

Disability Discrimination by the California Judiciary in Conservatorships

Victims Have Remedies



Webinar References

Statutes, Regulations,
Guidance Memos,
Court Decisions
Commentaries

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*Sua Sponte**

These materials are referenced in a webinar conducted by Thomas F. Coleman, legal director of Spectrum Institute, for the benefit of judges, judicial staff, public defenders, appointed attorneys, bar associations, law professors, law students, disability rights advocates, conservatorship reformers, civil rights enforcement agencies, disability service providers and coordinators, and people with disabilities.

The purpose of the webinar is to educate the judiciary, legal profession, litigants, and the public about the duties of judges and court staff under federal and state nondiscrimination laws to take affirmative measures to provide access to justice for people with developmental disabilities or cognitive or communication disabilities in probate conservatorship proceedings.

Such duties are not dependent upon a request from people with disabilities who may need reasonable accommodations or modifications to policies and procedures in order to ensure that they have effective communication and meaningful participation in these proceedings. Courts have a *sua sponte* obligation to assess and address these needs when they have knowledge that a litigant has a disability that interferes with access to justice.

When courts fail to fulfill this duty, litigants who are deprived of access to justice have legal recourse under state and federal laws. They can file grievances with the offending courts, lodge complaints with civil rights enforcement agencies, file writs or appeals, and initiate civil litigation. The materials referenced in this webinar explain these duties, rights, and remedies.

* *Sua Sponte*. (sooh-uh-spahn-tay) [Latin, of his or her or its own will; voluntarily.] For example, when a court takes action on its own motion, rather than at the request of one of the parties, it is acting *sua sponte*. West's Encyclopedia of American Law, edition 2 (2008).

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Document Online: <https://disabilityandguardianship.org/ada-references.pdf>
More Information: <https://spectruminstitute.org>

Federal and State Disability Non-Discrimination Laws that Apply to the California Judicial Branch

I. Federal Laws and Regulations

A. Title II of the Americans with Disabilities Act (1990)

[Applies to services by public entities, including courts]

1. Department of Justice Title II Regulations
2. DOJ Guidance Memos
3. Judicial Decisions

B. Section 504 of the Rehabilitation Act (1973)

[Applies to entities receiving federal funding]

1. Department of Justice Regulations
2. DOJ Guidance Memos
3. Judicial Decisions

II. State Laws and Regulations

A. Government Code Section 11135 (1977)

[Applies to any activity funded by the state]

1. Fair Employment and Housing Council Regulations

B. Welfare & Institutions Code Section 4502 (1977)

[Applies to any activity receiving public funds]

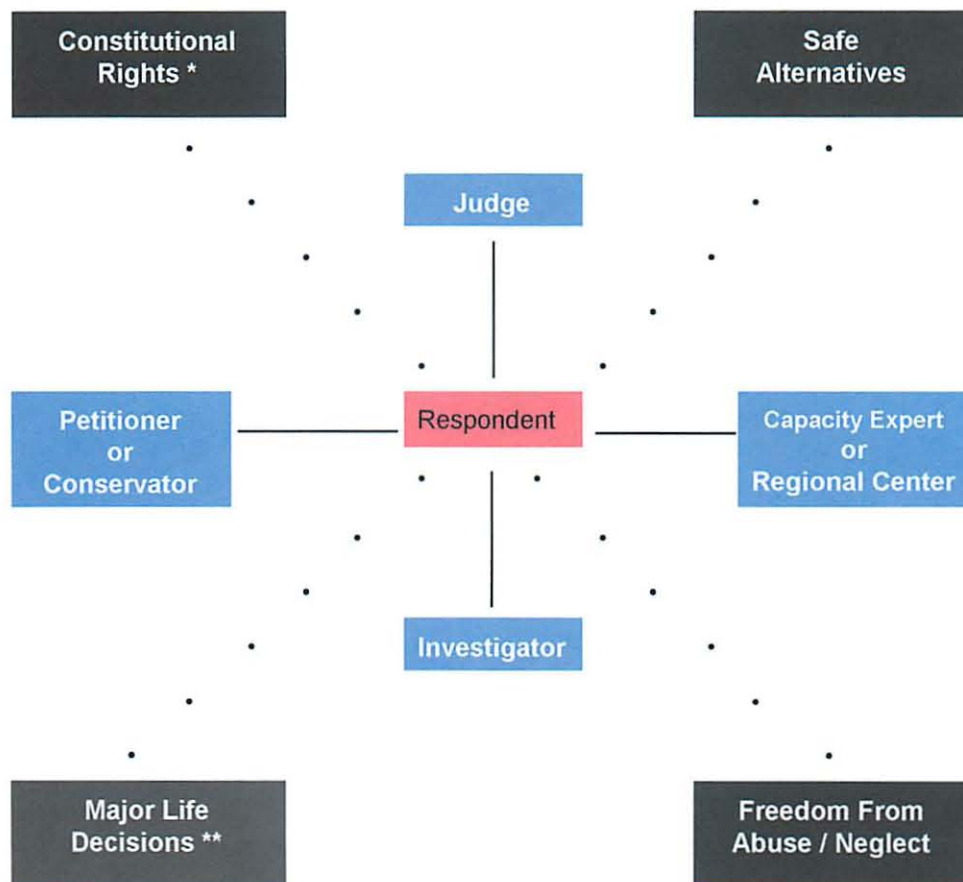
1. Department of Developmental Services Regulations

C. California Rules of Court, Rule 1.100

[Applies to each superior and appellate court]

Participants and Issues in Probate Conservatorships

Appointing Counsel is a Necessary ADA Accommodation to Ensure that Respondents with Cognitive Disabilities Have Access to Justice



Respondents with cognitive disabilities are unable to represent themselves in conservatorship proceedings. Appointing an attorney is a necessary accommodation under the Americans with Disabilities Act to enable a respondent to have meaningful participation in a case. Once an attorney is appointed, counsel must provide *effective* advocacy services. To ensure effective assistance of counsel, courts should adopt ADA-compliant performance standards, require proper training of the attorneys, and create methods to monitor their actual performance. The duty of the courts regarding appointment, training, and monitoring of ADA-accommodation attorneys stems from Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, Government Code Section 11135, Welfare & Institutions Code Section 4502, and implementing regulations..

Advocacy services of an appointed attorney include: examining capacity assessments in all areas of decision making, determining whether less restrictive and safe alternatives are viable, vetting the proposed conservator, insisting on a care plan that provides safety and reduces the risk of abuse, and making sure that the judge, petitioner, guardian ad litem (GAL) or court investigator, capacity experts, and conservator follow statutory directives. A respondent is unable to perform these essential functions without an attorney.

** Constitutional rights include intimate association (sex), the right to travel, the right to marry, the right to contract, the right to vote, and freedom of choice in personal decisions. ** Major life decisions include choices regarding residence, occupation, education, medical care, social life, finances, etc.*

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**Meaningful Participation and Effective Communication
by a *Pro Per* Respondent in a Conservatorship Case**

A respondent who represents himself or herself would need to be able to perform the following tasks in order to have meaningful participation and effective communication in a conservatorship proceeding:

1. Review the petition and moving papers. The respondent would *need to be able* to read the information in the petition and related documents (or have the papers read to them by someone else without a conflict of interest) to determine if the information is true. This would require the respondent to understand the meaning of the words and sentences used in these documents. The respondent must also be capable of having the response served.

2. Respond to the petition and investigator's report. The respondent would *need to be able* file paperwork pointing out any areas where information in the petition or court investigator's report is not true. This would require the respondent to be able to articulate words that convey any objections that may exist to factual statements contained in those documents.

3. Review and respond to the capacity declaration. The respondent would *need to be able* to evaluate the information contained in the medical capacity declaration filed by the doctor who presumably examined him or her. This would require the ability to understand technical medical words and concepts. It would also require the ability to determine if the examination was done properly. The respondent would need to have the ability to call the doctor on the phone to discuss the evaluation process and to question the opinions contained in the declaration.

4. Challenge sufficiency of petitioner's evidence. The respondent would *need to be able* to understand the concept of "clear and convincing evidence" and make an informed decision about whether the allegations in the petition – and evidence produced by the petitioner – meets this standard on each and every legal element necessary for the issuance of a conservatorship order.

5. Develop an affirmative defense. The respondent would *need to be able* to present evidence that a conservatorship is not needed, that there is a lesser restrictive alternative, that capacity to make decisions exists in some of the relevant areas (financial, medical, residence, marital, social, sexual, etc), there is a better choice of who should be conservator, that petitioner has ulterior motives in initiating the proceeding, that the proposed conservator has been or would be abusive, etc. The respondent would need to be able to call witnesses, to present evidence, and to cross-examine the petitioner's witnesses to challenge their assertions.

6. Call expert witnesses. The respondent would *need to be able* to ask that an independent expert be appointed to develop an affirmative defense that respondent has capacity in one or more areas.

7. Demand contested hearing and jury trial. The respondent would *need to be able* to decide whether to demand a contested hearing and if so, whether also to demand a jury trial.

8. Insist on due process. The respondent would *need to be able* to know what statutory and constitutional protections exist and to insist that the judge and other participants follow the law.

9. Waive rights. In order to forego the procedures listed above, the respondent would *need to be able* to make a knowing and voluntary waiver of these rights and be able to communicate the waiver of each of them to the court.

Appointment of competent counsel helps to ensure meaningful participation and effective communication by a respondent in a conservatorship case.

AMERICANS WITH DISABILITIES ACT OF 1990, AS AMENDED

Following is the current text of the Americans with Disabilities Act of 1990 (ADA), including changes made by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. The ADA was originally enacted in public law format and later rearranged and published in the United States Code. The United States Code is divided into titles and chapters that classify laws according to their subject matter. Titles I, II, III, and V of the original law are codified in Title 42, chapter 126, of the United States Code beginning at section 12101. Title IV of the original law is codified in Title 47, chapter 5, of the United States Code. Since this codification resulted in changes in the numbering system, the Table of Contents provides the section numbers of the ADA as originally enacted in brackets after the codified section numbers and headings.

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SUBCHAPTER II - PUBLIC SERVICES

Part A - Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12131. Definitions

As used in this subchapter:

(1) **Public entity.** The term "public entity" means

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Sec. 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Sec. 12134. Regulations

(a) **In general.** Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) **Relationship to other regulations.** Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) **Standards.** Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers

Excerpts from ADA Title II Regulations

Issued by the Department of Justice

Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services (as amended by the final rule published on August 11, 2016)

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a.

Subpart A—General

§ 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S. C. 12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Acts purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

§ 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of this part.

§ 35.104 Definitions

Public entity means —

- 1) Any State or local government;
- (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

§ 35.107 Designation of responsible employee and adoption of grievance procedures

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)

(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others . . .

(7)

(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Subpart E—Communications

§ 35.160 General

(a)

(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)

(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

Subpart F—Compliance Procedures

§ 35.170 Complaints

(a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing.* A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

(c) *Where to file.* An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

§ 35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Subpart G—Designated Agencies

§ 35.190 Designated Agencies

(b) The Federal agencies listed in paragraph (b)(1)–(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(6) *Department of Justice*: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (*e.g.*, audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

Title II ADA Authorities

1. Title II of the ADA

United States Codes – Title 42

Section 12132 – Discrimination

Subject to the provisions of this subchapter, **no qualified individual with a disability shall, by reason of such disability**, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or **be subjected to discrimination by any such entity**.

Section 12131 – Definitions

As used in this subchapter: (1) Public entity. The term "public entity" means (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . .

Sec. 12134 – Regulations

(a) In general. Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part.

Comments:

No instrumentality of a state or local government may discriminate on the basis of disability in its services, programs, or activities. The superior court is an instrumentality of state government. The Attorney General is authorized to promulgate regulations to enforce Title II.

2. Title II Regulations / 28 CFR Part 35

Part 35 – Nondiscrimination on the basis of disability in state and local governments

§ 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall , on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

§ 35.170 Complaints

(a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

§ 35.171 Acceptance of complaints

(a) *Receipt of complaints.*

(1) (i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

§ 35.190 Designated Agencies

(b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, **and the administration of justice, including courts**

3. *Thompson v. Davis* (9th Cir. 2002) 282 F.3d 780, 783-784

“Title II of the ADA prohibits a public entity from discriminating against a qualified individual with a disability on the basis of disability. [42 U.S.C. § 12132](#) (1994); *Weinreich v. L.A. County Metro. Transp. Auth.*, [114 F.3d 976, 978](#) (9th Cir.1997). To state a claim of disability discrimination under Title II, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *Weinreich*, [114 F.3d at 978](#).

With respect to the first element, the ADA defines "disability" as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) **being regarded as having such an impairment."**

Comments:

a. To have a cause of action for discrimination, a plaintiff need only show that he was treated in a disparate manner by a public entity because he was regarded as having a disabling condition. The ADA not only prohibits discrimination against individuals who actually have a mental impairment that substantially limits major life activities but also against persons who the public entity perceives to have such a condition.

4. *Prakel v. Indiana* (S.D. Ind. 2015) 100 F. Supp.3d 661, 680

“Title II of the ADA prohibits discrimination by public entities, **including state and local courts**, providing that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

Comments:

a. The superior court is an entity covered by Title II of the ADA. The Supreme Court has held that state courts are covered by Title II. (*Tennessee v. Lane* (2004) 541 U.S. 509)

5. 28 C.F.R. § 35.108 – Title II Regulations – Definition of Disability

(a)(1) **Disability means**, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) **Being regarded as having such an impairment** as described in paragraph (f) of this section.

(2) Rules of construction. (i) The **definition of “disability” shall be construed broadly in favor of expansive coverage**, to the maximum extent permitted by the terms of the ADA.

(ii) An individual may establish coverage under **any one or more of the three prongs** of the definition of “disability” in paragraph (a)(1) of this section, the “actual disability” prong in paragraph (a)(1)(i) of this section, the “record of” prong in paragraph (a)(1)(ii) of this section, or the “regarded as” prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a public entity's failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, **the evaluation of coverage can be made solely under the “regarded as” prong of the definition of “disability,” which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.**

Comments:

a. An individual does not have to establish that he or she has an actual disability in order to have a cause of action against a public entity for discrimination under the ADA.

Instead, a showing can be made that the discriminatory treatment occurred because the individual was “regarded as” having such a disability.

6. 28 C.F.R. § 35.102 – Title II Regulations – All Services

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities,

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

Comments:

a. All services of the superior court are regulated by Title II of the ADA.

7. Title II - Regulations (more)

§35.104 Definitions.

The term "disability" means, with respect to an individual -

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) A record of such an impairment; or

(C) **Being regarded as having such an impairment.**

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. First, it has worked well since it was adopted in 1974. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

Test C – Being regarded as having such an impairment

This test, as contained in paragraph (4) of the definition, **is intended to cover persons who are treated by a public entity as having a physical or mental impairment that substantially limits a major life activity.** It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) **"Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.**

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *Arline*, 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, **the reaction of others may prove just as disabling.** "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work **as a result of the negative reactions of others** to the impairment." *Id.* at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, **"Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."** *Id.* at 284.

Comments:

a. The language of the DOJ in these regulations is a perfect fit to what the superior court did to Brad. The "regarded as" option for a cause of action is explained as being based on the "perception" of the public entity. It is noteworthy that Section 11135 specifically uses the term "perception." These are just different words for the same thing.

8. Title II – DOJ Technical Assistance Manual

II-9.0000 INVESTIGATION OF COMPLAINTS AND ENFORCEMENT

Regulatory references: 28 CFR 35.170-35.190.

II-9.1000 General. Individuals wishing to file title II complaints may either file --

- 1) An **administrative complaint** with an appropriate Federal agency; or
- 2) A **lawsuit in Federal district court**.

If an individual files an administrative complaint, an appropriate Federal agency will investigate the allegations of discrimination. Should the agency conclude that the public entity violated title II, it will attempt to negotiate a settlement with the public entity to remedy the violations. If settlement efforts fail, the matter will be referred to the Department of Justice for a decision whether to institute litigation.

How does title II relate to section 504? Many public entities are subject to section 504 of the Rehabilitation Act as well as title II. Section 504 covers those public entities operating programs or activities that receive Federal financial assistance. Title II does not displace any existing section 504 jurisdiction.

The substantive standards adopted for title II are generally the same as those required under section 504 for federally assisted programs. In those situations where title II provides greater protection of the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II in processing complaints covered by both title II and section 504.

Individuals may continue to file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The funding agencies will be enforcing both title II and section 504, however, for recipients that are also public entities.

II-9.2000 Complaints. A person or a specific class of individuals or their representative may file a complaint alleging discrimination on the basis of disability.

What must be included in a complaint? First, a complaint must be in writing. Second, it should contain the name and address of the individual or the representative filing the complaint. Third, the complaint should describe the public entity's alleged discriminatory action in sufficient detail to inform the Federal agency of the nature and date of the alleged violation. Fourth, the complaint must be signed by the complainant or by someone authorized to do so on his or her behalf. Finally, complaints filed on behalf of

classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Is there a time period in which a complaint must be filed? Yes. **A complaint must be filed within 180 days of the date of the alleged act(s) of discrimination, unless the time for filing is extended by the Federal agency for good cause.** As long as the complaint is filed with any Federal agency, the 180-day requirement will be considered satisfied.

Where should a complaint be filed? A complaint may be filed with either –

- 1) Any Federal agency that provides funding to the public entity that is the subject of the complaint;
- 2) A Federal agency designated in the title II regulation to investigate title II complaints;
- or
- 3) **The Department of Justice.**

Which are the designated Federal agencies and what are their areas of responsibility?

The eight designated Federal agencies, the functional areas covered by these agencies, and the addresses for filing a complaint are the –

- 6) **Department of Justice:** All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, **including courts** and correctional institutions

How will complaints be resolved? The Federal agency processing the complaint will resolve the complaint through informal means or issue a detailed letter containing findings of fact and conclusions of law and, where appropriate, a description of the actions necessary to remedy each violation. Where voluntary compliance cannot be achieved, the complaint may be referred to the Department of Justice for enforcement. In cases where there is Federal funding, **fund termination is also an enforcement option.**

If a public entity has a **grievance procedure**, must an individual use that procedure before filing a complaint with a Federal agency or a court? **No.** Exhaustion of a public entity's grievance procedure is not a prerequisite to filing a complaint with either a Federal agency or a court.

Must the complainant file a complaint with a Federal agency prior to filing an action in court? **No.** The ADA **does not require complainants to exhaust administrative remedies** prior to instituting litigation.

Are attorney's fees available? Yes. The prevailing party (other than the United States) in any action or administrative proceeding under the Act may recover attorney's fees in addition to any other relief granted. The "prevailing party" is the party that is successful and may be either the complainant (plaintiff) or the covered entity against which the

action is brought (defendant). **The defendant, however, may not recover attorney's fees unless the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation**, although it does not have to find that the action was brought in subjective bad faith. Attorney's fees include litigation expenses, such as expert witness fees, travel expenses, and costs. The United States is liable for attorney's fees in the same manner as any other party, but is not entitled to them when it is the prevailing party.

9. Biscaro v. Stern (2010) 18 Cal.App.4th 702 – Structural Error

Referring to Rule 1.100 (ADA Accommodations) of the California Rules of Court, the Court of Appeal stated that the underlying policy of the rule “is to acknowledge and address disabilities of people who come before the court, thereby **ensuring “equal and full access to the judicial system.”**”

We now turn to whether appellant must show he was prejudiced. From as far back as 1872, a fundamental precept in California is that in civil cases only prejudicial error is reversible. (Code Civ. Proc., § 475. See Cal. Const., art. VI, § 13.) Nevertheless, some errors in civil cases remain reversible per se, primarily when the error calls into question the very fairness of the trial or hearing itself. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 456, pp. 511–513.) The sole published decision to interpret rule 1.100 suggests that wrongful denial of an accommodation is **structural error that does not require prejudice for reversal.**

The present case, which involves not a denial of the motion but a failure to rule on it, presents an even stronger argument for structural error.

ADA Title II Guidance from the U. S. Department of Justice is Instructive to Participants in the Limited Conservatorship System

by Thomas F. Coleman
January 16, 2017

Title II of the Americans with Disabilities Act prohibits public entities from discriminating on the basis of disability against recipients of the services of such entities. Title II applies to state and local government entities, including state and local courts. The service that courts provide is the administration of justice. Title II requires public entities to modify policies and practices, when appropriate, to provide necessary accommodations to people with disabilities to ensure they have meaningful access to the services of such entities.

The United States Department of Justice posted a [Technical Assistance Publication](#) on its website on January 11, 2017, to provide guidance to criminal justice agencies on how to comply with Title II of the ADA in the administration of their programs and delivery of their services. Much of what is said in that publication is relevant to the administration of justice by courts and ancillary personnel (court investigators, court-appointed attorneys, and guardians ad litem) in conservatorship proceedings. As a result, I am providing some excerpts from that publication here, with comments on how they are relevant to the need for compliance with the ADA in the administration of justice, and provision of legal services, in limited conservatorship proceedings.

Application of Title II to Public Entities

Quote: “Title II of the Americans with Disabilities Act (ADA) protects individuals with mental health disabilities and intellectual and developmental disabilities (I/DD) from discrimination within the criminal justice system. Pursuant to the ADA, state and local government criminal justice entities—including police, courts, prosecutors, public defense attorneys, jails, juvenile justice, and corrections agencies—must ensure

that people with mental health disabilities or I/DD are treated equally in the criminal justice system.”

Comment: Replace “criminal justice system” with “limited conservatorship system” and change “public defense attorneys” to “court-appointed attorneys” and the relevance of this mandate to judges and attorneys in the limited conservatorship system is clear.

General Requirements

Quote: “Title II of the ADA provides that no qualified individual with a disability shall, because of that disability, be excluded from participation in, denied the benefits of, or subjected to discrimination in the services, programs, and activities of all state or local government entities, including law enforcement, corrections, and justice system entities. Such services, programs, and activities include: Interviewing and questioning witnesses, victims, or parties, negotiating pleas, assessing individuals for diversion programs, conducting arraignment, setting bail or conditions of release, taking testimony, sentencing, providing notices of rights, determining whether to revoke probation or parole, or making service referrals, whether by prosecutors and public defense attorneys, courts, juvenile justice systems, pre-trial services, or probation and parole services.”

Comment: A conservatorship court is a justice system entity. An attorney appointed to represent a proposed conservatee is the equivalent of a public defense attorney. A court investigator is the equivalent of a pre-trial service provider or a probation service provider. Investigators and attorneys in conservatorship proceedings also conduct interviews, assess individuals, and

provide notices of rights. Attorneys also negotiate dispositions. Therefore, the ADA mandates mentioned in this guidance memo are applicable to similar services in limited conservatorship proceedings.

Modifications and Accommodations

Quote: “Under Title II, state and local government entities must, among other obligations . . . Make reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination in all interactions with people with mental health disabilities or I/DD, unless the modifications would fundamentally alter the nature of the service, program, or activity. The reasonable modification obligation applies when an agency employee knows or reasonably should know that the person has a disability and needs a modification, even where the individual has not requested a modification, such as during a crisis, when a disability may interfere with a person’s ability to articulate a request.”

Comment: The need to make modifications of policies and practices in order to ensure meaningful participation in public services does not depend on a request from someone with a disability if a representative of a public entity knows the person has a disability and needs a modification. Judges, court investigators, and court-appointed attorneys in limited conservatorship proceedings know, by virtue of the allegations in a petition, that the proposed conservatee likely has serious cognitive and/or communication disabilities that require some form of accommodation in order for the person to participate in the proceeding in a meaningful way. They therefore have a duty to conduct an assessment of the person’s needs and to develop a disability accommodation plan.

Effective Communication

Quote: “Under Title II, state and local government entities must, among other obligations . . . Take appropriate steps to ensure that communication with people with disabilities is as effective as

communication with people without disabilities, and provide auxiliary aids and services when necessary to afford an equal opportunity to participate in the entities’ programs or activities. Even when staff take affirmative steps to ensure effective communication, not everyone will understand everything in the same way and there will necessarily be a spectrum of comprehension across the population based on many factors, including but not limited to age, education, intelligence, and the nature and severity of a disability. Public entities are not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or undue financial and administrative burdens.”

Comment: The very nature of conservatorship proceedings involves the need to assess a person’s capacity to make decisions and to care for his or her own basic needs. By definition, the people who are intended to receive the benefit of judicial and legal services in these proceedings are individuals with cognitive and communication disabilities. Therefore, it cannot be reasonably argued that providing the necessary supports and services needed for effective communication would fundamentally alter the nature of the service, i.e., the administration of justice. Maximizing the potential for effective communication with proposed conservatees may be difficult, but it is essential to do so in order to interview and assess the intended beneficiaries of these judicial and legal services.

Training

Quote: “Appropriate training can prepare personnel to execute their ADA responsibilities in a manner that . . . respects the rights of individuals with disabilities; ensures effective use of criminal justice resources; and contributes to reliable investigative and judicial results.”

Comment: Training of judges, investigators, and court-appointed attorneys is also necessary in the limited conservatorship system so they can execute their ADA responsibilities.

Analysis of Policies and Practices

Quote: “Criminal justice entities have reviewed their policies, practices, procedures, and standing orders to ensure that they do not discriminate against people with mental health disabilities or I/DD. For example, entities have collected, aggregated, and analyzed data regarding individuals served by the entity and outcomes to determine whether people with disabilities are subjected to bias or other discrimination. Where potential discrimination has been found, entities have taken necessary corrective measures, such as revising policies and procedures; refining quality assurance processes; and implementing training.”

Comment: In some states the judicial branch has established a statewide task force or advisory committee to review policies and practices in guardianship or conservatorship systems. For example, this has occurred in Pennsylvania, Nevada, Washington, and some other states. However, to my knowledge none of these entities has included a review of the compliance or noncompliance of the system with the ADA. The California State Bar has recently shown an interest in access to justice for individuals with disabilities in the limited conservatorship system. However it has not yet proposed a formal action plan to assess and address this issue.

Observations and Conclusions

A search of the website of the U.S. Department of Justice for information or publications on the ADA and guardianship or conservatorship proceedings yields no results. Apparently, the DOJ has not yet issued any guidance memos or technical assistance manuals on this topic.

A DOJ website search also turned up no results for complaints filed against state or local agencies that administer such proceedings. No litigation by the DOJ or settlement agreements on this topic can be found on its website.

I am aware of one formal investigation which

was opened by the DOJ and which is pending. It was filed against the Los Angeles Superior Court by my own organization – Spectrum Institute – for ADA violations involving the voting rights of people with developmental disabilities in limited conservatorship proceedings.

I am also aware of a second complaint against the Los Angeles Superior Court – also filed by Spectrum Institute – for ADA violations due to deficient legal services by court-appointed attorneys in limited conservatorship proceedings. The complaint names the court as the source of the problem since it is the court that appoints the attorneys and mandates their training. It also highlights the lack of quality assurance controls by the local entity that funds the legal services, and the lack of standards by the state entity that promulgates rules for legal proceedings.

That complaint was filed in June 2015 and has been pending with the DOJ for 18 months now. The DOJ has placed considerable resources into the investigation of this complaint. However, there has been no indication yet as to what, if any, responsive action it may take.

The application of the ADA to guardianship and conservatorship proceedings is a topic that needs further development. Little attention has been given to people with intellectual and developmental disabilities and how to ensure they have access to justice in these proceedings.

Until there is formal action taken by the DOJ – in the form of investigations, settlements, litigation, guidance memos, or technical assistance manuals – participants in the limited conservatorship system may find instruction in other relevant publications and materials. This is one of them.

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The ADA and Guardianship Courts

Excerpts from DOJ and HHS Joint Guidance to Courts in Child Welfare Proceedings, With Comments on Their Application to Adult Guardianship Proceedings

In August 2015, the United States Department of Justice and the Department of Health and Human Services issued a joint memo to provide guidance to court systems and other public entities involved in child welfare proceedings involving parents with disabilities. The joint memo explains how the Americans with Disabilities Act and Section 504 of the Rehabilitation Act apply to such proceedings. https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html

This commentary focuses on specific provisions of the joint memo and explains how the guidance is equally applicable to court systems and adult protective service agencies interacting with people with disabilities who are involved in adult guardianship proceedings.

The DOJ has not yet issued an ADA guidance memo specifically addressing adult guardianship proceedings. Therefore, until such guidance is published, guardianship courts can find indirect advice about their ADA obligations in guidance memos issued by the DOJ for other types of court proceedings. This is one such guidance memo. Another is a memo to courts and law enforcement agencies involved in criminal proceedings. <http://disabilityandabuse.org/doj-guidance-memo.pdf> Spectrum Institute used that memo as the basis for another commentary about ADA obligations of guardianship courts. <http://disabilityandabuse.org/doj-guidance-and-maryland.pdf>

Overview of Legal Requirements

Title II of the ADA

Quote: “Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.¹² Title II of the ADA applies to the services, programs, and activities of all state and local governments throughout the United States, including child welfare agencies and **court systems**.¹³ The “services, programs, and activities” provided by public entities include, but are not limited to, **investigations, assessments**, provision of in-home services, removal of children from their homes, case planning and service planning, **visitation, guardianship**, adoption, foster care, and reunification services. “Services, programs, and activities” also extend to child welfare **hearings**, custody hearings, and proceedings to terminate parental rights.” (Emphasis added)

Comment: The requirements of Title II apply to all court systems and all welfare agencies whether the service involves children or adults with disabilities. The ADA applies to all guardianship

proceedings whether the ward or proposed ward is an adult or a child. Therefore the mandates of the ADA apply to court systems, investigations, assessments, case planning, service planning, and visitation of adults with cognitive and communication disabilities who find themselves as voluntary or involuntary participants in adult guardianship proceedings.

Section 504 of the Rehabilitation Act

Quote: “Section 504 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of any entity that receives Federal financial assistance, or be subjected to discrimination by such entity.¹⁴ Federal financial assistance includes grants, loans, and reimbursements from Federal agencies, including assistance provided to child welfare agencies and the courts.¹⁵ An entity can be a recipient of Federal financial assistance either directly or as a sub-recipient.¹⁶ Section 504 applies to all of the operations of agencies and sub-agencies of state and local governments, even if Federal financial assistance is directed to one component of the agency or for one purpose of the agency.¹⁷ Recipients of Federal financial assistance must agree to comply with Section 504, and generally other civil rights laws, as a condition of receiving Federal financial assistance.¹⁸”

Comment: Many if not most state and local courts receive federal funding of some sort. As a condition of receiving such funds, the courts have agreed to abide by the requirements of Section 504 in all of their services. Guardianship proceedings are a service provided by court systems. As a result, the courts are required by follow the mandate of Section 504 – a parallel law to the ADA.

Application

Quote: “A child welfare agency or court may not, directly or through contract or other arrangements, engage in practices or methods of administration that have the effect of discriminating on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the child welfare agency’s or court’s program for persons with disabilities.¹⁹ Under these prohibitions, a child welfare agency could be responsible for the discriminatory actions of a private foster care or adoption agency with which it contracts when those actions are taken in fulfillment of the private entity’s contractual obligations with the child welfare agency.”

Comment: A guardianship court may not directly violate the mandates of the ADA or Section 504, nor may it escape fulfilling its Title II responsibilities as a public entity by delegating authority to individuals, organizations, or agencies through contracts or other arrangements. If the court authorizes actions of agents through delegation of authority – such as court investigators, guardians ad litem, capacity assessment professionals, or court-appointed attorneys – the court is responsible for ensuring that the actions of these agents comply with the ADA and Title II. Such responsibility can be fulfilled by adopting ADA-compliant performance standards for these agents, making sure they are appropriately trained in how to comply with the ADA, and by implementing an effective monitoring mechanism to ensure the training and services of these agents are in conformity with the requirements of the ADA and Section 504. A court cannot delegate authority to such agents and by doing so absolve itself of its duty to ensure that people with disabilities have meaningful

participation in their cases, including meaningful and effective communication with the court and its appointed agents.

Individualized Treatment and Equal Opportunity

Quote: “Two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity.”

Quote: “Individualized treatment. Individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence.²⁰ Persons with disabilities may not be treated on the basis of generalizations or stereotypes.²¹”

Quote: “Full and equal opportunity. Individuals with disabilities must be provided opportunities to benefit from or participate in child welfare programs, services, and activities that are equal to those extended to individuals without disabilities.²² This principle can require the provision of aids, benefits, and services different from those provided to other parents and prospective parents where necessary to ensure an equal opportunity to obtain the same result or gain the same benefit, such as family reunification.²³”

Quote: “Under Title II of the ADA or Section 504, in some cases, a parent or prospective parent with a disability may not be appropriate for child placement because he or she poses a significant risk to the health or safety of the child that cannot be eliminated by a reasonable modification.²⁷ This exception is consistent with the obligations of child welfare agencies and courts to ensure the safety of children. However, both the ADA and Section 504 require that decisions about child safety and whether a parent or prospective parent represents a threat to safety must be based on an individualized assessment and objective facts, including the nature, duration, and severity of the risk to the child, and the probability that the potential injury to the child will actually occur.²⁸ In addition, if the risk can be eliminated by a reasonable modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, the child welfare agency must take such mitigating actions.²⁹ A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities, but they may not be based on stereotypes or generalizations about persons with disabilities.³⁰”

Comment: In order for courts and agents appointed by the court to provide individualized treatment and a full and equal opportunity to participate in the guardianship proceeding, they must be properly educated about the specific disabilities of the respondent or ward, know how to effectively communicate with the adult in question, and ensure that the adult has received an individualized assessment of capacity to make decisions in each of the relevant areas of concern by a professional who is qualified to make such an assessment. The court or its agents may only restrict the rights of the respondent or ward based on such assessments and on objective facts – not assumptions or generalizations. Such assessments take time and cost money. Finding qualified professionals to conduct such assessments may not be easy, especially in areas of a state where such professionals are hard to find. The fact that compliance with the ADA is not easy, however, does not authorize noncompliance.

QUESTIONS AND ANSWERS

1.What are the basic requirements of ADA Title II and Section 504?

Quote: “Under the ADA and Section 504, programs cannot deny people with disabilities an opportunity to participate,³³ and must provide people with disabilities with meaningful and equal access to programs, services, and activities.³⁴ “

Quote: “Moreover, programs must provide reasonable modifications in policies, practices, and procedures when necessary to avoid discrimination;³⁸ and must take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others through the provision of auxiliary aids and services.³⁹”

Comment: A guardianship court must take steps to ensure that a respondent or ward who has cognitive or communication disabilities has meaningful participation in court proceedings – both inside and outside of the courtroom. When a guardianship petition or notice of hearing is filed, the court is placed on notice that a respondent in the proceeding has disabilities that may impede him or her from having equal access to the administration of justice. In order to maximize the potential for meaningful participation in the proceeding, the court must rely on its employees and appointed agents to conduct an ADA needs assessment of the individual in question. Based on an individualized assessment, the court and its agents can develop a plan to ensure that communications with the individual are as effective as reasonably possible.

2.Who is considered a person with a disability under Title II of the ADA and Section 504?

Quote: “The ADA and Section 504 protect the rights of individuals with disabilities.⁴⁰

Quote: “Congress has made clear that the definition of disability in the ADA and Section 504 is to be interpreted broadly.⁴³

Quote: “Even if an individual’s substantially limiting impairment can be mitigated through the use of medication; medical supplies, equipment, and devices; learned behavioral or adaptive neurological modifications; assistive technology (e.g. a person with a hearing disability who uses hearing aids that substantially restores the sense of hearing); or reasonable modifications to policies, practices, or procedures, the individual is still protected by the ADA and Section 504.⁴⁴ The ADA and Section 504 also apply to people who have a record of having a substantial impairment (e.g., medical, military, or employment records denoting such an impairment), or are regarded as having such an impairment, regardless of actually having an impairment.⁴⁵”

Comment: Respondents and wards in guardianship proceedings are protected by the ADA since they have actual or perceived disabilities that impair major life functions. The filing of a petition or notice of hearing puts the court and its personnel and agents on notice that the respondent or ward has a significant disability that is impairing his or her ability to understand or communicate.

3. Who do Title II of the ADA and Section 504 protect in child welfare programs?

Quote: "Title II of the ADA and Section 504 protect qualified individuals with disabilities, which can include children, parents, legal guardians, relatives, other caretakers, foster and adoptive parents, and individuals seeking to become foster or adoptive parents, from discrimination by child welfare agencies and courts.⁴⁹"

Comment: Whether a person with an actual or perceived cognitive or communication disability is a petitioner or respondent, a proposed ward or conservatee or an adjudicated ward or conservatee, the individual in question is protected by Title II of the ADA and Section 504.

4. What types of child welfare programs and activities are covered by these laws?

Quote: "All activities of child welfare agencies are covered by Title II and Section 504, including removal proceedings and agencies' programs and activities must not discriminate on the basis of disability."

Quote: "Title II covers all of the programs, services, and activities of state and local governments, their agencies, and departments.⁵⁴ Similarly, Section 504 applies to all of the activities of agencies that receive Federal financial assistance.⁵⁵ Therefore, all child welfare-related activities and programs of child welfare agencies and courts are covered, including, but not limited to, investigations, witness interviews, assessments, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings. Title II and Section 504 also make child welfare agencies responsible for the programs and activities of private and non-profit agencies that provide services to children and families on behalf of the state or municipality.⁵⁶

Comment: All activities of guardianship courts and employees and agents of such courts are covered by Title II of the ADA and Section 504. Such activities include investigations, witness interviews, assessments, case planning and service planning, advocacy and defense services, and court proceedings.

5. Do Title II and Section 504 apply to the programs, services, and activities of family courts?

Quote: "Yes. State court proceedings, such as termination of parental rights proceedings, are state activities and services for purposes of Title II.⁵⁷ Section 504 also applies to state court proceedings to the extent that court systems receive Federal financial assistance.⁵⁸

Quote: "Title II and Section 504 require court proceedings to be accessible to persons with disabilities, and persons with disabilities must have an equal opportunity to participate in proceedings.⁵⁹ "

Quote: "Courts are required to provide auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.⁶⁰"

Quote: "Like child welfare agencies, courts must also make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination on the basis of disability.⁶¹ For example, it may be necessary to adjust hearing schedules to accommodate the needs of persons with disabilities, if the need for the adjustment is related to the individual's disability. Or it may be necessary to provide an aide or other assistive services in order for a person with a disability to participate fully in a court event.⁶² Such assistance should be provided unless doing so would result in a fundamental alteration.⁶³"

Comment: Guardianship court proceedings, like child welfare court proceedings, are considered services of a public entity governed by Title II of the ADA and Section 504.

6. Do Title II and Section 504 apply to private contractors of child welfare agencies and courts?

Quote: "Yes. Title II prohibits discrimination in child welfare programs and services when those services are provided by contractors.⁶⁴ Section 504 prohibits discrimination in child welfare programs receiving federal financial assistance, including programs receiving federal financial assistance operated by private entities under contract with child welfare agencies.⁶⁵ Accordingly, to the extent that courts and agencies contract with private agencies and providers to conduct child welfare activities, the agencies should ensure that in the performance of their contractual duties contractors comply with the prohibition of discrimination in Title II and Section 504.⁶⁶"

Comment: The direct role of judges in guardianship proceedings is limited to activities inside of the courtroom. However, both pre-adjudication and post-adjudication, most activities occur outside of the courtroom through the actions of court investigators, professionals who conduct assessments, guardians ad litem, guardians, and court-appointed attorneys. Because such individuals are employed by or appointed by the court to perform these services, they are also covered by Title II of the ADA and Section 504.

7. What is a reasonable modification?

Quote: "Under Title II of the ADA and Section 504, child welfare agencies and courts must make changes in policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability, unless the change would result in a fundamental alteration to the nature of the program."

Comment: Judges, court personnel, and agents appointed by the court must take whatever steps are reasonably necessary to ensure that the respondent or ward has meaningful participation in his or her case. Generally the first step would be to appoint an attorney to provide advocacy and defense services for the individual – an attorney whose primary duty is to ensure that the rights of the client are protected, including his or her rights under the ADA. In order to comply with the ADA, court-appointed attorneys and other court personnel and agents must receive training in what the ADA requires of them. Compliance with the ADA is not discretionary and may not be left to chance.

8. What does it mean to provide effective communication?

Quote: “Child welfare agencies and courts are required to take appropriate steps – including the provision of appropriate auxiliary aids and services – where necessary to ensure that individuals with communication disabilities understand what is said or written and can communicate as effectively as individuals without disabilities.⁶⁸”

Quote: “In order to be effective, auxiliary aids and services must be provided in a timely manner and in such a way as to protect the privacy and independence of the individual with a disability.⁷⁴”

Comment: The first step to ensure effective communication between a respondent or ward and the court or agents of the court would be to appoint an attorney to represent the respondent or ward in the proceeding. The attorney would ensure that an ADA needs assessment is conducted so that appropriate supports and services can be provided to help the litigant understand the proceeding and effectively give and receive communications with the judge, court personnel, and all appointed agents.

9. What steps are child welfare agencies required to take to ensure that parents and prospective parents with disabilities involved with the child welfare system have an equal opportunity to participate in and benefit from their programs and activities?

Quote: “Title II and Section 504 require that agency staff refrain from basing assessments, services, or decisions on assumptions, generalizations, or stereotypes about disability.

Quote: “Agencies should take steps to ensure, for example, that investigators, social workers, supervisors, and others base their assessments of and decisions regarding individuals with disabilities on actual facts that pertain to the individual person, and not on assumptions, generalizations, fears, or stereotypes about disabilities and how they might manifest. The child welfare agency’s obligation to ensure individualized assessments applies at the outset and throughout any involvement that an individual with a disability has with the child welfare system.”

Comment: The ADA requires that adults with disabilities who are involved in guardianship proceedings receive individualized assessments by qualified professionals. These assessments must address which rights should be retained as well as which areas of decision-making should be transferred to a guardian. Such an assessment must also address the issue of less restrictive alternatives that may be viable with ancillary supports and services. Capacity and alternatives to guardianship are issues at the very core of a guardianship proceeding. Individualized assessments by qualified professionals must be a part of each and every guardianship proceeding in order for the proceeding to comply with Title II of the ADA.

Quote: “Child welfare agencies should take steps to ensure that their obligations under Title II and Section 504 are met by reviewing the following: existing policies, practices, and procedures; how the agency actually processes cases; the agency’s licensing and eligibility requirements for foster parents and guardians; and whether there are staff training or professional development needs.”

Comment: A court is not fulfilling its Title II responsibilities unless it has assessed its own policies and procedures to ensure they are complying with Title II requirements. Most courts do not acknowledge that the ADA applies to guardianship proceedings and to all of the official participants in the proceedings. Without such an acknowledgment, there will not be a meaningful assessment of court policies and practices to determine if they are in fact complying with the ADA.

10. When a child welfare agency or court provides or requires an assessment of a parent during the processing of the child welfare case, what do Title II and Section 504 require regarding the assessment?

Quote: "Title II and Section 504 require that assessments be individualized.⁸⁴ An individualized assessment is a fact-specific inquiry that evaluates the strengths, needs, and capabilities of a particular person with disabilities based on objective evidence, personal circumstances, demonstrated competencies, and other factors that are divorced from generalizations and stereotypes regarding people with disabilities. Child welfare agencies and courts may also be required to provide reasonable modifications to their policies, practices, or procedures and/or appropriate auxiliary aids and services during assessments to ensure equal opportunities for individuals with disabilities.

Comment: The same requirements for individualized assessments that are discussed above in connection with child welfare court proceedings also apply to adult guardianship proceedings.

16. What can individuals do when they believe they have been subjected to discrimination in violation of Title II or Section 504?

Quote: "An aggrieved person may raise a Title II or Section 504 claim in child welfare proceedings. Additionally, subject to certain limitations, an aggrieved person may pursue a complaint regarding discrimination in child welfare services, programs, or activities under Title II or Section 504 in federal court. ⁹²"

Quote: "Aggrieved individuals may also file complaints with HHS and DOJ. HHS and DOJ also have authority to initiate compliance review investigations of child welfare agencies and courts with or without receiving a complaint. If an investigation of a complaint or a compliance review reveals a violation, HHS or DOJ may issue letters of findings and initiate resolution efforts.⁹³ DOJ may initiate litigation when it finds that a child welfare agency or court is not in compliance with Title II. HHS may also refer cases to DOJ for litigation where a violation is found and is not voluntarily resolved.⁹⁴

Quote: "Title II and Section 504 allow for declaratory and injunctive relief, such as an order from a court finding a violation and requiring the provision of reasonable modifications. Title II and Section 504 also allow for compensatory damages for aggrieved individuals. Individuals who prevail as parties in litigation may also obtain reasonable attorney's fees, costs, and litigation expenses.⁹⁵

Quote: "Under Section 504, remedies also include suspension and termination of Federal financial assistance, the use of cautionary language or attachment of special conditions when awarding Federal

financial assistance, and bypassing recalcitrant agencies and providing Federal financial assistance directly to sub-recipients.⁹⁶"

Comment: A complaint may be filed against a court, or against agents who have assumed responsibilities delegated to them by a court in a guardianship proceeding for violations of Title II of the ADA or Section 504. An objection may be filed with the court or a complaint for systemic violations may be filed with the state court system. An appeal may be filed with an appellate court. ADA violations may be considered structural error that makes the judgement or order of the court reversible per se. An individual or class-based complaint may be filed with the DOJ against an individual court entity or against the state court system as a whole if the violation is based on statewide policies and practices of the court system. The DOJ may also initiate an investigation on its own motion if it learns of an individual or class-oriented violation.

Additional Resources

For more information about the ADA and Section 504, you may call the DOJ's toll-free ADA information line at 800-514-0301 or 800-514-0383 (TDD), or access its ADA website at www.ada.gov. For more information about the responsibilities of child welfare agencies under the ADA and Rehabilitation Act, see "DOJ/HHS Joint Letter to Massachusetts Department of Children and Families," at www.ada.gov/new.htm. For more information about Title II of the ADA, including the Title II Technical Assistance Manual and Revised ADA Requirements: Effective Communication, see www.ada.gov/ta-pubs-pg2.htm.

Information about filing an ADA or Section 504 complaint with DOJ can be found at www.ada.gov/filing_complaint.htm. Individuals who believe they have been aggrieved under Title II or Section 504 should file complaints at the earliest opportunity.

Endnotes are found in the original join memo.

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Limited Conservatorships and the Denial of Access to Justice: Who is Responsible under the ADA?

A Suggested Focus of Inquiry for the U.S. Department of Justice

By Thomas F. Coleman

Limited Conservatorship Proceedings

1. Limited conservatorships are legal proceedings initiated because someone believes that an adult who has an intellectual or developmental disability is unable to care for his or her basic needs due to an incapacity to make major life decisions.
2. A petition to place the person under a conservatorship is generally filed by a parent or relative who asks the probate court to give them or another designated person the authority to make such decisions for the adult in question.
3. The petition is served on the adult who is then required to respond. The adult becomes an involuntary litigant. Due to cognitive and communication disabilities, the adult is not able to defend himself or herself or to participate in the proceedings in a meaningful way without assistance.

The Americans with Disabilities Act

4. Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 require public agencies, including courts, to take necessary steps to ensure that people with disabilities have meaningful access to the services they offer. The service offered by courts is the administration of justice. Section 504 applies mandates similar to the ADA to public agencies that receive federal funds. Most courts receive some federal funding.
5. Generally a public agency must modify its normal policies or provide an accommodation to a person with a disability *upon request*. However, when the agency knows that the person has a disability and that the nature of the disability precludes or impedes them from making a request for an accommodation, the agency has an affirmative duty to assess the situation and provide an accommodation *without request*.
6. The type of accommodation provided to the person must be sufficient to enable the person to have access to the services and to participate in the services in a meaningful manner. A violation of the ADA and Section 504 occurs when the supports and services provided to someone with a disability are not sufficient to give the person meaningful access to the services of the agency.
7. The only significant accommodation that California courts provide to proposed limited conservatees to give them access to justice in these proceedings is the appointment of an attorney. Since they cannot represent themselves, these involuntary litigants depend on their court-appointed attorney to advocate for their wishes and to defend their rights.
8. The administration of justice in these cases is a process of deciding whether the allegations of the

petition are true, whether they are supported by clear and convincing evidence, whether there are less restrictive alternatives to conservatorship, whether the person nominated to act as conservator is qualified, and whether that person is the best choice for conservator. The adult does not have meaningful access to justice unless the process that is required by law is actually followed. The adult is completely dependent on the court-appointed attorney to ensure that constitutional and statutory requirements for conservatorship proceedings are followed by all participants to the proceedings.

9. Due process of law entitles the adult to *effective* assistance of counsel. To provide effective assistance, the attorney must: (a) have sufficient expertise to deal with issues involving cognitive and communication disabilities, capacity to make decisions, and constitutional and statutory rights of people with developmental disabilities; (b) obey ethical requirements of confidentiality and loyalty; (c) conduct a thorough investigation of the sufficiency of the allegations and evidence in support of the petition; (d) develop evidence to rebut those allegations or to defend the retention of rights by the client; (e) file appropriate objections; (f) demand an evidentiary hearing when appropriate; and (g) assist the client in filing a notice of appeal to challenge errors by the trial court. If the attorney does not provide effective assistance, the client has been denied meaningful access to justice as required by the ADA and Section 504.

Evidence of ADA Violations by Attorneys

10. Spectrum Institute has conducted a thorough investigation of the limited conservatorship system in California, with a special focus on Los Angeles County. The investigation has yielded significant evidence that court-appointed attorneys are not providing their clients meaningful access to justice as required by federal disability laws. The investigation has also documented that the violations are not isolated instances by a few attorneys. Audits of cases show systematic violations by many attorneys – violations that are known to the court. The denial of access to justice for people with developmental disabilities in limited conservatorship cases is systemic.

11. Three individual cases investigated by Spectrum Institute in depth show the seriousness and wide range of ADA access-to-justice violations. The case of Michael Parisio involved allegations of abuse by his conservators. The court-appointed attorney failed to properly investigate the allegations. Michael eventually died. The case of Gregory Demer involved allegations that his court-appointed attorney failed to protect his social rights – the right to decide for himself who to socialize with and who to avoid. It was alleged that his attorney actually advocated against her client and violated ethical duties of loyalty and confidentiality. As a result of not having someone to advocate for him, Gregory is forced to visit regularly with a parent who he says he does not want to see and of whom he says he is afraid. He has been relegated to a life of social servitude. The case of Stephen Lopate involved allegations of numerous ADA violations by his appointed attorney. The attorney refused to allow Stephen, who was mostly nonverbal, to use his chosen method of communication by typing with partial assistance from a support person. The attorney initially dismissed Stephen's right to vote as "inconsistent with conservatorship." He violated client confidentiality and did not properly advocate for his client's wishes not to visit his father.

12. The ADA violations in these cases are not isolated instances. Spectrum Institute conducted an audit of the performance of court-appointed attorneys in Los Angeles in dozens of other cases. The audit revealed that the attorneys did not conduct proper investigations and generally rushed the cases through the system. Many of them devoted only 4 or 5 hours to a case, from start to finish. They did not object to the failure of the regional centers to file capacity assessment reports on time. They

did not object to the failure of the court to appoint an investigator to objectively assess the need for a conservatorship or whether the proposed conservator was qualified or whether the home in which the conservatee would live was safe. The attorneys did not ask for an expert to be appointed to conduct an evaluation of their client's abilities. They did not use the resources of the regional centers to evaluate whether there were feasible alternatives to conservatorship for their clients.

Evidence of Failure to Train Attorneys

13. Under Section 504 and Title II of the ADA, the court has the responsibility to provide access to justice for litigants with cognitive and communication disabilities. In limited conservatorship cases, the court attempts to fulfill this obligation through the appointment of counsel for the litigant.

14. Having extended an accommodation intended to provide access to justice for involuntary litigants with serious disabilities, the court has an obligation to ensure that the attorneys are qualified to represent clients with special needs. Appointing an unqualified attorney is not providing the litigant access to justice. Whether an attorney is qualified or not should not be left to chance. The court should know, in advance of the appointment, that the attorney has the necessary qualifications and experience to represent a client with cognitive and communication disabilities in a proceeding involving specialized legal, medical, and psychological issues.

15. The Los Angeles County Superior Court purports to satisfy its Title II obligation by limiting appointments to attorneys who are listed on a Probate Volunteer Panel. To get on the PVP list and remain on the list, an attorney needs to attend trainings that are mandated by the court. The mandatory trainings have been delegated by the court to the Los Angeles County Bar Association.

16. Spectrum Institute has audited the mandatory PVP trainings conducted by the bar association for the past several years. The trainings are seriously deficient. Many issues essential to effective assistance of counsel have never been addressed. Some seminars have given misinformation to attorneys. Most of the legal, medical, and psychological issues inherent in effective advocacy have been absent from these trainings. The court is aware of what topics are covered or not, since judges participate in the planning of the trainings and attend the trainings. Thus, the court is responsible for the deficiencies. The court is aware that the attorneys have not received sufficient training to provide effective representation to clients with special needs in limited conservatorship proceedings.

Agencies Responsible for These ADA Violations

Los Angeles County Superior Court

17. The Los Angeles County Superior Court has a responsibility to provide litigants with developmental disabilities access to justice in limited conservatorship proceedings. The court has attempted to fulfill this responsibility by appointing an attorney to represent these litigants. Although a public entity can delegate duties, this does not absolve the entity of its supervisory duties to ensure that the agent or contractor provides meaningful access to the services of the public entity.

18. The Superior Court knows that conservatorship respondents cannot participate in the proceedings without the assistance of an attorney. The court knows that these litigants depend entirely on their court-appointed attorneys to ensure that the proceedings are conducted according to the mandates of the law. In other words, the court knows the litigants rely on their attorneys to make sure they are afforded due process. Due process is the service the court provides.

19. The court is aware that these litigants will not know whether or not their attorneys are giving them access to justice. The court also knows that the litigants are not able to complain about ineffective assistance of counsel or to appeal when they are denied due process. Without effective assistance of counsel, the litigants are not given meaningful access to justice. Therefore, it is the responsibility of the court to adopt procedures to ensure the attorneys are qualified and that they are complying with performance standards that are consistent with ADA requirements.

20. The Los Angeles County Superior Court has not adopted training and performance standards that are ADA compliant. There are no performance standards. The trainings mandated by the court are severely deficient. The deficiencies have been brought to the court's attention and yet the deficiencies have not been corrected.

21. The court knows that the actual performance of the appointed attorneys is deficient. The attorneys submit a report in each case which is reviewed by a judge. An audit of dozens of such reports shows that the judges are aware that the attorneys are not performing activities essential to effective advocacy. The attorneys also submit fee claims in which they detail the services they have performed. The fee claims also alert the court as to services the attorneys did not perform. An audit of dozens of fee claims shows that the court is aware that attorneys are performing deficiently. Despite having such knowledge, the judges reappoint the attorneys with deficient performances over and over again to new cases.

22. The court is also creating a barrier to ADA-compliant performance by these attorneys by having adopted a local court rule that gives the attorneys a dual role. In addition to being an advocate for their clients, the attorneys are expected to "assist the court in the resolution of the matter to be decided." This rule creates a conflict of interest for the attorneys. Based on this secondary duty, attorneys are violating client confidences and acting in a manner that is disloyal to the client. The court has been asked by Spectrum Institute to rescind this rule but has failed to do so.

County of Los Angeles

23. The County of Los Angeles funds the legal services program that supplies attorneys for respondents in limited conservatorship proceedings. The court-appointed attorneys submit fee claims for their services, they are approved by the court, and the county then sends a check to the attorneys. The county has no quality assurance controls for the legal services program it funds. It simply pays the fees as ordered by the court. Attorneys with deficient performance are paid. There are no performance audits. The county does not monitor the training programs.

24. The Board of Supervisors has a choice as to the method of providing legal services to conservatorship respondents. It can fund the PVP program operated by the court; or it can designate the Office of the Public Defender to represent these clients; or it can contract with a nonprofit organization to provide such legal services. Quality controls can be included in any of these options.

25. The deficiencies of the PVP legal services program has been brought to the attention of the Board of Supervisors by Spectrum Institute. The supervisors were alerted that the program is violating the ADA rights of conservatorship respondents. The board was advised that the county is itself violating Section 504 and violating the ADA by funding an ADA-noncompliant legal services program with willful indifference to the harm being caused to conservatorship respondents. The Board of Supervisors has failed to take corrective action.

Judicial Council of California

26. The Judicial Council of California is an agency within the judicial branch of government that was created by the California Constitution. Although the chairperson of the Judicial Council is the Chief Justice of California, the Council is an entity separate and distinct from the Supreme Court of California. It operates independently from the Supreme Court.

27. The Judicial Council is responsible for enacting rules and creating standards governing the performance of attorneys and judges in legal proceedings in the trial and appellate courts. It has the authority to enact rules and standards regarding the training and performance of attorneys.

28. The Judicial Council was alerted by Spectrum Institute of systemic deficiencies in limited conservatorship proceedings. It was informed that these deficiencies violate due process as well as the ADA and Section 504. It was asked to adopt rules for training and performance standards for court-appointed attorneys in limited conservatorship proceedings. Despite having this information for over a year, it has not taken action to develop such rules or standards.

29. The Judicial Council is a public entity subject to Section 504 and Title II of the ADA.

State Bar of California

30. The State Bar of California is a public corporation. All licensed attorneys must be a member in good standing of the State Bar. As a public entity, the State Bar is subject to the mandates of Section 504 and Title II of the ADA.

31. The State Bar has adopted rules of professional conduct that impose ethical and performance standards for licensed attorneys. It has adopted a system whereby clients can complain about violations of these standards. When complaints are filed, the State Bar investigates them, and if a violation is found to occur, it imposes appropriate discipline and requires appropriate corrective action.

32. Because of their cognitive and communication disabilities, clients of court-appointed attorneys in limited conservatorship proceedings are not able to file complaints with the State Bar. This is something the State Bar knows or should know. As a result, the State Bar should have an alternative method of monitoring the performance of attorneys who represent such clients, especially when deficient performance comes to the attention of the State Bar through methods other than specific complaints by clients with special needs.

33. Spectrum Institute has brought the problem of deficient performance of PVP attorneys to the attention of the State Bar on several occasions. The State Bar was asked to convene a task force to investigate the problem and recommend solutions. The State Bar did not respond to these requests. As a result, it is allowing the rights of litigants with developmental disabilities to be violated on a systematic basis without taking correction action, much less even investigating.

34. The State Bar of California requires attorneys to show proof of at least 25 continuing education credits every three years in order have an active license to practice law. The State Bar decides which continuing education providers are allowed to give credits for seminars and educational programs.

35. The State Bar has authorized the Los Angeles County Bar Association to give continuing

education credits to attorneys who attend educational programs sponsored by the County Bar. The County Bar operates the training programs for PVP attorneys who are appointed by the Los Angeles County Superior Court to represent respondents in conservatorship cases. The court mandates that attorneys attend these programs in order to receive appointments to these cases. The court participates in the development of these programs and actively participates in the seminars. Judges of the court show their approval of these seminars by entrusting this educational function to the County Bar, year after year.

36. Spectrum Institute has brought to the attention of the State Bar the deficiencies with these seminars. It has asked for an audit of the seminars that have been given over the past several years.

Supreme Court of California

37. The State Bar of California is an arm of the Supreme Court of California. The Supreme Court is the supervisory entity to which the State Bar is responsible.

38. Spectrum Institute has brought to the attention of the Supreme Court the deficiencies of the training programs of the Los Angeles County Bar Association. It has alerted the court of its request that the State Bar audit these seminars as well as its previous request that the State Bar convene a Task Force on Access to Justice in Limited Conservatorship Proceedings. The court was asked to encourage the State Bar to convene such a task force and to monitor the response of the State Bar to the request for an audit of the PVP training program operated by the County Bar Association.

Court-Appointed Attorneys

39. Attorneys who are appointed to represent clients with special needs in limited conservatorship proceedings themselves have a responsibility under the ADA. Since they are agents of the court due to their appointment by the court to represent these clients, the attorneys are subject to Title II of the ADA. Their duties under Title II – as a public agency – also stems from the fact that their services are paid for by public funds. The attorneys may also have ADA duties pursuant to Title III which governs public accommodations, including providers of legal services.

40. The attorneys have a responsibility, under State Bar rules, not to accept a case for which they lack the necessary training or skills. They have a duty, under state law as well as the ADA, to acquire the appropriate skills prior to taking such a case. Evidence shows a pattern that attorneys representing clients in limited conservatorship cases do not have the necessary training and skills.

41. In addition to the complaint filed with the DOJ for the class of limited conservatees, a complaint was also filed on behalf of Mr. Gregory Demer. An inquiry into the performance of Mr. Demer's attorney could serve as the basis for a remedial template to instruct the entire panel of PVP attorneys.

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for guardianship and conservatorship reform. Spectrum Institute has filed complaints with the U.S. Department of Justice regarding the denial of access to justice for people with developmental disabilities in limited conservatorship proceedings in California. The focus of the complaints is the systematically deficient performance of court-appointed attorneys in these cases.

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The ADA and Ensuring Access to Justice in Probate Conservatorship Proceedings in Alameda County

What Laws and Procedures Apply?

The Americans with Disabilities Act prohibits discrimination on the basis of disability against employees, applicants for employment, and persons who receive the services of government entities or private businesses. Title I applies to private employers. Title II applies to state and local public entities. Title III applies to public accommodations operated by private businesses or nonprofit organizations.

Litigants with disabilities who are involved in probate conservatorship proceedings in California are recipients of government services. They may also be recipients of services provided by private businesses or nonprofit organizations that are involved in these proceedings.

Government agencies who are or may be involved in probate conservatorship proceedings include the superior court and its employees and agents, the county public defender, the county public guardian-conservator, and the county adult protective services. Nonprofit organizations that may be involved in probate conservatorship proceedings include law firms such as Legal Assistance for Seniors (LAS) and the Regional Center of the East Bay. Private businesses that may be involved include licensed professional fiduciaries who are appointed to act as conservators.

Public entities have their own independent obligations under Title II of the ADA, as do private businesses and nonprofit organizations under Title III. However, as the Title III ADA Technical Assistance Manual explains: "Where public and private entities act jointly, the public entity must ensure that the relevant requirements of Title II are met; and the

private entity must ensure compliance with Title III." <https://www.ada.gov/taman3.html>

Courts are public entities subject to the mandates of the ADA. (*Tennessee v. Lane* (2004) 541 U.S. 509) The departments of the County of Alameda that perform functions in conservatorship proceedings are also considered to be public entities under Title II. <https://www.ada.gov/taman2.html#II-1.2000> Organizations such as LAS and the Regional Center are private entities with obligations under Title III of the ADA, as are professional fiduciaries appointed by the court to act as conservators.

The superior court has adopted a local court rule appointing LAS to cases where the litigants are not indigent and do not have developmental disabilities. (Rule 7.820) The court also has a contractual arrangement with LAS. As a result, LAS is governed by Title III, but under Title II the court is also responsible for ensuring that LAS services comply with Title II since LAS is performing a function delegated to it by a public entity. LAS is considered a "service establishment" under Title III.

Likewise, the Regional Center is not purely a private actor. It is performing functions in these proceedings that are mandated by the California Legislature, is under contract with the Department of Developmental Services (DDS), and receives state and federal funds that subsidize its services. The Regional Center has independent obligations under Title III of the ADA. It is considered a "social service center establishment" under Title III. However, independent of the Regional Center's Title III obligations, the State of California has a duty to ensure that the state-

mandated services the Regional Center performs in conservatorship proceedings also comply with Title II. The Department of Developmental Services would perform this oversight function.

Title II Obligations

Public entities may not discriminate on the basis of disability against recipients of their services. Once a public entity knows that a service recipient has a disability that may interfere with the ability to have full access to its services, the entity has an obligation to take pro-active steps to address the situation to alleviate the potential inaccessibility.

Knowledge of the disability, and its potential interference in equal access to services, is sometimes acquired by the entity when it receives a request for accommodations or modifications of the entity's regular policies and practices. However, a request for accommodation is not needed to trigger the entity's duties under Title II. Knowledge that a disability exists and that it may interfere with equal access to services can come from any source.

In a conservatorship proceeding, for example, such knowledge is virtually automatic upon the filing of a petition. Facts alleged in the petition put the court and all participants in the proceedings on notice that a conservatee or proposed conservatee has significant cognitive or communication disabilities that may render them unable to care for their own basic needs. Facts are alleged that put everyone on notice that the litigant is so disabled that he or she lacks the capacity to make basic life decisions due to the nature and severity of these cognitive challenges. Therefore, virtually every proposed conservatee has rights under Title II of the ADA and the court and other governmental participants have obligations to ensure those rights are protected. Again, these obligations apply even without request once the governmental entity becomes aware of the

nature and extent of the litigant's disabilities.

In terms of Title II, a public entity has two primary obligations. One is to ensure that the litigant has effective communication in the service being received. The other is to ensure the litigant has meaningful participation in the service. In terms of conservatorship proceedings, public entities that play a role in them must take pro-active measures to assess the ADA needs of the litigant and to provide the necessary supports and services to ensure effective communication and meaningful participation in the proceedings, including ancillary services that may need to be provided outside of the court house itself.

Title III Obligations

The ADA requires that a public accommodation provide an equal opportunity to participate in or benefit from the serviced being offered. A public accommodation must reasonably modify its policies, practices, and procedures, to avoid the denial of equal access to services.

It should be noted that litigants with disabilities in conservatorship proceedings are not seeking to participate in services being offered to the general public. In fact, they are not seeking the services of LAS or the Regional Center, or of professional fiduciaries. These services are being foisted on them. They have no choice but to participate in these services.

These service providers are signing contracts, or accepting funds, or receiving court appointments to provide services specifically to people with serious cognitive and communication disabilities. Therefore, the service itself is a disability-related service. As such, reasonable accommodations to ensure effective communication in the service and meaningful participation in the service is part of the service by definition. These service providers know, from the start, that the

recipients of their services have special needs that will require special accommodations in order to ensure meaningful participation in the services.

California State Law

California has a state-law equivalent of Title II of the ADA and Title III of the ADA. Title II is incorporated into Government Code Section 11135. Title III is incorporated into Civil Code Section 51 et seq.

Section 11135 prohibits the denial of full and equal access to the benefits of any program or activity conducted, operated, or administered by any entity funded by the state or that receives financial assistance from the state. The statute specifies that such state-operated or state-funded entities must comply with the protections and prohibitions under Title II of the ADA. The state Department of Fair Employment and Housing has authority to investigate complaints filed with it and to civilly prosecute violations of Section 11135.

Section 51 is part of a series of statutes known as the Unruh Civil Rights Act. The Act prohibits business establishments of any kind whatsoever from engaging in various types of discrimination in the delivery of services. Subdivision (f) of Section 51 declares that a violation of the right of any individual under ADA is a violation of this section. In effect, Section 51 is the state's equivalent of Title III of the ADA. The Unruh Act also applies to services provided by nonprofit organizations. (*Board of Directors v. Rotary Club of Duarte* (1987) 481 U.S. 537; *Ibister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72.)

Whenever there is reasonable cause to believe that any person is engaged in conduct that is intended to deprive someone of the rights protected by Section 51, Section 52 authorizes the victim or the district attorney to bring a civil action in an appropriate court by filing with it a complaint.

Administrative Complaints

Federal DOJ. In addition to civil actions that can be filed in court by conservatees or proposed conservatees whose rights are violated under the ADA, the victim of discrimination or someone on his or her behalf may file an administrative complaint with the United States Department of Justice. A complaint may be filed for Title II violations committed by the superior court or any public entity involved in the conservatorship process. A complaint may be filed for Title III violations by LAS, the Regional Center, or professional fiduciaries acting as conservators.

State Agencies. In addition to civil actions that can be filed in court by conservatees or proposed conservatees whose rights are violated under the ADA as incorporated into Section 11135, the victim of discrimination or someone on his or her behalf may file an administrative complaint with the state Department of Fair Employment and Housing. A complaint may also be filed with the agency that funds or authorizes the services, e.g., a complaint may be filed with the superior court for ADA violations by LAS, or with DDS for ADA violations by the Regional Center.

District Attorney. In addition to civil actions that can be filed in court by conservatees or proposed conservatees whose rights are violated under Title III of the ADA as incorporated into Section 51, an administrative complaint can be filed with the local district attorney invoking that agency's authority to investigate and civilly prosecute violations by businesses and nonprofit organizations that engage in discrimination in the delivery of services. This would include alleged violations by LAS, the Regional Center, or professional fiduciaries acting as conservators.

By Thomas F. Coleman

www.spectruminstitute.org/path

June 2010

We create opportunities for independence for people with disabilities through research, education and consultation

Remedies under the ADA

The Americans with Disabilities Act (ADA) is a complex civil rights law that may award different remedies depending on the discrimination that occurred. Some remedies are spelled out in the Act explicitly while others are established by case law interpreting the ADA and its sister law, Section 504 of the Rehabilitation Act. For a potential plaintiff, the available remedies must be considered before filing suit. For the potential defendants, the potential liability discourages violations of the ADA. This e-bulletin will discuss what remedies are available under the ADA.

Glossary of terms used in this e-bulletin:

•**Damages** are what people normally think of when they think about lawsuits. Damages are the money paid to the plaintiff (the person who filed the lawsuit) if the plaintiff wins the lawsuit. There are several types of damages.

•**Compensatory damages**, sometimes called actual damages, are the money paid to the plaintiff to make up for any loss, harm, or injury. The purpose of this type of remedy is to make the plaintiff whole -- that is, to restore the plaintiff to where s/he was before the loss, harm, or

injury. Compensatory damages may include actual money losses as well as money paid to make up for non-monetary injuries such as pain and suffering or loss of reputation.

•**Punitive damages** are the money paid to punish the losing defendant. The purpose is to reform or deter the defendant and others in similar situations from committing future discriminatory acts. Punitive damages are not always available as a remedy in a case and should not be overly excessive.

•**Equitable remedies** are orders given at the discretion of the court that direct parties to do or not do something. They include such things as injunctive relief.

•**Injunctive relief**, or an injunction, is a court order requiring the party to either do something or refrain from doing something. In the context of the ADA, a court could order a defendant to modify a discriminatory policy or end its discriminatory practices.

•**Attorneys' fees** are when the losing side has to pay the winning side's legal bills. Normally, each party is responsible for paying its own attorneys. The calculation of the fee often includes litigation expenses

such as travel and expert witness expenses.

- **Court costs** are the administrative costs of the court to handle the case.

- A **statute of limitation** is a law that sets the maximum amount of time after certain events that a person may file a lawsuit. With the Americans with Disabilities Act, the triggering event is when the plaintiff learns about the discriminatory conduct or has reason to know about the conduct.¹

- If the alleged discrimination is not an isolated incident but is part of an ongoing and continuous violation with multiple incidents, then only one of the incidents has to occur during this time period for the plaintiff to be able to sue on the basis of the continuing violation.

Remedies for employment discrimination

Title I of the ADA prohibits discrimination on the basis of disability in employment.² A person must exhaust all administrative remedies available before being able to sue under Title I. The person must first file a charge with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act. This deadline may be extended to 300 days if there is a state or local fair employment practices agency that also has jurisdiction over this matter.³ The EEOC may choose to investigate the matter or have willing parties go through its mediation program. If there is no resolution to the charges, the EEOC will issue a right-to-sue letter to the charging party. The plaintiff then has 90 days to file a lawsuit after receiving the right to sue.⁴

The remedies available in a lawsuit under Title I of the ADA are derived from Title II of the Civil Rights Act which prohibits discrimination in employment on the basis of race, color,

religion, sex, and national origin. The remedies may include both compensatory and punitive damages, injunctive relief, attorneys' fees, and court costs.

Compensatory damages may include monetary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-monetary losses. Punitive damages are only awarded if the plaintiff can show that the defendant discriminated with malice or with reckless indifference to the federally protected rights of the plaintiff.⁵ Injunctive relief may include a court ordering an employer to hire, reinstate with or without back pay, or promote someone. The relief may also include requiring an employer to provide reasonable accommodation, front pay instead of reinstatement, and any interest accrued. It may also be a simple order requiring the employer to stop its discrimination.

Both compensatory and punitive damages are available under Title I in cases where the employer intentionally discriminated, but the award of damages combined is capped depending on the size of the employer.⁶

If seeking damages, the plaintiff has the right to a jury trial, and the court does not inform the jury of the cap in damages.⁷ If the jury awards damages in excess of the cap, the court will reduce the amount accordingly. Plaintiffs who seek only equitable relief are only entitled to a bench trial (trial by judge).

In calculating damages that involve monetary loss for the purpose of the cap, this amount does not include back pay or interest on the back pay.⁸ Specifically, this means that the amount of back pay awarded is not subject to the damages cap. However, back pay liability is limited to two years accrued before the filing

¹ *Chisholm v. United of Omaha Life Ins. Co.*, 514 F. Supp. 2d 318 (D. Conn. 2007).

² 42 U.S.C. 12112(a).

³ 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(e)(1).

⁴ 29 C.F.R. § 1601.28(b)(1).

⁵ *Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998); *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000).

⁶ 42 U.S.C. § 1981a(b).

⁷ 42 U.S.C. § 1981a(c).

⁸ 42 U.S.C. § 1981a(b)(2).

Size of employer	Combined damages capped at
15-100 employees	\$50,000
101-200 employees	\$100,000
201-500 employees	\$200,000
Over 500 employees	\$300,000

of the charge. Back pay liability is usually the time between termination and reinstatement.² To calculate back pay, a court will consider the difference between the employee's former salary and current lower salary which could be zero for the unemployed.¹⁰ This amount may be reduced by the amount of interim earnings that the employee should have earned with due diligence.

Front pay is also excluded from these damages calculations as courts consider it an equitable remedy in some cases where courts determined reinstatement is not an appropriate or practical remedy.¹¹ Front pay is the amount of money that the employee would have earned in the future had he remained on the job. Just how far into the future is determined at the discretion of the court.

In cases that involve the provision, or lack of provision, of reasonable accommodation, damages are not available if the employer made a good faith effort, in consultation with the employee, to identify and provide a reasonable accommodation.¹²

Three federal courts of appeal have ruled

that damages are not available for claims of retaliation in the workplace. A plaintiff affected by these rulings is only entitled to equitable relief and is not entitled to a jury trial for these types of claims.¹³ Lower federal courts not bound by these rulings have disagreed over this issue.¹⁴

Due to the Supreme Court decision in *Board of Trustees of University of Alabama v. Garrett*, monetary awards are not available against state employers due to their constitutional immunity.¹⁵ That means if the employer is a state government or its agencies/institutions, a plaintiff's only recourse in a private lawsuit is injunctive relief that does not involve money. Compensatory damages are still available in employment claims against local government entities but not punitive damages.¹⁶

Remedies for discrimination by state or local government

Title II of the ADA prohibits discrimination on the basis of disability in state and local government programs and services. Title II incorporates the remedies available under the analogous federal law, Section 504 of the Rehabilitation Act, which prohibits disability discrimination by federal agencies and federally-funded programs.¹⁷

A person may file an administrative complaint with the U.S. Department of Justice (DOJ) or another appropriate federal agency like the Department of Education or Depart-

² 42 U.S.C. § 2000e-5(g).

¹⁰ *McDaniel v. Mississippi Baptist Medical Center*, 877 F. Supp. 321 (S.D. Miss. 1994).

¹¹ *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000); *Bizelli v. Parker Amchem*, 17 F. Supp. 2d 949 (E.D. Mo. 1998).

¹² 42 U.S.C. § 1981a(a)(3).

¹³ *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009); *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir. 2004); *Bowles v. Carolina Cargo, Inc.*, 100 Fed.Appx. 889, 890 (4th Cir.2004).

¹⁴ Compare *Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F.Supp.2d 225, 236 (E.D.N.Y.2005), *Rumler v. Dept. of Corrs.*, 546 F.Supp.2d 1334, 1342-43 (M.D.Fla.2008), *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d 236, 240-41 (W.D.N.Y.2003) (compensatory and punitive damages are available under retaliation claims); with *Sink v. Wal-Mart Stores*, 147 F.Supp.2d 1085, 1100-01 (D.Kan. 2001), and *Brown v. City of Lee's Summit*, 1999 WL 827768, *2-*4 (W.D.Mo.1999) (damages are not available).

¹⁵ 531 U.S. 356 (2001).

¹⁶ See 42 U.S.C. § 1981a(b)(1) (A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision)).

ment of Transportation.¹⁸ The complaint must be filed within 180 days of the alleged discriminatory act, unless the deadline is extended for good cause shown.¹⁹ The agency will investigate the claim or refer the complaint to a more appropriate designated federal agency. The designated agency will attempt an informal resolution to the matter based on its investigation.²⁰ If there is no resolution, the agency will issue a letter of findings to the parties.²¹ If the designated agency finds a violation, it will attempt a voluntary compliance agreement with the violating public entity²² or refer the case back to the DOJ with appropriate recommendations.²³ However, the complainant does not have to go through this administrative process under Title II and can instead directly file a lawsuit in federal court.²⁴

Title II does not have a statute of limitations for private lawsuits so federal courts usually adopt the most analogous statute of limitations under state law.²⁵ Therefore, the statute of limitations may be different in every state and a potential litigant should check with an attorney to determine the applicable time limit on filing suit. The importance of when a statute of limitation starts running has been highlighted by recent Title II construction cases. Two federal circuit courts have ruled that the time limit is derived from the date of the completed inaccessible construction, not when the plaintiff encounters or discovers the barrier.²⁶ This means that in certain areas of the country, if the plaintiff does not discover a construction barrier within a certain time after construction by a

public entity, he can not sue to have it corrected!

Compensatory damages and injunctive relief are traditional remedies available in a lawsuit under Title II and Section 504. Punitive damages are not available though, no matter how deliberate and malicious the conduct.²⁷ Attorneys' fees awards are at the discretion of the court.

Compensatory damages are available only if a plaintiff can prove that the discrimination by the public entity was intentional. Intentional discrimination means conduct that results from deliberate indifference to the rights of the individual or actual malice.²⁸ This is a very high evidentiary threshold to meet.

Complicating matters even further is that state government entities may attempt to assert their constitutional immunity under the Eleventh Amendment against a private Title II lawsuit. Depending on the alleged violation, the state may be immune to monetary awards.²⁹ This immunity does not apply to cases brought by the federal government.³⁰ Local government entities like counties and cities do not have this immunity.

Remedies for discrimination by public accommodations

Title III of the ADA prohibits discrimination on the basis of disability by places of public accommodation.³¹ A person may file a Title III complaint with the Department of Justice or file a lawsuit in federal court. The complainant does not have to file a complaint before suing in court. In circumstances in which the court

¹⁸ 28 C.F.R. § 35.170(c).

¹⁹ 28 C.F.R. § 35.170(b).

²⁰ 28 C.F.R. § 35.172(a).

²¹ 28 C.F.R. § 35.172(b).

²² 28 C.F.R. § 35.173.

²³ 28 C.F.R. § 35.174.

²⁴ 28 C.F.R. § 35.172(b).

²⁵ *Everett v. Cobb County School Dist.*, 138 F.3d 1407 (11th Cir. 1998).

²⁶ *Frame v. City of Arlington*, 575 F.3d 432 (5th Cir. 2009); *Disabled in Action of Penn. v. Southeastern Penn. Transp.*, 539 F.3d 199 (3d Cir. 2008).

²⁷ *Barnes v. Gorman*, 536 U.S. 181 (2002).

²⁸ *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); *Center v. City of West Carrollton*, 227 F. Supp. 2d 863 (S.D. Ohio 2002); *Swenson v. Lincoln County School Dist. No. 2*, 260 F. Supp. 2d 1136 (D. Wyo. 2003); *Fetto v. Sergi*, 181 F. Supp. 2d 53 (D. Conn. 2001).

²⁹ See *Tennessee v. Lane*, 541 U.S. 509 (2004) and *United States v. Georgia*, 546 U.S. 151 (2005).

³⁰ See *Garrett*, footnote 9.

³¹ 42 U.S.C. § 12182(a).

believes it would be just, an attorney may be appointed for the complainant.³² The Department of Justice may also file suit on behalf of the complainants if the defendant has engaged in a pattern or practice of discrimination or if the case raises an issue of general public importance.³³

The traditional remedy in a private Title III lawsuit is injunctive relief. Injunctive relief may include an order to make a facility accessible, to provide auxiliary aids or services, modify an existing policy or practice, or whatever else the court feels would be appropriate to enable to full use and enjoyment of a place of public accommodation for people with disabilities.³⁴

The court may also choose to award attorneys' fees at its discretion.³⁵ This discretion is limited and ordinarily a prevailing plaintiff should recover attorney fees unless special circumstances would make such an award unjust.³⁶ The rationale is that if successful plaintiffs were forced to bear their own attorneys cost, few parties would be able to afford to advance the public interest using only court-ordered injunctions.³⁷ Prevailing defendants may be entitled to attorneys fees if the lawsuit was frivolous, unreasonable, or brought in bad faith.³⁸

In Title III cases brought by the Department of Justice, the court may award injunctive relief, compensatory damages, and other relief that the court believes is appropriate, like attorneys' fees and court cost. In cases that are to vindicate the public interest, the Department of Justice may also seek civil penalties of up to \$50,000 for the first violation and up to \$100,000 for each subsequent violation.

The lack of money damages in private lawsuits may seem like a disincentive to a potential plaintiff, but there may be analogous state dis-

crimination laws that do provide damages. A plaintiff may also combine other remedies available under state law with the ADA.

For example, suppose a wheelchair user is physically injured from going down a steep ramp that does not meet ADA guidelines. In this scenario, a plaintiff may be able to receive compensatory damages under state personal injury and negligence laws using the lack of ADA compliance as evidence against the defendant.

Like Title II, Title III is also silent with respect to statutes of limitations. Federal courts will use the most analogous statute of limitations under state law.³⁹ Therefore, the statute of limitations may be different in every state and a potential litigant should check with an attorney to determine the applicable time limitation.

³² 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a).

³³ 42 U.S.C. § 12188(b)(1)(B).

³⁴ 42 U.S.C. § 12188(a)(2).

³⁵ 42 U.S.C. § 12205.

³⁶ *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir.2002).

³⁷ *Id.*

³⁸ *Sanglap v. LaSalle Bank, FSB*, 345 F.3d 515 (7th Cir. 2003).

³⁹ *Doukas v. Metropolitan Life Ins. Co.*, 882 F. Supp. 1197 (D.N.H. 1995); *Lewis v. Aetna Life Ins. Co.*, 993 F. Supp. 382 (E.D. Va. 1998).

Section 504 of Rehabilitation Act

1. Section 504 Report - Congressional Research Service

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against an otherwise qualified individual with a disability solely by reason of disability in **any program or activity receiving federal financial assistance . . .** This report examines Section 504, recent amendments to the definition of disability, Section 504's regulations, and Supreme Court interpretations.

The definition of disability applicable to Section 504 was amended by the ADA Amendments Act of 2008 to **conform with the new definition of disability for the ADA.**

The ADA definition defines the term disability with respect to an individual as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) **being regarded as having such an impairment** (as described in paragraph (3)).”

Subsection (b) of Section 504 defines the term “program or activity.” This subsection was added by P.L. 100-259 in 1988 in response to the Supreme Court’s narrow interpretation of the phrase “program or activity” in Title IX of the Education Amendments of 1972. The amendment clarified that **discrimination is prohibited throughout the entire institution if any part of the institution receives federal financial assistance.**

Subsection (d) of Section 504 requires that the **standards** used to determine whether there has been a violation of **Section 504** regarding employment discrimination complaints are the **same as those in the Americans with Disabilities Act.**

The Supreme Court in *Barnes v. Gorman* held in a unanimous decision that **punitive damages may not be awarded** under Section 20241 of the ADA and Section 504 of the Rehabilitation Act.

2. Federal Funding for California Judicial Branch

0150			STATE TRIAL COURT FUNDING	
Local Assistance:				
0890	Federal Trust Fund	971	2,275	2,275
0150059			Federal Child Access and Visitation Grant Program	
Local Assistance:				
0890	Federal Trust Fund	\$881	\$800	\$800
Totals, Local Assistance	\$881		\$800	\$800
SUBPROGRAM REQUIREMENTS				
0150063			Federal Court Improvement Grant Program	
Local Assistance:				
0890	Federal Trust Fund	\$90	\$700	\$700
0890 Federal Trust Fund				
APPROPRIATIONS				
001 Budget Act appropriation	\$2,351		\$4,366	\$4,362
Totals Available	\$2,351		\$4,366	\$4,362
TOTALS,	\$2,351		\$4,366	\$4,362
EXPENDITURES				

Comments:

The Judicial Council disburses federal funding to superior courts. The Los Angeles County Superior Court must receive some of that federal funding.

3. Judicial Council Press Release – 2019

Funding lawyers for California's most vulnerable

Advocates cheered \$20 million included in the budget to help fund legal representation for children and families in California's child welfare system. Coupled with **\$34 million in federal money**, the funds are expected to have a dramatic impact.

Comments:

It is likely that the Los Angeles County Superior Court received a significant amount of that federal money since it handles about 25% or more of the caseload in the state.

Application of Section 504 to State Court Services

“Section 504 of the Rehabilitation Act of 1973, as amended, applies to all entities that receive federal assistance and contains provisions that are nearly interchangeable with the Americans with Disabilities Act of 1990. Section 504 was the first civil rights legislation in United States designed to protect individuals from disability-based discrimination. The broad reach of Section 504 is indicated in the statutory language which states that **“no otherwise qualified individual with a disability in the United States...shall, solely by reason of his or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”** Section 504, 29 U.S.C. §794. All functions of a state department or agency are subject to Section 504 if “any part...is extended Federal financial assistance” (see Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988)). Each federal agency that distributes federal financial assistance has adopted Section 504 regulations covering entities that receive federal aid. Most of the court system’s federal funding comes through the Department of Justice; therefore, the applicable federal regulations are located in Title 28 Code of Federal Regulation – Judicial Administration. In addition to other remedies that may be available, administrative remedies available under Section 504 include suspension or termination of Federal financial assistance (29 U.S. C. §794a) for the particular program or part thereof that is not in compliance (28 C.F.R. §42.108(c)).” (Supreme Court of Florida – Commission on Trial Court Performance and Accountability, [Recommendations for the Provision of Court Interpreting Services in Florida’s Trial Courts](#) (2010))

Investigation and Remedies by Department of Justice

The Department is authorized under 28 C.F.R. Part 42, Subpart G, to determine the County's compliance with section 504 of the Rehabilitation Act of 1973, to issue findings, and, where appropriate, to negotiate and secure voluntary compliance agreements. Furthermore, the Attorney General is authorized, under 29 U.S.C. § 794 and 28 C.F.R. §§ 42.530 and 42.108-110, to suspend or terminate financial assistance to the County provided by the Department of Justice should the Department fail to secure voluntary compliance pursuant to Subpart G or to bring a civil suit to enforce the rights of the United States under applicable federal, state, or local law. (Settlement Agreement, United States of America and Madison County, DJ 204-72-48 <http://www.ada.gov/madisonnsa.htm>)

DENIAL OF MEANINGFUL ACCESS

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination against the handicapped by recipients of federal funds. Each federal agency has its own regulations that are applicable to federal fund recipients.

Under the Rehabilitation Act, in *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court held that:

The balance struck in *Davis* [*Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)] requires that an otherwise qualified handicapped individual 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 grantees program or benefit may have to be made. *Id.* at 301.

In a decision under Title III of the Americans with Disabilities Act (ADA), the Supreme Court held that:

Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations. In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:

"Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et. seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a)

The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act. (emphasis added). See *Bragdon v. Abbott*, 524 U.S. 624, 631-32, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998).

In a decision under Title II of the ADA, the U.S. Court of Appeals for the Ninth Circuit explained "meaningful access" as it was used in *Alexander v. Choate*. The Crowder Court explained:

The Supreme Court interpreted the Rehabilitation Act in *Alexander v. Choate*. In *Choate*, the Court concluded that Congress intended to protect disabled persons from discrimination arising out of both discriminatory animus and “thoughtlessness,” “indifference,” or “benign neglect.” The Court held, however, that judicial review over each and every instance of disparate impact discrimination would be overly burdensome. Rather than attempt to classify a type of discrimination as “deliberate” or “disparate impact,” the Court determined it would be more useful to assess whether disabled persons were denied “meaningful access” to state-provided services. (citations omitted). See *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)

Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, prohibits public entities from discriminating against the disabled. The regulations for the ADA are 28 C.F.R. Part 35.

Title II’s definition section states that “public entity” includes “any State or local government” and “any department, agency or special purpose district.” See *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 590, 119 S.Ct. 2176, 2182, 144 L.Ed.2d 540 (1999).

The U.S. Court of Appeals for the First Circuit held that the protection afforded by the ADA is characterized as a guarantee of “meaningful access” to government benefits and programs which broadly means that public entities must take reasonable steps to ensure that individuals with disabilities can take advantage of such public undertakings. See *Therault v. Flynn*, 162 F.3d 46, 48 (1st Cir. 1998).

The U.S. Court of Appeals for the Second Circuit held that otherwise qualified handicapped individuals are entitled to “meaningful access” to activities that a public entity offers under the Rehabilitation Act in *Rothschild v. Grottenthaler*, 907 F.2d 286, 292 (2nd Cir. 1990).

The U.S. Court of Appeals for the Second Circuit held that “meaningful access” applied to the ADA in *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273, 277 (2nd Cir. 2003).

The U.S. Court of Appeals for the Third Circuit held that “meaningful access” applied to Section 504 of the Rehabilitation Act in *Three Rivers Center for Independent Living, Inc. v. Housing Authority of the City of Pittsburgh*, 382 F.3d 412, 427 (3rd Cir. 2004).

The U.S. Court of Appeals for the Fifth Circuit stated that although Supreme Court precedent suggests that denial of “meaningful access” is equivalent to a full denial of access under the ADA it did not address the issue in *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 672 n.2.

The Fifth Circuit includes Louisiana, Mississippi, and Texas. Texas State Senator Rodney Ellis requested that the Texas Attorney General issue an opinion as to whether or not “meaningful access” applies to Title II of the ADA with regard to a public entity’s programs in Texas. The Texas Attorney General answered in the affirmative in Opinion No. GA-0579.

The opinion can be viewed in html format at:

<http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/htm/ga-0579.htm>

The opinion can also be downloaded in pdf format at:

<http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/pdf/ga0579.pdf>

The U.S. Court of Appeals for the Fifth Circuit had previously held that “meaningful access” applies to Section 504 of the Rehabilitation Act in *Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1988).

The U.S. Court of Appeals for the Sixth Circuit held that the ADA requires that public entities provide “meaningful access” to disabled individuals so as not to deprive them of the benefits of the services that the public entities provide in *Ability Center of Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004).

The U.S. Court of Appeals for the Eighth Circuit held that the ADA and the Rehabilitation Act require that otherwise qualified individuals with disabilities receive “meaningful access” to a public entities programs and activities in *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999).

The U.S. Court of Appeals for the Ninth Circuit held that if a public entity denies an otherwise qualified individual “meaningful access” to its services, programs, or activities by reason of his or her disability, that individual may have an ADA claim against the public entity in *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001).

The U.S. Court of Appeals for the Ninth Circuit held that Section 504 of the Rehabilitation Act guarantees “meaningful access” to programs or activities receiving federal financial assistance in *Bonner v. Lewis*, 857 F.2d 559, 561 (9th Cir. 1988).

The U.S. Court of Appeals for the Tenth Circuit held that the ADA requires public entities to provide disabled individuals “meaningful access” to their programs and services in *Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 857 (10th Cir. 2003).

The U.S. District Court for the Middle District of Florida held that the ADA requires “meaningful access” to a public entities benefits under the ADA in *Harding v. Winn-Dixie Stores, Inc.*, 907 F.Supp. 386, 391 (M.D.Fla. 1995).

So, if individuals with disabilities caused or exacerbated by second hand tobacco smoke are entitled to “meaningful access” to airports, why are they assaulted by second hand tobacco smoke in some airports?

There are a number of reasons for this and one of those reasons is that when they complain about access to airports they claim that they are being “denied a reasonable accommodation” rather

than claim that they are being denied “meaningful access” to the airport in violation of *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985)).”

Another reason is the fact that the Department of Transportation and the Federal Aviation Administration allow airports to “make reasonable accommodations on an individual basis” rather than require airports to make “meaningful access” to individuals with disabilities. (See letter to Betty Campbell at <http://www.gaspoftexas.com/bettycampbell.pdf>)

In 1996, Ms. Patricia L. Young made a complaint to the City of Dallas, Texas, alleging that she was being “denied meaningful access” to Dallas Love Field in violation of the Supreme Court decision in *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985).”

Ms. Diane Emery contacted Ms. Diana M. Sword, Director of Human Recourses, City of Dallas, every day until Ms. Sword responded to Patty’s complaint in a letter to Diane.

In her letter to Diane Emery, dated September 18, 1996, Ms. Sword stated:

I am writing to follow-up our telephone conversation regarding smoking at City facilities. The Office on Disability, Department of Human Recourses, has been working with City facilities concerning smoking as a barrier to people with respiratory disabilities. Reunion Arena and Love Field are now smoke-free environments.

See letter to Diane Emery at <http://www.gaspoftexas.com/dianeemery.pdf>.

Also, Ms. Young made a disability discrimination complaint to Michael DiGirolamo, Deputy Executive Director of Operations, DFW Airport, and that resulted in DFW Airport going smoke-free. This was reported in the media, both in print and on television.

Therefore, complaints made to public entities, such as airports, should allege “denial of meaningful access in violation of *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985).”

Also, in complaints regarding “denial of meaningful access,” the following text should be included:

Actually, the ADA language requiring “reasonable accommodation” appears in Title I of the ADA and applies only to *employers*. The language applicable to public services, benefits and programs is found in the regulations implementing Title II of the ADA. These regulations require “reasonable *modifications*” to public services and programs that discriminate on the basis of disability unless such modifications would fundamentally alter the nature of the service or program. (citing 28 C.F.R. § 35.130(b)(7)) (emphasis in original). See *Weinreich v. Los Angeles Metropolitan Transportation Authority*, 114 F.3d 976, 978 n.1 (9th Cir. 1997) *cert. denied* 118 S.Ct. 976.

The State Can Intervene When Counties Fund ADA-Noncompliant Legal Services Programs

By Thomas F. Coleman

All California counties receive funds from the state to operate legal services programs providing lawyers to respondents in limited conservatorship cases. If a program does not comply with the Americans with Disabilities Act, the entity using state funds to operate or finance the program is violating California Government Code Section 11135 because this law incorporates Title II of the ADA.

Title II requires public entities to provide people with disabilities meaningful access to services. ADA-compliant advocacy services require performance standards and training programs for appointed attorneys and a system of monitoring performance. The County of Los Angeles is not doing any of this. It pays for substandard services the same as it pays for effective services. No questions asked.

The Department of Fair Employment and Housing (DFEH) has jurisdiction to enforce Section 11135. It therefore can investigate complaints for Title II violations by a county and, if warranted, can negotiate a settlement or

file a lawsuit in state or federal court. The director may also initiate an investigation on his or her own motion and file a lawsuit for systemic violations affecting a protected class.

DFEH has not yet been presented with evidence of [systematic ADA violations](#) by the court-appointed attorney program for limited conservatorships funded by the County of Los Angeles. Spectrum Institute filed an informal [ADA complaint](#) with the county but later withdrew it when the county failed to follow its own procedures for such complaints.

If the Board of Supervisors were to restructure the legal services program to make sure that attorneys for limited conservatorship respondents are complying with the ADA, the problem of systemic and ongoing violations of Title II and Section 11135 would be moot.

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Thomas F. Coleman is the legal director of Spectrum Institute. He may be reached at: tomcoleman@spectruminstitute.org.

Government Code Section 11135

(a) No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

(b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.

(c) The protected bases referenced in this section have the same meanings as those terms are defined in Section 12926.

(d) The protected bases used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

Framework for Complaint

Government Code Section 11135

1. Section 11135

(a) No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

(b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.

(c) The protected bases referenced in this section have the same meanings as those terms are defined in Section 12926.

(d) The protected bases used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

Comments:

a. The operation of the Superior Court of the State of California for the County of Los Angeles is an activity conducted, operated, and administered by the state. Therefore, the superior court is subject to the provisions of Section 11135.

b. Section 11135 prohibits the superior court from discriminating on the basis of disability against the recipients of its services.

c. Section 11135 incorporates into state law the prohibitions and mandates of Title II of the ADA, including federal rules and regulations implementing Title II.

d. Section 11135 cannot provide less protection than Title II of the ADA. It can, however, provide greater protection than federal law.

e. The superior court may not discriminate on the basis of a perception of disability.

2. Government Code Section 12930

The department shall have the following functions, duties, and powers:

(e) To adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution, and dispute resolution functions and duties of the department pursuant to this part.

(f)(4) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 . . .

(A) Nothing in this part prevents the director or the director's authorized representative, in that person's discretion, from making, signing, and filing a complaint pursuant to Section 12960 or 12961 alleging practices made unlawful under Section 11135.

(h) To bring civil actions pursuant to Section 12965 or 12981 of this code, or Title VII of the Civil Rights Act of 1964 (Public Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. 12101, et seq.), as amended, or the federal Fair Housing Act (42 U.S.C. Sec. 3601

et seq.), and to prosecute those civil actions before state and federal trial courts.

Comments:

a. This section became effective January 1, 2017. It gives DFEH authority to investigate complaints of discrimination by any public entity covered by Section 11135.

b. Prior to January 1, 2017, victims of discrimination could only file administrative complaints with the state agency that funded the offending entity. Now they can file directly with DFEH. The only role that administrative agencies have, pursuant to Section 11136, is to file a complaint themselves with DFEH if they find probable cause to believe a state-funded entity to which they administer funds has violated Section 11135. If DFEH finds that a violation has occurred, then the funding agency can terminate some or all of the state funds the offending entity receives. Thus, a victim can bring the act of discrimination to the state agency and ask for a determination of probable cause and an agency complaint to DFEH if the agency in fact finds probable cause to believe a violation of Section 11135 has occurred.

3. *Sharkey v. O'Neal* (9th Cir 2015) 778 F.3d 767, 771-773

“We now hold that California Government Code § 11135 provides the most analogous state-law claim to a Title II claim. . . . The principal difference between section 11135 and Title II is that the former statute “**may be enforced by a civil action for equitable relief,**” Cal. Gov't.Code § 11139, whereas under the latter statute, a plaintiff may recover compensatory damages if he makes a showing of discriminatory intent. *See Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir.1998). Notwithstanding this distinction, we conclude that section 11135 is the closest state-law analog to Title II. .

.. section 11135 is subject to section 338(a)'s three-year limitations period.”

4. Statutes 1977, Chapter 975 – Original Section 11135 et seq.

An act to add Article 9.5 (commencing with Section 11135) to Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, relating to discrimination.

11135. No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

11136. Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state, has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, or any regulation adopted to implement such section, the head of the state agency shall notify the contractor, grantee, or local agency of such violation and shall, after considering all relevant evidence, determine whether there is probable cause to believe that a violation of the provisions of Section 11135, or any regulation adopted to implement such section, has occurred. In the event that it is determined that there is probable cause to believe that the provisions of Section 11135, or any regulation adopted to implement such section, have been violated, the head of the state agency shall cause to be instituted a hearing conducted pursuant to the provisions of Chapter 5 (commencing with Section 11500) of this part to determine whether a violation has occurred.

11137. If it is determined that a contractor, grantee, or local agency has violated the provisions of this article, the state agency that administers the program or activity involved shall take action to curtail state funding in whole or in part to such contractor, grantee, or local agency.

11138. Each state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state and that enters into contracts for the performance of services to be provided to the public in an aggregate amount in excess of one hundred thousand dollars (\$100,000) per year shall, in accordance with the provisions of Chapter 4.5 (commencing with Section 11371) of this part, adopt such rules and regulations as are necessary to carry out the purpose and provisions of this article.

Comments:

a. When first enacted, DFEH had no role in enforcing Section 11135. Each state agency that administered state funds to a recipient had the duty to promulgate enforcement regulations, investigate, and if there was probable cause to hold evidentiary hearings and then, if found true, to provide remedies. Significant changes were made to this

enforcement scheme effective January 1, 2017, when SB 1442 became law. (See #5)

5. SB 1442 – Effective January 1, 2017

SEC. 5. Section 11136 of the Government Code is amended to read:

11136. Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, Part 2.8 (commencing with Section 12900) of this code, Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code, or any regulation adopted to implement these sections or Article 1 (commencing with Section 12960) of Chapter 7 of this code, the head of the state agency, or his or her designee, shall notify the contractor, grantee, or local agency of such violation and shall submit a complaint detailing the alleged violations to the Department of Fair Employment and Housing for investigation and determination pursuant to Article 1 (commencing with Section 12960) of Chapter 7 of this code.

Comments:

a. In addition to giving DFEH authority to investigate violations of and enforce Section 11135, SB 1442 modified the duties of state agencies that administer state funds to recipient entities. Those agencies no longer have to promulgate regulations or conduct evidentiary hearings into alleged violations. However, head of the agency or his or her designee is given a duty to file a complaint with DFEH if the agency has reasonable cause to believe that a receipt of state funds that it administers has violated Section 11135. Such cause could come from a variety of sources, including information provided to the agency by a victim of discrimination. Thus, under this new scheme, a victim can provide such evidence to the state agency that administers funds to the offending agency, with a request to file a complaint with DFEH if it determines that the evidence supplied by the victim constitutes probable cause.

6. FEHC – March 2017 Minutes

“Authority to enforce Gov. Code § 11135 et seq. was given to the DFEH on Jan 1, 2017. This statute prohibits discrimination in any state funded program or activity. DFEH has created complaint forms and has begun receiving complaints under this statute. DFEH has conducted a statewide survey on what state departments and agencies have done in the past to ensure compliance with section 11135. This new enforcement authority also creates some urgency on the Council to amend the section 11135 regulations.”

Comments:

a. The quote above is a summary of a report of the director of DFEH to the Fair Employment and Housing Council. It confirms that DFEH was given authority to enforce Section 11135 on January 1, 2017. It would be interesting to determine if the Judicial Council or any other judicial branch entity was asked by DFEH about previous efforts to ensure compliance.



CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING PRE-COMPLAINT INQUIRY

Discrimination by State-operated, funded, or financially-assisted entity

The completion and submission of this Pre-Complaint Inquiry will initiate an intake interview with a Department of Fair Employment and Housing (DFEH) representative. The Pre-Complaint Inquiry is not a filed complaint. The DFEH representative will determine if a complaint can be accepted for investigation. Your submission of this document acknowledges that you have read and agree to the DFEH's Privacy Policy.

COMPLAINANT:

NAME:

TELEPHONE NUMBER:

Spectrum Institute (for class of persons with developmental disabilities)

818-230-5156

ADDRESS:

EMAIL ADDRESS:

tomcoleman@spectruminstitute.org

CITY/STATE/ZIP:

Palm Springs, CA 92262

Do you need an interpreter during the complaint process? No ☒ Yes ☐ If yes, indicate language _____

STATE BODY, STATE ENTITY, STATE AGENCY OR RECIPIENT OF STATE FUNDING OR FINANCIAL ASSISTANCE THAT YOU WISH TO FILE AGAINST (e.g., name of State agency or recipient of state funding or financial assistance being complained about, name of program or activity where violation occurred:

NAME:

TELEPHONE NUMBER:

Superior Court of the State of California for the County of Sacramento

818-230-5156

ADDRESS: 720 9th Street

CITY/STATE/ZIP: Sacramento, CA 95814

NUMBER OF EMPLOYEES: 787

1. I ALLEGE THAT I EXPERIENCED DISCRIMINATION OR DENIAL OF FULL AND EQUAL ACCESS

BECAUSE OF MY ACTUAL OR PERCEIVED:

- ☐ Age
- ☐ Ancestry
- ☐ Color
- ☒ Disability - (physical or mental)
- ☐ Ethnic Group Identification
- ☐ Genetic Information - (information about genetic tests or participation in clinical research or manifestation of disease)
- ☐ Marital Status
- ☐ Medical Condition - Including cancer or cancer related medical condition or genetic characteristics (a gene, chromosome or characteristic not presently associated with symptoms of disease)
- ☐ National Origin - Includes language use restriction and use and possession of a driver's license issued to persons unable to prove their presence in the U. S. is authorized under federal law
- ☐ Race
- ☐ Religion - Includes religious dress and grooming practices
- ☐ Sex - Gender
- ☐ Sex - Gender identity or Gender Expression
- ☐ Sex - Includes pregnancy, childbirth, breastfeeding and/or related medical conditions
- ☐ Sexual Orientation
- ☐ Other - (specify)

AS A RESULT, I WAS DENIED FULL OR EQUAL ACCESS TO THE BENEFITS OF, OR SUBJECT TO DISCRIMINATION UNDER, A PROGRAM OR ACTIVITY THAT WAS CONDUCTED, OPERATED, OR ADMINISTERED BY THE STATE OR A STATE AGENCY, OR A RECIPIENT FUNDED OR RECEIVING FINANCIAL ASSISTANCE FROM THE STATE OR A STATE AGENCY.

DATE OF MOST RECENT HARM (Month/Day/Year): April 2018 (current and ongoing)

2. Do you have an attorney who agreed to represent you in this matter? Yes ☒ No ☐

If yes, please provide the attorney's contact information.

Attorney Name: Thomas F. Coleman

Attorney Firm Name: Thomas F. Coleman

Attorney Address: 555 S. Sunrise Way, Suite 205 City, State: Palm Springs, CA Zip: 92264

3. Briefly describe the type of program or activity and the denial of benefits or full and equal access you experienced:

This inquiry will be filed by Spectrum Institute and others on behalf of third parties -- a class of people with developmental disabilities who are not given court-appointed attorneys in conservatorship cases in the Sacramento Superior Court. The class consists of adults whose disabilities preclude them from asking for an attorney, waiving an attorney, or knowing the value of an attorney in these cases. The class includes proposed and adjudicated conservatees with disabilities. By failing to appoint an attorney to represent them in the proceedings, the Superior Court is violating the mandates of Title II of the ADA, Section 504 of the Rehabilitation Act, and Government Code Section 11135. The nature of their disabilities precludes these litigants from representing themselves in an effective manner. Without an attorney, they lack the ability to defend their rights, to investigate the facts, to test the sufficiency of the complaint and the evidence, to question the capacity assessment, to seek less restrictive alternatives, to produce evidence in support of retention of rights, to assess the qualifications of the proposed conservator, to offer an alternative choice for conservator, etc. Without an attorney they are denied effective communication with the court, court investigator, and other participants. Without an attorney, they are denied meaningful participation in their cases. The only reason they are denied an attorney is the fact that the petitioners chose to file a petition for a general conservatorship. Had a limited conservatorship petition been filed in these cases, an attorney would have been appointed. The ADA and Section 504 are federal laws that preempt the probate code. The Sacramento Superior Court is a public entity subject to Title II of the ADA. It receives federal funds and is subject to Section 504. It is state funded and subject to Section 11135. Conservatorship respondents have qualified disabilities that entitle them to protection under these laws. There is no excuse for the court failing to appoint an attorney to advocate for and defend the rights of these involuntary litigants with disabilities. The courts appoint counsel as a matter of right when a petition for limited conservatorship is filed. It is a violation of due process and equal protection (in addition to the ADA, 504, and 11135) to fail to appoint an attorney for respondents in general conservatorship proceedings -- a proceeding that poses a greater threat to liberty.

Section 11135 incorporates the ADA as a matter of state law. ADA regulations make it clear that an interested individual or organization may file a complaint to vindicate the rights of a class or third parties who are victims of discrimination. State law allows an interested person to organization to bring a pattern and practice of discrimination to the attention of the DFEH director with a request that a director's investigation be opened that the director represent the interests of the affected class.

This pre-complaint inquiry should be construed as a referral to the director for the purpose of him initiating a director's investigation into and complaint against the Superior Court for violations of the rights of persons with developmental disabilities who recently have been who are, and who will be proposed conservatees in general conservatorship proceedings in that court and who were not given court-appointed attorneys. The inquiry will be filed with DFEH if these unlawful practices are not voluntarily corrected by the superior court.

DEMOGRAPHIC INFORMATION

THIS INFORMATION IS OPTIONAL AND IS ONLY USED FOR STATISTICAL PURPOSES.

Primary Language: n/a

Age: n/a

GENDER:

- ☐ Male
- ☐ Female
- ☒ Other

MARITAL STATUS:

- ☐ Single
- ☐ Married
- ☐ Cohabitation
- ☐ Divorced

RACE:

- ☐ American Indian or Alaskan Native
- ☐ Asian
- ☐ Black or African American
- ☐ Native Hawaiian or Other Pacific Islander
- ☐ White
- ☐ Other

ETHNICITY:

- ☐ Hispanic or Latino
- ☐ Non-Hispanic or Latino

NATIONAL ORIGIN:

- | | |
|---|--|
| <input type="checkbox"/> Afghani National Origin | <input type="checkbox"/> Italian National Origin |
| <input type="checkbox"/> American [U.S.A] National Origin | <input type="checkbox"/> Jamaican National Origin |
| <input type="checkbox"/> Asian Indian National Origin | <input type="checkbox"/> Japanese National Origin |
| <input type="checkbox"/> Bangladeshi National Origin | <input type="checkbox"/> Korean National Origin |
| <input type="checkbox"/> Cambodian National Origin | <input type="checkbox"/> Laotian National Origin |
| <input type="checkbox"/> Canadian National Origin | <input type="checkbox"/> Lebanese National Origin |
| <input type="checkbox"/> Chinese National Origin | <input type="checkbox"/> Malaysian National Origin |
| <input type="checkbox"/> Cuban National Origin | <input type="checkbox"/> Mexican National Origin |
| <input type="checkbox"/> Dominican National Origin | <input type="checkbox"/> Nigerian National Origin |
| <input type="checkbox"/> Egyptian National Origin | <input type="checkbox"/> Other National Origin |
| <input type="checkbox"/> English National Origin | <input type="checkbox"/> Other African National Origin |
| <input type="checkbox"/> Ethiopian National Origin | <input type="checkbox"/> Other Asian National Origin |
| <input type="checkbox"/> Fijian National Origin | <input type="checkbox"/> Other Caribbean National Origin |
| <input type="checkbox"/> Filipino National Origin | <input type="checkbox"/> Other European National Origin |
| <input type="checkbox"/> German National Origin | <input type="checkbox"/> Other Hispanic/Latino National Origin |
| <input type="checkbox"/> Ghanaian National Origin | <input type="checkbox"/> Other Middle Eastern National |
| <input type="checkbox"/> Guamanian National Origin | <input type="checkbox"/> Pakistani National Origin |
| <input type="checkbox"/> Haitian National Origin | <input type="checkbox"/> Puerto Rican National Origin |
| <input type="checkbox"/> Hawaiian National Origin | <input type="checkbox"/> Salvadoran National Origin |
| <input type="checkbox"/> Hmong National Origin | <input type="checkbox"/> Samoan National Origin |
| <input type="checkbox"/> Indonesian National Origin | <input type="checkbox"/> Sri Lankan National Origin |
| <input type="checkbox"/> Iranian National Origin | <input type="checkbox"/> Syrian National Origin |
| <input type="checkbox"/> Iraqi National Origin | <input type="checkbox"/> Taiwanese National Origin |
| <input type="checkbox"/> Irish National Origin | <input type="checkbox"/> Thai National Origin |
| <input type="checkbox"/> Israeli National Origin | <input type="checkbox"/> Tongan National Origin |
| | <input type="checkbox"/> Vietnamese National Origin |

DEMOGRAPHIC INFORMATION

THIS INFORMATION IS OPTIONAL AND IS ONLY USED FOR STATISTICAL PURPOSES.

DISABILITY:

- ☐ AIDS or HIV
- ☐ Blood / Circulation
- ☐ Brain / Nerves / Muscles
- ☐ Digestive / Urinary / Reproduction
- ☐ Hearing
- ☐ Heart
- ☐ Limbs [Arms / Legs]
- ☒ Mental
- ☐ Sight
- ☐ Speech / Respiration
- ☐ Spinal / Back / Respiration
- ☐ Other Disability

RELIGION:

- | | |
|--|---|
| <input type="checkbox"/> Agnostic | <input type="checkbox"/> Nonreligious |
| <input type="checkbox"/> Atheist | <input type="checkbox"/> Protestantism |
| <input type="checkbox"/> Bahai | <input type="checkbox"/> Primal-indigenous |
| <input type="checkbox"/> Buddhism | <input type="checkbox"/> Quakers |
| <input type="checkbox"/> Catholicism | <input type="checkbox"/> Rastafarianism |
| <input type="checkbox"/> Christianity | <input type="checkbox"/> Spiritism |
| <input type="checkbox"/> Confucianism | <input type="checkbox"/> Shinto |
| <input type="checkbox"/> Hinduism | <input type="checkbox"/> Sikhism |
| <input type="checkbox"/> Islam | <input type="checkbox"/> Taoism |
| <input type="checkbox"/> Jehovah's Witness | <input type="checkbox"/> Unitarian-Universalism |
| <input type="checkbox"/> Judaism | <input type="checkbox"/> Zoroastrianism |
| <input type="checkbox"/> Neo-Paganism | <input type="checkbox"/> Other |

California Department of Fair Employment & Housing Privacy Policy

The California Department of Fair Employment & Housing (DFEH) has adopted this Privacy Policy, effective January 1, 2017. DFEH values the security and privacy of your personal information and is committed to protecting your privacy rights. The DFEH seeks only to collect relevant personal information that enables us to assist you in investigating and resolving complaints of discrimination as prescribed by California Government Code sections 11135 et seq., 12900 et seq., and California Civil Code sections 51, 51.7, 52.5, and 54 et seq.

All personal information we collect is governed by the State of California Information Practices Act of 1977 (Civ. Code, §§ 1798-1798.78), Government Code sections 11015.5 and 11019.9, and the California Public Records Act (Gov. Code § 6250 et seq.).

Outlined below is our online Privacy Policy and Notice:

- [Legal Authority for Collection and Use of Information](#)
- [Disclosure and Sharing](#)
- [What happens to information you submit to us?](#)
- [Cookies](#)
- [Links](#)
- [Public Disclosure](#)
- [Minors](#)
- [Security](#)
- [Changes to our Privacy Policy](#)
- [Access and Corrections to your Personal Information](#)
- [How to contact us if you have any questions regarding this policy](#)
- [Effective date](#)

Legal Authority for Collection and Use of Information

We collect information that may be directly associated with a specific person. We call this "Personal Information," and it includes, names, addresses, telephone numbers and email addresses. We collect this Personal Information through lawful means from individuals who seek to file a complaint with the DFEH, and we use this information to establish jurisdiction and to conduct an investigation of any allegations of Civil Rights violations. If you seek to file a complaint, you are required to provide us with sufficient information in accordance with California Government Code sections 11135 et seq., 12900 et seq., and California Civil Code sections 51, 51.7, 52.5, and 54 et seq.

Disclosure and Sharing

We do not sell your personal information. Government Code section 11015.5, subdivision (6), prohibits DFEH and all state agencies from distributing or selling any electronically collected personal information about users to any third party without the permission of the user. Any distribution of electronically collected personal information will be solely for the purposes for which it was provided to us, as described below.

We also may share your personal information under the following circumstances:

1. You give us permission.

2. We receive a request from a party with legal authority to obtain the information, such as a subpoena.
3. As authorized by law, it is transferred to / shared with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the U.S. Department of Labor, the U.S. Department of Housing and Urban Development, the U.S. Department of Health and Human Services, the U.S. Department of Education, the U.S. Department of Justice, or any branch of the California State Government, or any other local or Federal agency with similar jurisdiction.
4. Non personal information, including the allegations in the complaint document itself, may be disclosed to the public under the California Public Records Act.

What happens to information you submit to us?

The Personal Information we obtain from you will be used for the purposes for which it was provided: to further the DFEH's efforts to investigate and attempt to resolve the allegations of unlawful discrimination, harassment and/or retaliation that you filed. Electronically collected Personal Information we gather about visits to our website is used to help us improve the user experience and for basic web metrics of our website.

Links

Our website may contain links to other websites on the Internet that are owned and operated by third parties. DFEH does not control the privacy policies or practices of these websites. You are advised to review the privacy policies of the third party offering the website before providing any personal information to these websites. DFEH is not responsible for the content or practices of any linked third party website and such third party websites are provided solely for the convenience and information to our visitors.

Cookies

We do not collect information such as names, addresses, and emails from individuals browsing DFEH's website. However, when you visit our website, a "cookie" may be saved on your computer. A cookie is a tiny piece of data stored by your browser that helps us recognize your unique computer and your preferences when using our website. The information DFEH automatically collects may include the type of browser used, date and time you visited the site, and web pages you visited. This information is collected to improve the user experience and for basic web metrics. The information is deleted after 30 days. This type of electronic information collection is permitted by law and is exempt from requests made under the Public Records Act.

You can refuse the cookie or delete the cookie file from your computer after you visit our website. You can find instructions for managing cookie controls on websites for particular browsers. For example:

- [Microsoft Internet Explorer browsers](#)
- [Macintosh Safari browsers](#)
- [Mozilla Firefox browsers](#)

Public Disclosure

In the State of California, laws exist to ensure that government is open and that the public has a right to access appropriate records and information possessed by state government. At the same time, there are exceptions to the public's right to access public records.

These exceptions serve various needs including maintaining the privacy of individuals. Both state and federal laws provide exceptions. All information collected at this site becomes a public record that may be subject to

inspection and copying by the public, unless an exemption in law exists. In the event of a conflict between this Privacy Notice and the Public Records Act, the Information Practices Act and/or other law governing the disclosure of records, the Public Records Act, the Information Practices Act and/or other applicable law will control.

Minors

We recognize the importance of protecting privacy where minors (a person under 18 years of age) are involved. We are committed to protecting the privacy of minors and do not knowingly collect personal information from minors or create profiles of minors through our website. Users are cautioned, however, that the collection of personal information submitted online or in an e-mail will be treated as though it was submitted by an adult. DFEH strongly encourages parents, guardians and adults to be involved in the internet activities of their children or other minors they are responsible for and to provide guidance whenever minors are asked to provide personal information online. If you believe a minor has provided us with personal information, we ask that a parent or guardian contact us at 1-800-884-1684.

Security

DFEH has put security measures in place to safeguard and protect your information from unauthorized access, disclosure, and loss. Our policy limits access to personal information to employees who have an established business need for the Personal Information including those directly involved in the filing, investigation, resolution and/or litigation of your complaint. Information that is physically located within the DFEH is protected by various security measures, which may include the use of encryption software to protect the security of an individuals' personal information during transmission and storage. Personal Information is destroyed according to the DFEH's records retention policy, and we only retain these records for as long as necessary to fulfill our business need. We train our employees on procedures and management of personal information we collect as well as on taking precautions and complying with limitations on the release of personal information.

Access and Corrections to your Personal Information

You have the right to review any Personal Information we collect about you. If you request all or a portion of the Personal Information collected about you by the DFEH, we will provide you with the Personal Information requested and explain how we use the information. You may request changes to your Personal Information you believe is incorrect by submitting a written request that credibly shows the error. If you believe that your Personal Information is being used for a purpose other than what you intended when you submitted it, you may contact us to so we can rectify the misuse. In all cases, we will take reasonable steps to verify your identity before granting access or making corrections.

How to contact us if you have any questions regarding this policy

If you have any questions or concerns about the information presented in this Privacy Notice, you may contact:

DFEH Privacy Officer
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758
1-800-884-1684

Changes to our Privacy Policy

We may update and revise our Privacy Policy. We will post any privacy policy changes on this page and, if the changes are significant, we will provide a more prominent notice.

Effective date

January 1, 2017

Lanterman Developmental Disabilities Services Act

California Welfare and Institutions Code

Statement of Rights

4502. Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California.

No otherwise qualified person by reason of having a developmental disability shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds.

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following: (a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports. (b) A right to dignity, privacy, and humane care. To the maximum extent possible, treatment, services, and supports shall be provided in natural community settings. (c) A right to participate in an appropriate program of publicly supported education, regardless of degree of disability. (d) A right to prompt

medical care and treatment. (e) A right to religious freedom and practice. (f) A right to social interaction and participation in community activities. (g) A right to physical exercise and recreational opportunities. (h) A right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect. (i) A right to be free from hazardous procedures. (j) A right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.

4502.1. The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities, including, but not limited to, regional centers, shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator. Those public or private agencies shall provide consumers with opportunities to exercise decisionmaking skills in any aspect of day-to-day living and shall provide consumers with relevant information in an understandable form to aid the consumer in making his or her choice.

Spectrum Institute

DDS Administrative Complaint Procedures Are Available for Violations of Access Rights to Conservatees and Proposed Conservatees with Developmental Disabilities

People with developmental disabilities, like everyone else, have a right of "access to the courts." This right is specifically recognized and emphasized in the portion of the California Code of Regulations implemented by the Department of Developmental Services (DDS). (17 CCR § 50510) This regulation implements the statement of rights contained in Welfare and Institutions Code Section 4502. That statute affirms the right of people with such disabilities to full participation in any program or activity that receives public funds.

Legal proceedings are an activity of the courts. Full participation in a legal proceeding would include the right to examine and evaluate pleadings, offer objections, make motions, produce evidence, challenge evidence, call witnesses, cross-examine witnesses, and file an appeal.

People with developmental disabilities are denied access to the courts and full participation in conservatorship proceedings when their disabilities prevent them from performing these activities. Appointment of counsel, therefore, would be required to ensure that they have meaningful participation in the proceedings. Furthermore, to ensure equal access, appointed counsel must perform competently and provide effective assistance. The rights of such litigants under this statute and this regulation are coextensive with their "equal access" rights under the Americans with Disabilities Act and Government Code Section 11135.

Relevant portions of Section 50510 appear below:

"Each person with a developmental disability . . . is entitled to the same rights, protections, and responsibilities as all other persons under the laws and Constitution of the State of California and the Constitution of the United States. . . These rights include, but are not limited to the following:

"(A) Access Rights . . .

(10) A right to advocacy services, as provided by law, to protect and assert the civil, legal, and service rights to which any person with a developmental disability is entitled.

(12) A right of access to the courts for purposes including, but not limited to the following:

(D) To contest a guardianship or conservatorship, its terms, and/or the individual or entity appointed as guardian or conservator."

In interpreting and enforcing Section 11135 and relevant provisions of the ADA, as these legal protections would apply to people with developmental disabilities who are involved in conservatorship proceedings, the Department of Fair Employment and Housing should do so in a manner that recognizes and protects the equal access rights of such persons under Section 4502 and Section 50510. (Cf. *Payne v. Superior Court*, 17 Cal. 3d 908 (Cal. 1976))

Furthermore, Title 17 of the California Code of Regulations establishes an administrative complaint procedure to implement the provisions of the Lanterman Act protecting the rights specified in Section 4502 when these rights are allegedly violated by any program or activity which receives public funds. This includes "access rights" such as the right of access to the courts, advocacy services, and a right to contest conservatorship proceedings. (17 CCR § 50510) Therefore, conservatees and proposed conservatees should be entitled to use the Department of Developmental Services complaint procedure (17 CCR § 50540) to contest violations of Lanterman Act rights committed by courts, court employees, public defenders, court-appointed counsel, or others who receive public funds.

Disability Rights California Can Become a Leading Advocate for Access to Justice in Conservatorship Proceedings

by Thomas F. Coleman

Disability Rights California is the “protection and advocacy” agency in California. As such, the California Legislature has given DRC authority to “[p]ursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of the rights of people with disabilities.” (Welfare and Institutions Code Section 4902(a)(2))

The State of California provides millions of dollars per year to DRC to perform advocacy functions for people with disabilities. That state funding is over and above the considerable money DRC receives from the federal government and other sources.

In addition to central staff, which includes a team of lawyers, DRC has clients’ rights advocates in each of the regional centers throughout the state. DRC’s Office of Clients’ Rights Advocacy (OCRA) has a memorandum of understanding with all 21 regional centers that requires it to “comply with all applicable state, federal, departmental and regional center laws, contracts, and MOU’s governing the protection of clients’ rights.”

Such laws include the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, California’s Lanterman Developmental Disabilities Services Act, and California Government Code Section 11135. Each of these statutes applies to adults with intellectual and developmental disabilities who receive court orders requiring them to participate in probate conservatorship proceedings. These laws guarantee people with disabilities meaningful participation and effective communication in such court proceedings.

The MOU between OCRA and each regional center specifies that clients’ rights advocates will be available for consultation to regional center clients and staff regarding conservatorship matters. Also

mentioned in the MOU’s is a role for clients’ rights advocates to investigate and process complaints for violations of Title 17 of the California Code of Regulations.

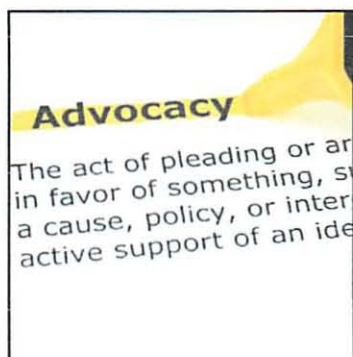
Title 17 includes a section on “access rights.” (17 CCR Sec. 50510) This includes a right to advocacy services to protect and assert the civil, legal, and service rights to which any person with developmental disabilities is entitled. It also includes a right of access to the courts to contest a conservatorship, its terms, and/or the person appointed as a conservator.

The Lanterman Act says that no person with a developmental disability shall be denied the benefits of or be subjected to discrimination under any program or activity which receives public funds. (Welfare and Institutions Code Sec. 4502) Conservatorship proceedings are activities of the courts. Courts receive public funds. It is therefore a violation of the Lanterman Act when people with developmental disabilities are denied access to justice in such proceedings.

DRC has a multi-year contract with the Department of Developmental Services. Under the contract, DRC has a duty to provide clients’ rights advocacy services responsive to the access needs of persons with disabilities. For tens of thousands of adults with developmental disabilities, there is a need for access to justice in conservatorship proceedings.

The contract specifies that DRC shall protect and assert the rights of people with developmental disabilities under Title 17 of the California Code of Regulations. Of course, this would include “access rights” in conservatorship proceedings as described in Section 50510.

In addition to investigating and taking action to resolve complaints initiated by regional center



clients or their representatives, DRC also has authority to initiate action on behalf of clients who are unable to register complaints on their own behalf. This includes clients engaged in civil proceedings. Conservatorships are civil proceedings.

Based on these statutory and contractual [grants of authority](#), it is clear that Disability Rights California should be playing a major role in advocacy for individual regional center clients whose rights are being violated in conservatorship proceedings. Such rights violations may be premised on the policies and practices of the courts, or on the failures of regional centers, court investigators, or court-appointed attorneys to protect the rights of conservatees and proposed conservatees under state and federal laws – including disability rights laws.

DRC does not have to wait for specific complaints to be presented to it. Because of the nature and extent of their disabilities, most regional center clients would not know that their rights are being violated by judges, attorneys, or other participants in conservatorship proceedings.

If DRC waits for individual complaints, the legal system will perpetually deny access to justice to regional center clients because these clients generally lack the ability to complain. Therefore, to fulfill the advocacy role mandated by statute and by contract, DRC should be pro-active. It should identify systemic deficiencies. It should shine a light on policies and practices that deprive regional center clients of the access rights to which they are entitled in conservatorship proceedings.

These deficiencies have been brought to the attention of DRC over the past several years. Individual injustices in cases such as Mickey Parisio (2012) and Gregory Demer (2013) have been presented to DRC. Unfortunately, DRC did not advocate for these individuals in their time of need.

The problem of systemic injustices and the need for class-based reform have also been brought to the attention of DRC over the years. DRC was invited to participate in a roundtable conference on conservatorship reform (2014) but did not send a representative. An invitation to a voting rights conference

(2014) yielded the same result. It was asked to support a voting rights reform bill (2014) but did not. To its credit, DRC promoted a voting rights reform bill the following year.

DRC has not participated in conservatorship reform outreach efforts over the last several years to the California Supreme Court, Judicial Council, and Department of Developmental Services. It has not weighed in on complaints to the United States Department of Justice under the Americans with Disabilities Act.

That was then. This is now. It is time for optimism and inclusion. There is room at the conservatorship reform table for Disability Rights California.

DRC has the legal mandate, funding, and contractual obligations that should prompt the organization to take a leadership role in advocating for access to justice for people with developmental disabilities in conservatorship proceedings.

The staff of DRC does not have to start from scratch. DRC attorneys can immerse themselves in the [hundreds of documents](#) that have been published in the past several years about the need for conservatorship reform in California.

Advocacy for conservatorship reform will continue, with or without DRC, but the chances of success will be much improved if DRC's leadership puts this matter on the organization's agenda and makes access to justice in conservatorships a priority.

Come on in. The water may be a little chilly, but as seasoned advocates for disability rights, DRC staff have plenty of experience being in uncomfortable situations. All they need to test the conservatorship waters is approval from DRC's board of directors so they can add their skills to this reform movement.



Thomas F. Coleman is the legal director of Spectrum Institute. tomcoleman@spectruminstitute.org
Website: www.pursuitofjusticefilm.com

A Role for OCRA in Conservatorships

Through its Office of Clients' Rights Advocacy (OCRA), Disability Rights California can help to ensure that the rights of regional center clients are respected in probate conservatorship proceedings.

Right to Counsel. A CRA (clients' rights advocate) can send a letter to the superior courts in the area of the regional center where he or she is imbedded, insisting that the courts appoint counsel to represent clients in each and every conservatorship proceeding. It should make no difference whether the case is designated as a general or limited conservatorship. If a CRA becomes aware that counsel has not been appointed for any client in such a proceeding, DRC can file a complaint with the Department of Fair Employment and Housing alleging a violation of Government Code Section 11135. DRC has standing to file such complaints and DFEH is reading and willing to process such cases when individual complaints are filed. <http://spectruminstitute.org/Sacramento/>

IPP Review. A CRA can notify the regional center where he or she is imbedded that it should initiate an Individual Program Plan review, with the assistance of a qualified professional, to determine: (1) whether a conservatorship is necessary or whether there are less restrictive alternatives that are viable; and (2) if less restrictive alternatives are viable, to develop a supported decision-making plan to present to the court; and (3) if a conservatorship is necessary, who should be appointed as conservator and what the terms and conditions of the conservatorship should be. If the regional center fails to initiate an IPP review, DRC can file a complaint with the Department of Developmental Services. <http://spectruminstitute.org/ipp-by-pvp.pdf>

Effective Representation. Clients are entitled to effective advocacy services in a conservatorship proceedings. However, clients usually are unable to determine whether they are receiving such services. Therefore, a CRA can monitor the services for them. The CRA can inquire into the training of court-appointed attorneys in the superior courts in the area serviced by the regional center. If the quality of the training appears to be deficient, DRC can file a complaint with DFEH for a violation of Government Code Section 11135. If a CRA becomes aware that an appointed attorney is engaging in unethical practices or performing deficiently, DRC can file a complaint against the attorney with the State Bar. <http://disabilityandabuse.org/strategic-guide.pdf>

CRA's are in a unique position to protect the rights of regional center clients in conservatorship proceedings. For example, the CRA associated with Alta Regional Center could have played a significant role to advocate for clients there who were being denied attorneys or whose attorneys were inadequately trained. <http://www.disabilityandabuse.org/alta-letter.pdf>

Spectrum Institute can provide a training for the staff of OCRA to acquaint them of the due process, Lanterman, and ADA rights of regional center clients in probate conservatorship proceedings. Performing the functions described above would be consistent with the mandate and role of OCRA. <https://www.disabilityrightsca.org/what-we-do/programs/office-of-clients-rights-advocacy-ocra>



California Rules of Court

(Revised January 1, 2021)

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Rule 1.100. Requests for accommodations by persons with disabilities

(a) Definitions

As used in this rule:

- (1) "Persons with disabilities" means individuals covered by California Civil Code section 51 et seq.; the Americans With Disabilities Act of 1990 (42 U.S.C. §12101 et seq.); or other applicable state and federal laws. This definition includes persons who have a physical or mental medical condition that limits one or more of the major life activities, have a record of such a condition, or are regarded as having such a condition.
- (2) "Applicant" means any lawyer, party, witness, juror, or other person with an interest in attending any proceeding before any court of this state.
- (3) "Accommodations" means actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities. Accommodations may include making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers, or certified interpreters for persons who are deaf or hard-of-hearing; relocating services or programs to accessible facilities; or providing services at alternative sites. Although not required where other actions are effective in providing access to court services, programs, or activities, alteration of existing facilities by the responsible entity may be an accommodation.

(Subd (a) amended effective July 1, 2017; adopted as subd (b) effective January 1, 1996; previously amended effective January 1, 2006, amended and relettered effective January 1, 2007.)

(b) Policy

It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system. To ensure access to the courts for persons with disabilities, each superior and appellate court must delegate at least one person to be the ADA coordinator, also known as the access coordinator, or designee to address requests for accommodations. This rule is not intended to impose limitations or to invalidate the remedies, rights, and procedures accorded to persons with disabilities under state or federal law.

(Subd (b) adopted effective January 1, 2007.)

(c) Process for requesting accommodations

The process for requesting accommodations is as follows:

- (1) Requests for accommodations under this rule may be presented ex parte on a form approved by the Judicial Council, in another written format, or orally. Requests must be forwarded to the ADA coordinator, also known as the access coordinator, or designee, within the time frame provided in (c)(3).
- (2) Requests for accommodations must include a description of the accommodation sought, along with a

statement of the medical condition that necessitates the accommodation. The court, in its discretion, may require the applicant to provide additional information about the medical condition.

- (3) Requests for accommodations must be made as far in advance as possible, and in any event must be made no fewer than 5 court days before the requested implementation date. The court may, in its discretion, waive this requirement.
- (4) The court must keep confidential all information of the applicant concerning the request for accommodation, unless confidentiality is waived in writing by the applicant or disclosure is required by law. The applicant's identity and confidential information may not be disclosed to the public or to persons other than those involved in the accommodation process. Confidential information includes all medical information pertaining to the applicant, and all oral or written communication from the applicant concerning the request for accommodation.

(Subd (c) amended effective July 1, 2017; previously amended effective January 1, 2006, and January 1, 2007.)

(d) Permitted communication

Communications under this rule must address only the accommodation requested by the applicant and must not address, in any manner, the subject matter or merits of the proceedings before the court.

(Subd (d) amended effective January 1, 2006.)

(e) Response to accommodation request

The court must respond to a request for accommodation as follows:

- (1) In determining whether to grant an accommodation request or provide an appropriate alternative accommodation, the court must consider, but is not limited by, California Civil Code section 51 et seq., the provisions of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12101, et seq.), and other applicable state and federal laws.
- (2) The court must promptly inform the applicant of the determination to grant or deny an accommodation request. If the accommodation request is denied in whole or in part, the response must be in writing. On request of the applicant, the court may also provide an additional response in an alternative format. The response to the applicant must indicate:
 - (A) Whether the request for accommodation is granted or denied, in whole or in part, or an alternative accommodation is granted;
 - (B) If the request for accommodation is denied, in whole or in part, the reason therefor;
 - (C) The nature of any accommodation to be provided;
 - (D) The duration of any accommodation to be provided; and
 - (E) If the response is in writing, the date the response was delivered in person or sent to the applicant.

(Subd (e) amended effective January 1, 2010; previously amended effective January 1, 2006, and January 1, 2007.)

(f) Denial of accommodation request

A request for accommodation may be denied only when the court determines that:

- (1) The applicant has failed to satisfy the requirements of this rule;

- (2) The requested accommodation would create an undue financial or administrative burden on the court; or
- (3) The requested accommodation would fundamentally alter the nature of the service, program, or activity.

(Subd (f) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(g) Review procedure

- (1) If the determination to grant or deny a request for accommodation is made by nonjudicial court personnel, an applicant or any participant in the proceeding may submit a written request for review of that determination to the presiding judge or designated judicial officer. The request for review must be submitted within 10 days of the date the response under (e)(2) was delivered in person or sent.
- (2) If the determination to grant or deny a request for accommodation is made by a presiding judge or another judicial officer, an applicant or any participant in the proceeding may file a petition for a writ of mandate under rules 8.485-8.493 or 8.930-8.936 in the appropriate reviewing court. The petition must be filed within 10 days of the date the response under (e)(2) was delivered in person or sent to the petitioner. For purposes of this rule, only those participants in the proceeding who were notified by the court of the determination to grant or deny the request for accommodation are considered real parties in interest in a writ proceeding. The petition for the writ must be served on the respondent court and any real party in interest as defined in this rule.
- (3) The confidentiality of all information of the applicant concerning the request for accommodation and review under (g)(1) or (2) must be maintained as required under (c)(4).

(Subd (g) amended effective January 1, 2010; previously amended effective January 1, 2006.)

(h) Duration of accommodations

The accommodation by the court must be provided for the duration indicated in the response to the request for accommodation and must remain in effect for the period specified. The court may provide an accommodation for an indefinite period of time, for a limited period of time, or for a particular matter or appearance.

(Subd (h) amended effective January 1, 2006.)

Rule 1.100 amended effective July 1, 2017; adopted as rule 989.3 effective January 1, 1996; previously amended effective January 1, 2006; previously amended and renumbered effective January 1, 2007; previously amended January 1, 2010.

Advisory Committee Comment

Subdivision (g)(2). Which court is the “appropriate reviewing court” under this rule depends on the court in which the accommodation decision is made and the nature of the underlying case. If the accommodation decision is made by a superior court judicial officer and the underlying case is a limited civil, misdemeanor, or infraction case, the appropriate reviewing court is the appellate division of the superior court. If the accommodation decision is made by a superior court judicial officer and the case is anything other than a limited civil, misdemeanor, or infraction case, such as a family law, unlimited civil, or felony case, the appropriate reviewing court is the Court of Appeal. If the accommodation decision is made by a judicial officer of the Court of Appeal, the appropriate reviewing court is the California Supreme Court.

Any program or activity that is funded by the state shall meet the protections and prohibitions of Title II of the ADA and federal rules and regulations implementing the ADA. (Cal. Gvt. Code Sec. 11135)

A public entity must offer accommodations for *known* physical or mental limitations. (Title II Technical Assistance Manual of DOJ)

Even without a request, an entity has an obligation to provide an accommodation when it knows or reasonably should know that a person has a disability and needs a modification. (DOJ Guidance Memo to Criminal Justice Agencies, January 2017)

Some people with disabilities are not able to make an ADA accommodation request. A public entity's duty to look into and provide accommodations may be triggered when the need for accommodation is obvious. (*Updike v. Multnomah County* (9th Cir 2017) 870 F.3d 939)

“If no request for an accommodation is made, the court need not provide one.”



– *Judicial Council*
2017 Brochure *

It is the knowledge of a disability and the need for accommodation that gives rise to a legal duty, not a request. (*Pierce v. District of Columbia* (D.D.C. 2015) 128 F.Supp.3d 250)

A request for accommodation is not necessary if a public entity has knowledge that a person has a disability that may require an accommodation in order to participate fully in the services. Sometimes the disability and need are obvious. (*Robertson v. Las Animas* (10th Cir. 2007) 500 F.3d 1185)

The failure to expressly request an accommodation is not fatal to an ADA claim where an entity otherwise had knowledge of an individual's disability and needs but took no action. (*A.G. v. Paradise Valley* (9th Cir. 2016) 815 F.3d 1195)

The import of the ADA is that a covered entity should provide an accommodation for *known* disabilities. A request is one way, but not the only way, an entity gains such knowledge. To require a request from those who are unable to make a request would eliminate an entire class of disabled persons from the protection of the ADA. (*Brady v. Walmart* (2nd Cir. 2008) 531 F.3d 127)

* Rule 1.100 and all Judicial Council educational materials are erroneously premised on the need for a request.

181 Cal.App.4th 702, 104 Cal.Rptr.3d 817, 10 Cal. Daily Op. Serv. 1319, 2010 Daily Journal D.A.R. 1625
(Cite as: 181 Cal.App.4th 702, 104 Cal.Rptr.3d 817)

Court of Appeal, Second District,
 Division 8.
 Daniela BISCARO, Plaintiff and Respondent,
 v.
 Marc Gregory STERN, Defendant and Appellant.

No. B205856.
 Jan. 28, 2010.

Background: Husband appealed from orders of the Superior Court, Los Angeles County, Maren E. Nelson, Commissioner, and Robert A. Schneider and Michael L. Convey, JJ., in dissolution proceeding regarding entry of default and denial of his request for accommodation of his disabilities.

Holdings: The Court of Appeal, Rubin, Acting Presiding Judge, held that:

- (1) court was required to consider and rule on husband's request for accommodation of his disabilities;
- (2) failure to do so was structural error; and
- (3) court could not confirm condominium as wife's separate property in light of her failure to identify condominium as separate property in her complaint.

Reversed and remanded.

Opinion, 103 Cal.Rptr.3d 251, vacated.

West Headnotes

[1] Civil Rights 78 ⚡1056

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1056 k. Courts and judicial proceedings.
 Most Cited Cases

Divorce 134 ⚡146

134 Divorce

134IV Proceedings

134IV(L) Trial or Hearing

134k146 k. Mode and conduct of trial in general. Most Cited Cases

Trial court was required to consider and rule on husband's request for accommodation of his permanent cognitive disabilities in dissolution of marriage proceeding through provision of a neuropsychologist; record did not suggest husband failed to comply with procedural requirements, that providing a neuropsychologist would burden the court any differently from the appointment of other facilitators, and nothing suggested that a neuropsychologist assisting husband would have necessarily altered the judicial services the court provided to the public. Cal.Rules of Court, Rule 1.100 (2009).
See 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 32; Cal. Jur. 3d, Labor, § 71; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 13:35 (CAFAMILY Ch. 13-A).

[2] Civil Rights 78 ⚡1056

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1056 k. Courts and judicial proceedings.
 Most Cited Cases

The purpose of Rule of Court governing requests for accommodations by persons with disabilities is to allow meaningful involvement by all participants in a legal proceeding to the fullest extent practicable. Cal.Rules of Court, Rule 1.100 (2009).

[3] Appeal and Error 30 ⚡907(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k906 Facts or Evidence Not Shown by Record

30k907 In General

30k907(1) k. In general. Most Cited Cases

181 Cal.App.4th 702, 104 Cal.Rptr.3d 817, 10 Cal. Daily Op. Serv. 1319, 2010 Daily Journal D.A.R. 1625
(Cite as: 181 Cal.App.4th 702, 104 Cal.Rptr.3d 817)

The general rule is that on a silent record the trial court is presumed to have been aware of and followed the applicable law when exercising its discretion; the appellate court will not presume error in this situation.

[4] Divorce 134 ⚡184(12)

134 Divorce

134IV Proceedings

134IV(O) Appeal

134k184 Review

134k184(12) k. Harmless error. Most Cited Cases

Error in failing to rule on husband's request for accommodation of disabilities was structural error in dissolution proceedings such that husband was not required to show prejudice; trial court was under a mandatory duty to rule on the motion, which requested a neuropsychologist due to husband's permanent cognitive disabilities. West's Ann.Cal. Const. Art. 6, § 13; West's Ann.Cal.C.C.P. § 475; Cal.Rules of Court, Rule 1.100 (2009).

[5] Divorce 134 ⚡875

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k875 k. Pleadings. Most Cited Cases

(Formerly 134k203)

Divorce 134 ⚡883

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k883 k. In general. Most Cited Cases
(Formerly 134k254(1))

Trial court could not confirm condominium as wife's separate property in default judgment in light of wife's failure in her original and amended petitions for dissolution of marriage to identify the condominium as her separate property. West's Ann.Cal.C.C.P. § 580.

[6] Constitutional Law 92 ⚡4010

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k4007 Judgment or Other Determination

92k4010 k. Default. Most Cited Cases

Constitutional Law 92 ⚡4386

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)18 Families and Children

92k4383 Marital Relationship

92k4386 k. Termination; divorce, dissolution, and separation. Most Cited Cases

A default judgment may not award more relief than a complaint requests without violating due process; that principle applies to marital dissolutions. U.S.C.A. Const.Amend. 14.

****819** Allen L. Lanstra, Jr., for Defendant and Appellant.

No response on behalf of Plaintiff and Respondent.

RUBIN, Acting P.J.

***705** Following the trial court's failure to rule on his request for accommodation of his disabilities, Marc Stern appeals from issuance of a restrain-

ADA Compliance

**A Request to the California Judicial Council
to Clarify the *Sua Sponte* Obligations of
Courts to Ensure Access to Justice**

Statutes, Cases, Rules, Complaints, Reports,
and Commentaries Supporting the
Expansion of Rule 1.100

Thomas F. Coleman
Legal Director
Spectrum Institute

September 24, 2019

spectruminstitute.org/ada-compliance.pdf

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Additional Steps for ADA Compliance by the Judicial Branch

<http://www.spectruminstitute.org/steps/>

Judicial Access Rights under CCR, Title 17 Section 50510

<http://spectruminstitute.org/judicial-council/ada/access-to-courts.pdf>

Activities of the Disability and Guardianship Project

<http://spectruminstitute.org/guardianship/>

<http://spectruminstitute.org/library/>

<http://www.disabilityandabuse.org/whats-new.htm>

Access to Justice: E(quality) = MC410

By Thomas F. Coleman
Daily Journal – January 6, 2017



An attorney does not have to be an Einstein to realize that a client with an intellectual or communication disability may need an accommodation in order to receive access to justice in a legal proceeding. When such disabilities become apparent, a lawyer has an obligation under state and federal law to take appropriate remedial action.

With the commemoration of the 25th anniversary of the Americans with Disabilities Act in the rear-view mirror, all attorneys should be aware that federal law requires government entities and businesses to provide reasonable accommodations to people with disabilities. This includes court-appointed and privately-retained attorneys.

Title II of the ADA requires courts to take appropriate actions to ensure that litigants with disabilities have access to justice and have an opportunity for meaningful participation in legal proceedings. Title II applies to attorneys who are appointed by the court and whose fees are paid with public funds.

Title III of the ADA requires professional offices, including law offices, to provide reasonable accommodations to clients with disabilities that necessitate such accommodation in order for them to receive the benefit of the services being provided.

There are several California statutes that impose a duty on lawyers to provide reasonable accommodations to clients with disabilities. Civil Code Section 51.4 (California Access Law) protects the right of people with physical or mental disabilities to “equal access” to business establishments. Civil Code Section 51 (Unruh Civil Rights Act) says that a violation of the federal ADA is also a violation of this statute.

The Rules of Professional Conduct also apply to legal services performed for clients who have disabilities. Under Rule 3-110, a lawyer shall not intentionally fail to perform legal services with competence. In order to show competence in a matter, a lawyer must “apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.”

When these state and federal legal mandates are applied to the representation of clients with cognitive and communication disabilities, several principles become evident.

First, when a lawyer becomes aware that his or her client has such a disability, the lawyer should assess whether he or she has the skill necessary to provide competent services to a client with such special needs. Does the attorney have knowledge about this type of a disability? Can the attorney effectively interview the client and ascertain the client’s true wishes? What types of accommodations should be used to ensure that the client receives access to justice and can have meaningful participation in the case?

If a lawyer does not have the requisite skill – or the necessary mental and emotional disposition for that matter – he or she might still represent the client if the lawyer acquires the skill before the service is scheduled to begin. (Rule 3-110, (c)). The lawyer may not need to become personally skilled to provide competent services if other professionals can be associated who will help fill the accessibility gap.

For example, if a client is deaf or hard of hearing, a sign language interpreter may be all that is necessary to ensure that the client receives access to justice in courtroom proceedings. However, for clients with intellectual or developmental disabilities, other accommodations will be necessary. Additional steps must be taken to ensure that such clients have the most effective communications with their attorneys that are possible and that they understand the court proceedings and participate in them in the most effective way that is reasonably possible.

Providing disability accommodations to clients with cognitive and communication disabilities is especially important in conservatorship cases. Lawyers appointed to represent proposed conservatees know from the get-go that the client probably has a significant mental disability and may have serious problems communicating and understanding. These lawyers also know that important liberty interests are in jeopardy. Court-appointed conservatorship lawyers, therefore, have an even stronger incentive to acquire the skills necessary to provide effective representation to clients with special needs.

There is a tool available to attorneys to assist them in meeting the needs of these clients, and at the same time fulfilling their legal duty to provide competent representation and ensure access to justice for such litigants. It is Judicial Council Form MC-410. It was formulated under the authority of Rule 1.100 of the California Rules of Court which regulates disability accommodations in judicial proceedings.

This form may be used by attorneys to request the court to provide disability accommodations for their clients. The form is submitted by the attorney to the court on an ex-parte basis. The request for accommodation is confidential. A brochure published by the Judicial Council explains that “The process for requesting accommodation under Rule 1.100 is not adversarial.”

My research suggests that MC-410 is seldom used in conservatorship cases. That is probably because the form is never mentioned in training programs for court-appointed attorneys who represent disabled clients in such cases. That is shame. The use of this form should be routine in such proceedings, or for that matter in any case where the client has a significant disability.

One use of the form would be for an attorney to request the appointment of an accommodation-assessment expert to assist the attorney in formulating a disability-accommodation plan for the client – to ensure access to justice in the proceeding, from the beginning to the end. If the client is indigent – which many conservatees are – the attorney would be entitled to have an expert appointed for such purpose, at county expense, under Evidence Code Section 730.

Perhaps it is time for bar associations to shine a spotlight on the MC-410 form, not only for the benefit of clients with disabilities, but for the benefit of lawyers who might someday find themselves on the receiving end of a complaint to the State Bar of California for violating state and federal disability rights laws and rules of professional conduct.

Thomas F. Coleman is the legal director of the Disability and Guardianship Project of Spectrum Institute. He may be contacted at tomcoleman@spectruminstitute.org.

APPLICANT'S INFORMATION TO BE KEPT CONFIDENTIAL

MC-410

APPLICANT (name): APPLICANT is <input type="checkbox"/> Witness <input type="checkbox"/> Juror <input type="checkbox"/> Attorney <input type="checkbox"/> Party <input type="checkbox"/> Other (Specify) Person submitting request (name): APPLICANT'S ADDRESS: TELEPHONE NO.:	FOR COURT USE ONLY
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
JUDGE:	
CASE TITLE:	DEPARTMENT:
REQUEST FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES AND RESPONSE	CASE NUMBER:

Applicant requests accommodation under rule 1.100 of the California Rules of Court, as follows:

1. Type of proceeding: ☐ Criminal ☐ Civil ☐ Other:
2. Proceedings to be covered (for example, bail hearing, preliminary hearing, trial, sentencing hearing, family, probate, juvenile):
3. Date or dates needed (specify):
4. Impairment necessitating accommodation (specify):
5. Type or types of accommodation requested (specify):
6. Special requests or anticipated problems (specify):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)	(SIGNATURE)
----------------------	-------------

RESPONSE

The accommodation request is **GRANTED** and the court will provide the

- ☐ requested accommodation, in whole
☐ requested accommodation, in part (specify below):

For the following duration:

- ☐ For the above matter or appearance
☐ From (dates): to
☐ Indefinite period

The accommodation is **DENIED** in whole or in part because it

- ☐ fails to satisfy the requirements of rule 1.100.
☐ creates an undue burden on the court.
☐ fundamentally alters the nature of the service, program, or activity.

For the following reason (attach additional pages, if necessary): [See Cal. Rules of Court, rule 1.100(g), for the review procedure]

- ☐ The court will provide the alternative accommodation as follows:

Date response delivered in person or sent to applicant:

(TYPE OR PRINT NAME)	(SIGNATURE)
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☐ SIGNATURE FOLLOWS THE LAST PAGE OF THE RESPONSE.

Page 1 of 1

Judicial Council of California
Americans with Disabilities Act Grievance Procedure

This Grievance Procedure is established in accordance with the requirements of the Americans with Disabilities Act of 1990 (ADA). It may be used by anyone who wishes to file a complaint alleging discrimination on the basis of disability in the provision of services, activities, programs, or benefits by the Judicial Council.

1. The complaint should be in writing and contain the complainant's name, address, and phone number, as well as a detailed description of the incident or condition, and the location, date, and time of any incident. Upon request to the Judicial Council's ADA Coordinator (contact information provided below) complaints may be filed in another format, such as in person or by telephone, that accommodates the complainant.
2. The complaint should be submitted by the complainant and/or his/her designee as soon as possible, but no later than 60 calendar days after the incident occurred, to the Judicial Council's ADA Coordinator:

ATTN: ADA Coordinator
Judicial Council and Trial Court Leadership Office
455 Golden Gate Avenue
San Francisco, CA 94102
Telephone: (415) 865-7737
JCCAccessCoordinator@jud.ca.gov

3. Upon receipt of a complaint, the ADA Coordinator or designee will investigate the complaint. The ADA Coordinator may, at his or her discretion, discuss the complaint or possible resolution of the complaint with the complainant, or seek additional information from the complainant. The complainant's failure to respond to a request for additional information may be deemed an abandonment of the complaint. The ADA Coordinator or designee may, in his/her discretion, seek assistance from other sources in responding to the complaint.
4. Within 30 calendar days of receiving the complaint, the ADA Coordinator or designee will respond in writing to the complainant. The response will explain the position of the Judicial Council, and if applicable, offer options for resolution of the complaint. Upon request to the ADA Coordinator, responses may be presented in another format, such as in person or by telephone, that accommodates the complainant. If more than 30 days is required to respond to the complaint, the ADA Coordinator will promptly notify the complainant of the expected date that a written response will be provided.
5. If the complainant and/or designee is dissatisfied with the response by the ADA Coordinator or designee, the complainant may request reconsideration of the response within 20 calendar days after the date of the response.

6. Requests for reconsideration should be in writing, and include the complainant's name, address, and phone number, a copy of the original complaint, a copy of the Judicial Council's response, and a description of issues for reconsideration. Upon request to the ADA Coordinator, requests for reconsideration may be filed in another format, such as in person or by telephone, that accommodates the complainant. Requests for reconsideration must be submitted to:

ATTN: ADA Administrator
Judicial Council and Trial Court Leadership Office
455 Golden Gate Avenue
San Francisco, CA 94102
Telephone: (415) 865-7737
JCCAccessAdministrator@jud.ca.gov

7. The ADA Administrator will review the initial complaint, written response of the ADA Coordinator or designee, and the request for reconsideration, and may at his or her discretion, discuss the complaint or possible resolution of the request for reconsideration with the complainant, or seek additional information from the complainant. The complainant's failure to respond to a request for additional information may be deemed an abandonment of the request for reconsideration. The ADA Administrator or designee may, in his/her discretion, seek assistance from other sources in responding to the request for reconsideration.
8. Within 30 calendar days of receiving the request for reconsideration, the ADA Administrator will respond in writing to the complainant with a final resolution of the complaint. Upon request to the ADA Administrator, the response may be presented in another format, such as in person or by telephone, that accommodates the complainant. If more than 30 days is required to respond to the request for reconsideration, the ADA Administrator will promptly notify the complainant of the expected date that a written response will be provided.
9. All written complaints, requests for reconsideration, and responses will be retained by the Judicial Council for at least three years.

This Grievance Procedure is not intended to resolve employment-related complaints of disability discrimination or harassment. The Judicial Council's Equal Employment Opportunity Policy; Policy Against Harassment; and/or Discrimination, Harassment, and Retaliation Complaint Resolution Policy govern employment-related complaints.

This document may be made available in alternate formats as a reasonable accommodation upon request.

From: Spectrum Institute <tomcoleman@spectruminstitute.org>
Sent: Thursday, July 20, 2017 7:14 AM
To: 'Thomas F. Coleman'
Subject: California Judicial Council is adopting a grievance procedure for complaints regarding ADA non-compliance
Attachments: chief-justice-letter-ada-2.pdf; ada-regs-part-35.pdf; judicil-council-emails.pdf

The letter sent by Spectrum Institute to the Chief Justice on May 1, 2017 (attached) prompted officials at the Judicial Council to realize that the agency did not have a grievance procedure to receive and process complaints about ADA non-compliant policies and procedures. To its credit, the Judicial Council is considering a proposal to delegate authority to its Administrative Director to develop and implement such procedures as required by the ADA and by implementing regulations of the United States Department of Justice (attached). Such a proposal is on the consent agenda at the July 28, 2017 meeting of the Judicial Council. (See below.)

The lack of procedures at the state level in California raises the question of how many local Superior Courts in the state with 50 or more employees do not have such a procedure in place – or for that matter how many large judicial branch entities or state bar associations in other states have failed to adopt such procedures.

The letter to the Chief Justice and the DOJ regulations are attached, as is a string of emails between a Judicial Council representative and attorney Thomas F. Coleman at Spectrum Institute.



Judicial Council of California

Meeting Agenda

Judicial Council

*Open to the Public Unless Indicated as Closed
(Cal. Rules of Court, rule 10.6(a))*

*Meeting materials are now only available electronically
through the hyperlinked reports on this agenda.*

Friday, July 28, 2017 8:30 AM San Francisco

455 Golden Gate Ave.
San Francisco, CA
94102-3688

Requests for ADA
accommodation
should be directed to
JCCAccessCoordinator
@jud.ca.gov

CONSENT AGENDA

A council member who wishes to request that any item be moved from the Consent Agenda to the Discussion Agenda is asked to please notify Roma Cheadle at 415-865-7640 at least 48 hours before the meeting.

17-121

Judicial Council: Delegation to Administrative Director for Approval of Americans with Disabilities Act Grievance Procedure (Action Required)

Summary:

Judicial Council staff recommends that the Judicial Council delegate authority to the Administrative Director to approve and maintain a grievance procedure drafted pursuant to the Americans with Disabilities Act (ADA) in order to reduce delays in implementing this required procedure. Consistent with the requirements of the ADA, the grievance procedure will provide members of the public with information about how to file a complaint alleging discrimination on the basis of disability in the provision of services, activities, programs, or benefits by the Judicial Council, as well as procedures for Judicial Council staff to resolve such complaints.



**Disability and Guardianship Project
Disability and Abuse Project**

9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

May 1, 2017

Honorable Tani Cantil-Sakauye
Chairperson
Judicial Council of California
350 McAllister Street
San Francisco, CA 94102

Re: Request for Information

SECOND REQUEST
sent on May 30, 2017
No response received
to first request as of
May 28, 2017

Dear Chief Justice:

I am writing to obtain contact information for the employee designated by the Judicial Council to receive and investigate complaints of noncompliance by the Judicial Council with its obligations under Title II of the Americans with Disabilities Act.

I would also like to know where I can obtain, or find online, the grievance procedures that may be used by persons wishing to complain to the Judicial Council that its policies or practices do not comply with the requirements of Title II.

I reached out to Ms. Linda McCulloh for this information last week but did not receive a response. Therefore, I am hoping that you, as Chairperson of the Judicial Council, can provide this information.

Respectfully submitted:

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Spectrum Institute

Subject: String of emails on the need for ADA grievance procedures at the Judicial Council

From: Thomas F. Coleman [mailto:tomcoleman@earthlink.net]
Sent: Tuesday, July 18, 2017 11:17 AM
To: 'Barnett, Amber' <Amber.Barnett@jud.ca.gov>
Subject: RE: Letter to Thomas Coleman

Thank you for the update.

I will look for the materials on the website tomorrow when they are posted there.

From: Barnett, Amber [mailto:Amber.Barnett@jud.ca.gov]
Sent: Tuesday, July 18, 2017 11:05 AM
To: 'tomcoleman@spectruminstitute.org' <tomcoleman@spectruminstitute.org>
Subject: RE: Letter to Thomas Coleman

Good afternoon Mr. Coleman,

I received an update regarding our agency's ADA required grievance procedure. The Judicial Council of California staff have been working to reduce delays in implementation of a grievance procedure. The matter will be on the Judicial Council's consent agenda during the July 27-28 meeting.

The agenda and materials for the July Council meeting will be posted on July 19. We will continue to keep you updated on the implementation on a grievance procedure.

Thank you,

Amber Lee Barnett, Principal Manager
Judicial Council and Trial Court Leadership | Leadership Services Division
Judicial Council of California
2860 Gateway Oaks Drive, Suite 400, Sacramento, CA 95833
916-263-1398 | amber.barnett@jud.ca.gov | www.courts.ca.gov

From: Barnett, Amber
Sent: Thursday, June 08, 2017 11:47 AM
To: 'Spectrum Institute' <tomcoleman@spectruminstitute.org>
Subject: RE: Letter to Thomas Coleman

Good afternoon Mr. Coleman,

I have received your email below and will provide responses to your questions as soon as possible. I am coordinating with the appropriate offices in our organization, and we will get back to you soon.

Thank you, Amber

Amber Lee Barnett, Principal Manager
Judicial Council and Trial Court Leadership | Leadership Services Division
Judicial Council of California
2860 Gateway Oaks Drive, Suite 400, Sacramento, CA 95833
916-263-1398 | amber.barnett@jud.ca.gov | www.courts.ca.gov

From: Spectrum Institute [<mailto:tomcoleman@spectruminstitute.org>]
Sent: Wednesday, June 07, 2017 6:07 AM
To: Barnett, Amber <Amber.Barnett@jud.ca.gov>
Subject: RE: Letter to Thomas Coleman

Dear Ms. Barnett:

I have received your message about the action being taken by the Judicial Council to comply with the ADA's requirement of having a grievance procedure and a contact person for compliance issues.

I do have an issue to raise about ADA noncompliance by the Judicial Council but I prefer to wait until the grievance procedure is finalized before I raise it. At what stage is the formulation of a grievance procedure now? Has it been reviewed by the Rules Committee? When will it be on the agenda of the full Judicial Council for consideration and approval?

Thank you.

Thomas F. Coleman
Legal Director
Spectrum Institute

From: Barnett, Amber [<mailto:Amber.Barnett@jud.ca.gov>]
Sent: Tuesday, June 6, 2017 7:41 AM
To: 'tomcoleman@spectruminstitute.org' <tomcoleman@spectruminstitute.org>
Subject: RE: Letter to Thomas Coleman

Dear Mr. Coleman:

This letter is in response to your inquiry to the Chief Justice on May 1, 2017, requesting contact information for the Judicial Council's compliance coordinator under Title II of the Americans with Disabilities Act. The Chief Justice has forwarded your request to my office.

I am the appropriate contact for ADA Title II compliance issues at the Judicial Council. My contact information is as follows:

Amber Lee Barnett, Principal Manager
Judicial Council and Trial Court Leadership | Leadership Services Division
Judicial Council of California
2860 Gateway Oaks Drive, Suite 400, Sacramento, CA 95833
916-263-1398
Amber.barnett@jud.ca.gov

In addition, you can also submit any issues, requests, or complaints through the Judicial Council's ADA Coordinator email address: JCCAccessCoordinator@jud.ca.gov. Additional information is also available on the Judicial Council website - <http://www.courts.ca.gov> – under the “Accessibility” tab.

We are unable to forward you the Judicial Council's ADA Grievance Procedure at this time. The Grievance Procedure is currently being finalized, and we will send you a copy once it has been approved.

Thank you for reaching out to the Judicial Council with your request. Please do not hesitate to contact me with any further questions.

Amber Lee Barnett, Principal Manager
Judicial Council and Trial Court Leadership | Leadership Services Division
Judicial Council of California
2860 Gateway Oaks Drive, Suite 400, Sacramento, CA 95833
916-263-1398 | amber.barnett@jud.ca.gov | www.courts.ca.gov

From: Spectrum Institute <tomcoleman@spectruminstitute.org>
Sent: Sunday, May 28, 2017 7:39 AM
To: 'Hull, Harry'
Subject: Second request to Chair of Judicial Council
Attachments: chief-justice-letter-ada-2.pdf; ada-regs-part-35.pdf

Justice Hull,

On May 1, 2017, I sent a letter in the postal mail to the Chief Justice, in her capacity as Chairperson of the Judicial Council. I requested information related to Judicial Council's procedures as required by Title II of the Americans with Disabilities Act.

I have not received a response.

I am planning to send a second request to her on Tuesday. In the meantime, I thought it would be appropriate to send you a copy of the letter and the enclosure that describes duties of Title II public entities under Section 35.107.

I look forward to receiving a response from someone at the Judicial Council with the information I am seeking.

Thomas F. Coleman
Legal Director
Spectrum Institute

p.s. A while back I sent you an email asking if there is a person replacing Douglas Miller as staff for the PMHAC. I was supposed to have him as my contact person with that committee but my emails to him have been returned as a bad email address. I did not receive a reply from you with this information. Perhaps it got lost in the shuffle. I know you are inundated with mail and email, so I am raising the issue now in case you did not see it before. Thanks.