Disability and Guardianship Project

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Ms. Anne Boomer
Administrative Counsel
Michigan Supreme Court
P.O. Box 48909
Lansing, MI 48909

Re: Appointment, Training, Standards, and Monitoring of Attorneys for Guardianship Respondents (Follow Up to Request for ADA Modifications)

Dear Ms. Boomer:

Thank you for your thoughtful reply to my letter to the Michigan Supreme Court about the appointment, training, performance standards, and monitoring of attorneys for respondents in adult guardianship cases.

I was not aware that a special statute governed the appointment of attorneys in guardianship proceedings involving adults with developmental disabilities. I am pleased to learn that the appointment of counsel for this class of guardianship respondents is mandatory.

With respect to other categories of guardianship respondents who are alleged to lack capacity to make major life decisions – such as seniors with dementia – it is unfortunate that the Legislature did not provide for the automatic appointment of counsel as a matter of right. It is appropriate for a guardian ad litem to be appointed, but as you know the duties of a GAL do not include advocacy for the respondent. The loyalty of the GAL is to the court, which is appropriate since the GAL acts as a neutral investigator, not a defender of the rights of the respondent.

Conditioning the appointment of counsel for these allegedly incapacitated individuals on a request by them or on their decision to contest the proceedings, runs contrary to Title II of the ADA which requires the court, on its own motion and without request, to ensure access to justice for those with obvious cognitive disabilities. A person with such a disability often will not know whether to contest a guardianship petition, much less what a guardianship petition is. For many of these individuals, an attempt by a GAL to explain the proceedings may not have its desired effect. Furthermore, these individuals are no less deserving of the automatic appointment of counsel than adults with developmental disabilities. So the explanation you provided in your letter does not describe a policy and practice in compliance with the ADA.

The explanation about the appointment of a GAL in conservatorship cases is similarly insufficient to provide respondents with access to effective *advocacy* services.

As for the availability of grievance procedures for people with mental incapacities, the procedure you describe is completely insufficient to ensure access to justice in the grievance process for people with cognitive and communication disabilities. Telling someone with severe mental impairments about a grievance procedure and how to use it is not adapting the grievance procedure with the type of modifications or accommodations required by Title II of the ADA.

In regards to the adoption of training and performance standards for court-appointed attorneys who represent guardianship respondents, you are correct in your assessment that doing so would require an infusion of time and money. The same could have been said in a era when sign language interpreters were first required for Deaf litigants in the courts or when structural modifications were needed to provide access to those with mobility limitations. The government found ways to address those challenges. The same can be done here to ensure access to justice for people with cognitive and communication disabilities in guardianship proceedings.

The Judicial Branch in California raised the "time and money" concern when we first approached the Judicial Council with a request to convene a task force to deal with these issues. However, after further consideration and after review of our framework for training and performance standards, the Council authorized its Probate and Mental Health Advisory Committee to initiate a two-year project to review our proposals and to consider developing new court rules to become effective January 1, 2018. I assume that the Michigan Supreme Court also has an advisory committee to assist the court in developing new court rules. Perhaps the court would consider assigning a review of our White Paper and the ADA-compliant training and performance standards to such a committee.

I appreciate your willingness to share the White Paper with court staff who are working on a "best practices" manual for appointed counsel in guardianship cases. Please ask the court to consider describing the manual as "performance standards" rather than "best practices" since the latter implies action that is desirable, while the former indicates that the described practices are required.

Finally, whichever description is given to the new guidelines, there needs to be a monitoring mechanism to ensure they are followed. As mentioned in my letter to the court, clients without disabilities can and do complain when their attorneys are perceived to be performing inadequately. Respondents with cognitive and communications disabilities, especially in guardianship cases, generally lack the ability to identify such deficiencies or to complain about them. Therefore, the usual grievance procedures need to be modified to accommodate this reality. Periodic auditing of attorney performance in such cases, perhaps by the bar association at the request of the court, is one method for the court to handle this difficult situation.

Your letter arrived just a few days after I received a response from the Oregon Supreme Court. That letter was refreshingly receptive to the suggestions offered to the court. Please share this letter and the enclosed Oregon reply with the members of the Michigan Supreme Court.

Very truly yours,

Thomas F. Coleman
Legal Director