

Sitting Ducks: 20 States Violate Federal Law by Not Appointing Attorneys for Guardianship Respondents

By Thomas F. Coleman

Most states have laws that provide for the mandatory appointment of counsel to represent adults in guardianship and conservatorship cases. Many of these guardianship respondents are people with intellectual and developmental disabilities, while others are seniors who allegedly lack capacity to make major life decisions due to cognitive impairments.

Whichever type of respondent they may be, the probate court knows that, due to their disabilities, these involuntary litigants lack the ability to represent themselves in these legal proceedings. As a matter of due process, and to comply with the requirements of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, most states require the appointment of an attorney to represent respondents in order to ensure they have access to justice.

Some 20 states fail to provide for the mandatory appointment of counsel in these cases. The ADA does not permit access to justice for litigants with known cognitive and communication disabilities to be left to the discretion of judges. It is mandated in all cases.

Equal protection of the law requires that *all* involuntary litigants with developmental disabilities receive an accommodation to ensure they have meaningful participation in their guardianship cases. They must be provided supports and services that enable them to question and probe the sufficiency of the allegations and evidence against them and allow them to produce evidence showing that less restrictive alternatives – such as supported decision making – may be feasible. Appointment of counsel is such an accommodation.

The 20 “sitting ducks” are: Colorado, Hawaii, Illinois, Indiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, and Washington. These states are prime targets for complaints to the United States Department of Justice which investigates alleged violations of Title II of the ADA and Section 504 by state and local courts. These states will have a hard time justifying the refusal to do what 30 other states have been doing

for years: appointing an attorney to ensure that guardianship respondents have access to justice in each and every case.

The Chief Justice in each of these states should initiate a plan, by adopting a court rule or seeking new legislation, to ensure that appointed counsel is mandatory in all adult guardianship cases. The ADA was adopted 25 years ago. The time for ensuring access to justice for guardianship respondents is long overdue.

Spectrum Institute has a variety of publications available to assist the courts in these noncomplying states become part of the access-to-justice majority. A good starting point would be for reform advocates and judicial officers to review a White Paper submitted recently to the Department of Justice titled “Due Process *Plus*: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases.” (<http://spectruminstitute.org/white-paper/>)

Reform advocates should note that the mandatory appointment of counsel is just the beginning of a longer process. Proper training and advocacy standards must also be enacted – and implemented. Judicial administrators should consider adopting proposals that were submitted recently by Spectrum Institute to the Judicial Council of California. (<http://spectruminstitute.org/attorney-proposals/>)

The courts in these 20 states do not have to remain targets for Section 504 lawsuits or for Title II ADA complaints. They can move into a safe zone by simply doing what the law has required for years – provide access to justice to guardianship respondents by appointing counsel to represent them in *every* case.

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for guardianship reform. This essay was inspired by [Franco-Gonzales v. Holder](#), 767 F.Supp. 2d 1034 (2010), a ruling that section 504 requires appointment of counsel for litigants with intellectual and developmental disabilities in cases where liberty is significantly infringed. Email: tomcoleman@spectruminstitute.org