

Supreme Court is Responsible for Complaint System Accessibility

By Thomas F. Coleman
Daily Journal / April 20, 2021

The board of trustees of the State Bar of California will be reviewing the Annual Discipline Report on Friday. During the meeting, the board should take note of a major flaw in the State Bar's complaint and discipline system: It is not accessible to people with cognitive disabilities.

The California Supreme Court should take note too.

Since the State Bar is considered to be an "arm of the Supreme Court," the seven justices are collectively responsible for the achievements and failures of the State Bar. Operating a complaint system that is not accessible to people with cognitive disabilities is a monumental failure.

The current complaint system assumes that clients will complain if their attorneys commit ethical violations or willfully provide deficient legal services. To a large extent, this assumption is reasonable. But not for clients who have dementia or developmental disabilities or other cognitive challenges.

Consider the 7,000 or so adults with cognitive disabilities who have conservatorship petitions filed against them each year in California. Or the 70,000 probate conservatees with active cases, many of which flare up occasionally and require court proceedings. Most of them have public defenders or private attorneys appointed to represent them.

These litigants depend on their attorneys to perform competent and ethical legal services. However, due to the nature of their disabilities, the clients don't realize when their attorney is willfully skipping steps or compromising their cases without their permission.

The failure of the board and the justices to take pro-active measures to address this inaccessibility problem is a violation of the Americans with Disabilities Act and the state law equivalent. 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. Gvt. Code Sec. 11135.

The ADA applies to state courts. "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 530 (2004). Title II "applies to all programs, services, or activities of public entities, from adoption services to zoning regulation." ADA Update: A Primer for State and Local Government, DOJ, p. 28. This would include the complaint and discipline system of the State Bar.

A public entity shall make reasonable modifications to policies, practices, or procedures in order to avoid discrimination on the basis of disability. ADA Title II Regulations, Section 35.130(b)(7).

Extensive research documents many instances where attorneys appointed to represent conservatees have willfully deprived their clients of competent services. However, the clients do not know they are receiving deficient services. These clients are not able to complain to the judges, file a complaint with the State Bar, or file ADA complaints with civil rights enforcement agencies. They almost never have a jury trial. They are not able to appeal to seek redress.

The Annual Discipline Report says that highest



priority in investigations is given to “cases involving vulnerable victims.” In this Tier 1 priority category are cases involving “aged, infirm, incapacitated, disabled.” Conservatees and proposed conservatees would, by definition, fall into this priority category. Unfortunately, violations of professional or ethical standards by their attorneys never reach the State Bar for the reasons stated above. For them, this “priority” is an illusory protection.

The Supreme Court and the State Bar should modify the policies of the complaint system to make its benefits available to these vulnerable litigants. “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*, 870 F.3d 939 (9th Cir 2017). Conservatorship litigants obviously need a modification of complaint system policies and procedures.

The Supreme Court and the State Bar are aware that the complaint system is not accessible in any practical way to conservatees and proposed conservatees. This problem has been brought to their attention by Spectrum Institute through letters, complaints, published commentaries, reports, and presentations at meetings of the trustees. This educational process has been ongoing since 2014. And yet, no action has been taken by the Court or the State Bar to address this continuing problem.

Two pro-active steps immediately come to mind. The State Bar, with approval of the Supreme Court, could adopt performance standards for attorneys appointed to represent conservatees and proposed conservatees. This has been done by the highest court in Maryland. The Probate and Mental Health Advisory Committee of the California Judicial Council identified the Supreme Court and the State Bar as entities with authority to promulgate such standards. Having such guidance would reduce potential violations of ethics and professional standards and therefore indirectly bring a similar type of preventive benefit to this class of litigants that State Bar investigations do.

The second step would be for the State Bar to annually audit a sample of conservatorship cases to verify whether or not there have been violations of ethics or professional standards. Audits are a part of the State Bar’s normal function. All attorneys must submit a declaration every three years that they have completed sufficient MCLE credits. Knowing that they may be audited by the State Bar helps keep everyone honest. The State Bar could require attorneys who are appointed to represent conservatees or proposed conservatees to file an annual report with the bar, including the case numbers of the cases in which they provided such representation. The State Bar could do a random audit of a sample number of cases throughout the state. This practice would put conservatorship attorneys on notice that their performance in any given case may be audited.

There may be other ways to directly or indirectly make the benefits of the complaint and discipline system available to conservatees and proposed conservatees. This is something that the Supreme Court can explore with the assistance of the recently created Ad Hoc Commission on the Discipline System.

There is growing public interest in the conservatorship system in California. Movies, conferences, and pending state legislation all have raised public awareness that something is not right with the way our vulnerable residents are being treated by the legal profession and the judiciary in these proceedings.

The Supreme Court and the State Bar should explore ways to make the benefits of the complaint system accessible to people with cognitive and communication disabilities in conservatorship proceedings. No more kicking this can down the road. ◇◇◇

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