The Washington Supreme Court Has a Duty to Bring the State's Guardianship System Into Compliance with the ADA

By Thomas F. Coleman
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In March 2016, Spectrum Institute issued a special report to the Washington Supreme Court. It explained that the judicial branch has a duty to appoint, train, and supervise attorneys to ensure that they provide effective advocacy services to respondents involved in adult guardianship cases. (http://www.spectruminstitute.org/gap)

There are more than 20,000 adults under an order of guardianship in Washington state. Many of these individuals are seniors with dementia, while others are people with intellectual and developmental disabilities, and still others are adults who acquired cognitive disabilities due to an accident or illness.

Hundreds of new petitions for guardianship are filed each year, thus adding more Washingtonians to the guardianship rolls. In each of these new cases, a judge must decide whether an individual retains any of his or her decision-making rights – in matters such a health, finances, residence, sex, marriage, education, vocation, or social and recreational opportunities – or whether to transfer such control to another person. Fundamental liberties are at stake in what the court decides.

Most of these individuals lack the ability to understand complex legal proceedings or to advocate for themselves. Due process requires that a lawyer must be appointed to advocate for the rights of these individuals and to help them navigate through the legal process to make sure that all participants in the proceedings – – judges, guardians ad litem, etc – are following the law.

These court-appointed attorneys cannot provide competent representation unless they: (1) know what the law expects them to do (performance standards); and (2) understand applicable legal, medical, and psychological issues (training) ; and (3) investigate the facts, consult with qualified capacity experts, find ways to help their clients understand the proceedings and to communicate with them, and take active measures to protect the rights of their clients (advocate and defend).

Despite their disabilities, the clients of these appointed attorneys are entitled to "access to justice" in these proceedings. The Americans with Disabilities Act requires courts to use pro-active measures to ensure that litigants with known disabilities have meaningful participation in their cases.

Even without a request, a public entity must provide necessary supports to maximize the possibility that someone with a known disability is able to have meaningful participation in the service being provided. Appointing an attorney is one such step in a judicial proceeding. But that may not be sufficient, especially if the attorney does not have performance standards or training.

Clients without disabilities in other types of cases – criminal law, family law, civil law – are likely to know when their attorneys are not performing up to par. If the lawyer's advocacy is perceived to be deficient, the client can complain to the judge or file a complaint with the State Bar. But clients who have cognitive disabilities are not likely to spot poor representation.

Because of the nature of their disabilities, they cannot complain of deficient performance. They are at the mercy of the attorneys and the courts who appointed the attorneys as to whether they receive access to justice or not. It is therefore

imperative that the normal complaint procedures – which assume the client has the ability to protest – be modified to account for situations in which clients cannot complain because of a known disability. Some form of monitoring may be required to fill the justice gap in this area.

All of this and more was brought to the attention of the Washington Supreme Court in *The Justice Gap* – the 32-page special report issued by Spectrum Institute last year. More than 50 pages of exhibits accompanied that report.

The cover letter that transmitted the report and exhibits to the Supreme Court was informational in nature. It assumed that the court would take some form of action based on the detailed flaws in the administration of justice described in the report. It also assumed that the court would take the matter even more seriously, considering that segments of the report explained how these failures violate Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

The report and exhibits highlighted the duty of the court under both of these federal laws to ensure access to justice to people with disabilities in guardianship proceedings.

More than 18 months have passed and it appears that no significant changes have occurred in guardianship practice and procedure in Washington State. There are no performance standards for court-appointed advocacy attorneys. Training programs for such attorneys are not required. There is no mechanism to monitor the performance of these attorneys. Worse yet, attorneys are not even appointed in many cases.
The justice gap persists due to systemic flaws in the guardianship system. It is clear that the informational approach did not work.

As a result, Spectrum Institute has decided to file a formal complaint with the Washington Supreme Court about the noncompliance of the state's guardianship system with the ADA and Section 504. The victims of the justice gap cannot themselves complain about these systematic violations of federal law.

As individuals, they do not know how to appeal on their own – and certainly their appointed attorneys will not file appeals to challenge their own performance in these cases. As a class, people with intellectual and developmental disabilities who are under orders of guardianship or who are in an active initial proceeding are also not able to file formal complaints. They lack the necessary understanding and communication abilities to do so.

Therefore, the task of complaining – speaking truth to power – is being assumed by Spectrum Institute as an ADA advocacy agent for people with disabilities who are being shortchanged by the current guardianship system.

As the attachments to this commentary show, the Washington Supreme Court has ample authority to adopt rules of practice and procedure to significantly close the justice gap in guardianship proceedings. The Legislature has acknowledged the primary authority of the courts when it comes to the guardianship system.

Certainly there is a legislative role in reform, but the Supreme Court has a special duty to ensure ADA-compliant access to justice for people with disabilities in these proceedings. Hopefully, the filing of this formal complaint will elevate this issue and give it the priority it deserves on the court's administrative agenda.

ADA Compliance Duties

The Americans with Disabilities Act was passed by Congress more than 25 years ago. The law's constitutionality has been upheld by the United States Supreme Court as a valid exercise of federal authority over the states.

The ADA builds upon and extends beyond the requirements of federal due process. The Due Process Clause of the Fourteenth Amendment requires state courts to protect the procedural and substantive rights of litigants in state proceedings. The ADA goes even further and may require extra accommodations to people with disabilities involved in legal proceedings.

The term "Due Process *Plus*" describes the duties of judges and court-appointed lawyers who interact with litigants with cognitive and communication disabilities in state guardianship proceedings. (*Due Process Plus: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Proceedings – 2015*) *Due Process Plus* is a White Paper submitted by Spectrum Institute to the U.S. Dept. of Justice. (http://spectruminstitute.org/white-paper/)

While no one would seriously doubt that the ADA applies to state guardianship proceedings, the Washington Supreme Court has not directly written about the rights of guardianship respondents under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. The court has not used its *adjudicative* authority to address this issue due to the fact that appeals by guardianship respondents are virtually nonexistent. Neither has the court used its *administrative* authority to address the role of the ADA and in guardianship cases. Although the WINGS project is looking at a variety of guardianship issues, the ADA is not one of them.

Title II of the ADA applies to services provided by public entities. The term "public entity" includes state and local courts. The service provided by courts in Washington in guardianship proceedings is the administration of justice.

Under Title II, judges, court-appointed advocacy attorneys, guardians ad litem, and other court-appointed or supervised participants must take affirmative steps to ensure that litigants with cognitive and communication disabilities receive access to justice in guardianship proceedings. Under the concept of Due Process *Plus*, extra steps (modifications of normal policies and practices) may be required to ensure effective communication between the litigant and all participants in the proceedings.

In addition to ensuring effective communication, various supports and services may be necessary to maximize the prospect that a litigant with serious disabilities has meaningful participation in all stages of the proceeding – both in and out of court. The duty to provide such supports and services does not depend on a request from a litigant with disabilities – especially when the court or court-appointed lawyers know that the nature of the disability precludes the litigant from making such a request.

The responsibility of judges to provide, and for court-appointed attorneys to seek, accommodations or modifications is *sua sponte* when it is known that a serious disability may hinder a litigant's ability to have meaningful participation in the case. It is obvious in guardianship proceedings – just by virtue of the allegations made in the petition – that the respondent has serious cognitive disabilities and may have significant communication and other disabilities as well.

The duty of a public entity to provide meaningful access to its services actually pre-dates the passage of the ADA. It is rooted in Section 504 of the Rehabilitation Act of 1974 – a federal law that did, and still does, apply to state and local government entities. Speaking of Section 504, the United States Supreme Court said: "[A]n otherwise qualified handicapped individual must 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 grantee's program or benefit may have to be made." (Alexander v.

Choate, 469 U.S. 287, 301 (1985))

The requirement of "meaningful access" to public services is not limited to Section 504. Many federal appellate courts have ruled that the ADA also requires public entities to provide "meaningful access" to people with disabilities so as not to deprive them of the benefits of the services provided. (Ability Center of Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004); Randolph v. Rogers, 170 F.3d 850 858 (8th Cir. 1999); Lee v. City of Los Angeles, 350 F.3d 668, 691 (9th Cir. 2001); Chaffen v. Kansas State Fair Board, 348 F.3d 850, 857 (10th Cir. 2003)).

A subtle clarification should be made at this point. ADA terminology makes a distinction between "accommodations" and "modifications." Under Title I of the ADA, a "reasonable accommodation" is only required by employers to avoid discrimination against employees with disabilities. Under Title II, public entities have an obligation to make "reasonable modifications" of policies and practices to ensure meaningful access to their services.

The two terms, however, may pose a distinction without a difference. For all practical purposes, the two terms are essentially equivalent. (McGary v. City of Portland, 386 F.3d 1259, 1266, n.3 (9th Cir. 2004). Courts often use the terms interchangeably. (Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997)).

Another requirement of the ADA is that a public entity take appropriate steps to ensure that communications with recipients of its services are as effective as communications with others. (Robertson v. Las Animas County Sheriff's Department, 500 F.3d 1185 (10th Cir. 2007)) To fulfill this duty, an entity may need to provide auxiliary aids and services.

The duty to provide accommodations, modifications, and effective communications applies to "known" disabilities. An entity, such as a court, cannot take steps to respond to a disability it does not know about. As the court in Robertson explained: "[T]he entity must have knowledge that the individual is disabled, either because the disability is obvious or because the individual (or someone else) has informed the entity of the disability." In other words, it is the knowledge of the disability, even without a request for accommodation, that triggers the entity's obligation to take reasonable steps to compensate for the disability in order to maximize the possibility of meaningful access to the services.

In the context of guardianship proceedings, the mere filing of a petition should be sufficient to trigger a duty of the court to inquire into the types of modifications or the extent of supports and services that are necessary to give the respondent meaningful access to the legal proceedings. The same is true about the court's duty to ensure effective communications between the respondent and all court participants.

The filing of a guardianship petition is predicated on allegations that a respondent has significant cognitive or other disabilities. The mere filing of a guardianship petition, therefore, puts the court on notice that the respondent has a known disability that may require accommodations. In addition, other documents submitted with the petition would give the court and attorneys additional information as to the types of disabilities the respondent has.

A recent publication issued by the U.S. Department of Justice explains these issues in the context of criminal justice proceedings involving people with intellectual and developmental disabilities. (https://www.ada.gov/cjta.html) The principles and examples contained in this DOJ publication should be helpful to courts in Washington as to the types of actions that may be required by the ADA to ensure access to justice in adult guardianship proceedings. (http://disabilityandabuse.org/doj-guidance.pdf)

A review of The Justice Gap report submitted in March 2016 to the Washington Supreme Court – and the many exhibits foundational to that report – should help that court to understand the need for it to exercise its administrative authority to ensure access to justice for litigants with disabilities in guardianship proceedings. Many of the "Due Process *Plus*" deficiencies in the guardianship system are identified in those materials.

Whether the Judicial Branch is fulfilling its responsibility to ensure access to justice in guardianship proceedings should be subject to a "pass-fail" test. As things now stand, judges, court-appointed attorneys, and other court-supervised personnel would not pass an ADA compliance test if the Department of Justice were to investigate the guardianship system in Missouri as it currently operates. Compliance with federal law is not "graded on the curve."

Washington has no performance standards for advocacy attorneys who represent respondents in guardianship proceedings. These court-appointed personnel are not receiving meaningful training on legal and medical issues involving litigants with intellectual and developmental disabilities. There is no training on how to maximize effective communication; nothing on forensic interviewing of clients in this special needs population; no educational programs on the ADA and its application to guardianships.

The Supreme Court should convene an Advisory Committee on Access to Justice in Guardianship Proceedings to identify ways in which the court can better fulfill its duties under Title II of the ADA by making state guardianship proceedings compliant with federal law.

The Washington Supreme Court has had duties under the ADA for more than 25 years, and under Section 504 for even longer. The court should exercise its administrative authority, sua sponte, to ensure that guardianship proceedings comply with access-to-justice requirements of the ADA.

An ADA violation in a legal proceeding may create "structural error" that requires reversal per se. No showing of prejudice is needed because a presumption of prejudice exists.

Some errors in civil cases are reversible per se, "primarily where the error calls into question the very fairness of the trial or hearing itself." (Biscaro v. Stern, 181 Cal.App. 4th 702 (2009)) "Wrongful denial of an [ADA] accommodation is structural error infecting a legal proceeding's reliability, which stands to reason because an accommodation's purpose is to help a party meaningfully participate in a way that enhances our confidence in a proceeding's outcome." (Id, at p. 710)

By failing to consider ADA accommodations or modifications of normal practices on their own motion at the initial stages of a guardianship proceeding, judges in Washington have been engaging in structural error in hundreds of cases each year. Similarly, structural error is being committed on a regular basis by the inaction of court-appointed advocacy attorneys who fail to assess communication needs or identify the supports and services needed to enhance access to justice for guardianship respondents.

The Supreme Court should use its administrative authority to ensure that the guardianship system complies with the ADA. Adopting performance standards for, and requiring access-to-justice training of appointed attorneys – plus implementing and effective way to monitor their services – would be a good place to start. Even more foundational would be requiring appointment of an advocacy attorney in each and every case. ◊◊◊

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