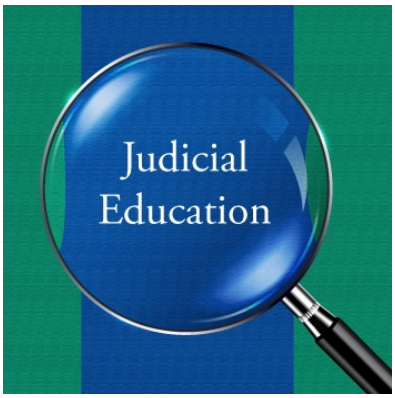
Judicial Council, Teach Thyself

By Thomas F. Coleman

President George H.W. Bush signed the Americans with Disabilities Act into law on July 26, 1990. The measure went into effect on Jan. 1, 1992.

Even though nearly 30 years have passed since Congress approved this landmark disability rights law, the judicial branch of California still does not understand it and as a result courts throughout the state are not implementing it properly.

This problem was the focus of my remarks at a meeting of the California Judicial Council last week. I explained that actions of this rule-making body are violating Title II of the ADA provisions that apply to state and local courts. In *Tennessee v. Lane,* 541 U.S. 509 (2004), the U.S. Supreme Court upheld the power of Congress to regulate the courts in this manner.



Along with my verbal remarks, I submitted a report asking the Judicial Council to make changes to court rules and educational materials so that judges and court employees are correctly advised of their duties under the ADA. The Judicial Council has been misinforming the judiciary about the requirements of the ADA since the time it adopted Rule 1.100 (formerly Rule 989.3) in 1996. It is time for the chief justice and other members of the Judicial Council to acknowledge this problem and take corrective action.

So what's the problem? What exactly does the Judicial Council misunderstand? Essentially, the error rests on its insertion of a premise into the ADA that does not exist. The Judicial Council believes that unless a request for an accommodation is made by a litigant or witness or other user of court services, that judges and court staff have no obligations under the ADA. That is a false premise.

Rule 1.100 is titled "Requests for Accommodations by Persons with Disabilities." It contains procedures the courts should use if and when someone asks for an accommodation. The rule is silent on what should happen when judges or court employees become aware that an individual has a serious disability that interferes with his or her participation in legal proceedings but the person does not make a request. Perhaps individuals are unable to do so because they have cognitive or communication disabilities that preclude them from asking.

Reports, brochures, and other materials on the website of the judicial branch all give the impression that courts have ADA obligations only when requests for accommodations are made. In fact, one brochure comes right out and states: "If no request for accommodation is made, courts need not provide one." You can't get more explicit than that.

The Center for Judicial Education and Research (CJER) publishes educational materials, produces training videos, and conducts seminars to educate judges and court employees of their duties under the ADA. I reviewed these materials pursuant to an administrative records request. What I discovered confirmed that the misunderstanding of the ADA permeates everything that CJER has produced on this topic.

Judges throughout the state are relying on the Judicial Council and CJER for guidance. Unfortunately, when it comes to judicial duties under the ADA, this reliance has been misplaced.

The statutory language of Title II of the ADA says nothing about requests for accommodations. Regulations adopted by the Department of Justice to implement Title II also do not mention the need for a request. Numerous federal court decisions have clarified that a request is not required in order for service providers to have a duty to provide an accommodation.

To reiterate, statutory provisions, DOJ regulations, and a long line of federal precedents all send the same message to state and local courts: requests are not required. Rather, federal law tells courts they have a duty to provide an accommodation, even without a request, when they know that a litigant has a disability that interferes with effective communication or meaningful participation in a court proceeding. It is the *knowledge* of such a condition, not a request, that triggers ADA duties.

State and federal law could not be clearer. 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. (Government Code Section 11135) The Judicial Council, appellate courts, and superior courts are funded by the state.

A public entity must offer accommodations for *known* physical or mental limitations. *See* 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. *See* 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,* 930 F.3d 939 (9th Cir 2017)

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,* 128 F.Supp.3d 250 (D.D.C. 2015)

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,* 531 F.3d 127 (2nd Cir. 2008)

The erroneous interpretation of the ADA by the Judicial Council has its most severe impact on seniors with cognitive challenges and adults with developmental disabilities who are implicated in probate conservatorship proceedings. The moment a verified petition is filed, the court knows that the target of the proceeding most likely needs an accommodation in order to participate in the proceeding in a meaningful way. Despite this knowledge, judges and court staff are not conducting an assessment of what those accommodations should be. Instead, relying on erroneous advice from the Judicial Council, they do nothing.

At last week's meeting of the Judicial Council, a new rule was adopted requiring court-appointed attorneys in probate conservatorship proceedings to receive training on a variety of important topics. Among them is training on the requirements of the ADA.

How ironic. Attorneys will be required to take ADA training classes, while the Judicial Council continues to instruct judges, attorneys, and the public with an erroneously narrow court rule and misleading educational materials.

Before this new training requirement goes into effect on Jan.1, 2020, I have a bit of advice to share: "Judicial Council, teach thyself." ◊◊◊

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