this duty, an entity may need to provide auxiliary aids and services.

The duty to provide accommodations, modifications, and effective communications applies to "known" disabilities. An entity, such as a court, cannot take steps to respond to a disability it does not know about. As the court in Robertson explained: [T]he entity must have knowledge that the individual is disabled, either because the disability is obvious or because the individual (or someone else) has informed the entity of the disability." In other words, it is the knowledge of the disability, even without a request for accommodation, that triggers the entity's obligation to take reasonable steps to compensate for the disability in order to maximize the possibility of meaningful access to the services.

In the context of conservatorship proceedings, the mere filing of a petition should be sufficient to trigger a duty of the court to inquire into the types of modifications or the extent of supports and services that are necessary to give the respondent meaningful access to the legal proceedings. The same is true about the court's duty to ensure effective communications between the respondent and all court participants.

The filing of a conservatorship petition is predicated on allegations that a respondent has significant cognitive or other disabilities. The mere filing of such a petition, therefore, puts the court on notice that the respondent has a known disability that may require accommodations. In addition, other documents submitted with the petition would give the court and attorneys additional information as to the types of disabilities the respondent has.

A review of court records in conservatorship cases in the Sacramento County Superior Court, and information from Alta Regional Center, show a pattern and practice by the court of not appointing counsel for proposed conservatees in scores of general conservatorship cases. It appears that counsel is appointed as a matter of routine and without fail in limited conservatorship proceedings, but not so in general conservatorship cases.

Under Probate Code Section 1471(b), the court shall appoint counsel if the court determines that it is necessary to protect the interests of the conservatee or proposed conservatee. As a matter of due process as well as ADA and Section 504 law, it is always necessary to appoint

counsel to protect the right of an involuntary litigant with cognitive disabilities to have access to justice in conservatorship proceedings.

A task force convened by the Chief Justice of California in 2006 had this to say about an ambiguity in California law as to whether counsel should automatically be appointed in every probate conservatorship case: "It is the task force's view that the Judicial Council should adopt a policy that an attorney should be automatically appointed for the proposed conservatee in connection with every petition to establish a conservatorship. A basic premise of the current statute is that counsel be appointed for those who request appointment. The reality is that if the individual truly lacks capacity and cannot request an appointment of counsel, that is when advocacy is most needed." (Report, "Status of Implementation," Administrative Office of the Courts (Dec. 9, 2008)

The implementation report added: "The task force concludes that practices in appointing counsel vary widely within the state, with many jurisdictions appointing attorneys only when mandated and others appointing attorneys in every instance. The needs of conservatees for representation do not vary by physical location within the state and should be met uniformly. This was the most far reaching policy issue that the task force grappled with."

The remarks on this issue concluded: "In forming its recommendation, the task force likened the situation of a conservatee to that of others within the judicial system. Conservatees are as vulnerable as dependents in our juvenile dependency system, are as at risk as minors in our family law system, and are as subject to deprivation of personal liberty and property as defendants in our criminal law system. Putting all of these factors together, it became apparent that the most effective way of affording protection to conservatees is to require the appointment of counsel in all cases. This need to safeguard the rights of the conservatee, the task force decided, far outweighs the arguments that it would be too costly or not necessary in all cases."

An ADA violation in a legal proceeding may create "structural error" that requires reversal per se. No showing of prejudice is needed because a presumption of prejudice exists.

Some errors in civil cases are reversible per se, "primarily where the error calls into question the very fairness of the trial or hearing itself." (Biscaro v. Stern, 181 Cal.App. 4th 702 (2009)) "Wrongful denial of an [ADA] accommodation is structural error infecting a legal proceeding's reliability, which stands to reason because an accommodation's purpose is to help a party meaningfully participate in a way that enhances our confidence in a proceeding's outcome." (Id, at p. 710)

The superior court should use its administrative authority to adopt a local rule of court requiring the appointment of counsel for all conservatees and proposed conservatees in furtherance of the due process and ADA rights of these litigants and in compliance with the court's obligations under the ADA and Section 504.

Appointing counsel in all conservatorship proceedings will bring the court into compliance with its duties as a public entity under the ADA. Such voluntary action will preclude the necessity of anyone seeking intervention by the Department of Fair Employment and Housing or the United States Department of Justice. ◊◊◊

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