

# Sitting Ducks: Courts that Fail to Appoint Attorneys for Guardianship Respondents Are Targets for ADA Complaints

By Thomas F. Coleman

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

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

Some 22 states fail to provide for the mandatory appointment of counsel in these cases. The ADA does not permit access to justice for litigants with known cognitive and communication disabilities to be left to the discretion of judges. It is mandated in all cases.

Equal protection of the law requires that *all* litigants with cognitive and communication disabilities receive accommodations to ensure they have meaningful participation in their guardianship cases. They must be provided supports and services to enable them to probe the sufficiency of evidence against them and to assist them in producing evidence showing that less restrictive alternatives – such as supported decision making – may be feasible. Appointment of competent counsel is the only type of accommodation that will meet these needs. Seniors with age-related cognitive impairments, and adults of all ages with intellectual and developmental disabilities are not equipped to represent themselves in these complex legal proceedings.

The 22 “sitting ducks” are: California, Colorado, Hawaii, Illinois, Indiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South

Dakota, Tennessee, Utah, Virginia, Washington, and Wisconsin. These states are prime targets for complaints to the United States Department of Justice which investigates alleged violations of Title II of the ADA and Section 504 by state and local courts. These states will have a hard time justifying the refusal to do what most states have been doing for years: appointing an attorney to ensure that guardianship respondents have access to justice in all cases.

The Chief Justice in these states should initiate a plan – by adopting a court rule or seeking new legislation – to ensure that appointed counsel is mandatory in all adult guardianship cases. The ADA was adopted 28 years ago. The time for ensuring access to justice in guardianship cases is long overdue.

Spectrum Institute has publications to assist courts become part of the access-to-justice majority. A starting point would be to review a White Paper submitted to the U.S.

Dept. of Justice titled “Due Process *Plus*: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases.”

<http://spectruminstitute.org/white-paper/>

Reformers know that the mandatory appointment of counsel is just the beginning of a longer process. Proper performance standards and training requirements must also be enacted and implemented. Judicial administrators should consider training standards like those under review by the California Judicial Council.

<http://spectruminstitute.org/attorney-proposals/>

The courts in these 22 states do not have to remain targets for Section 504 lawsuits or Title II ADA complaints. They can move into a safe zone by simply doing what the law has required for years – providing access to justice for guardianship respondents by appointing counsel to represent them in *every* case.

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Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization promoting guardianship reform. [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)

The Sacramento Superior Court is the first court in the nation to receive an ADA complaint for not appointing counsel in these cases.

