Access to Justice: E(quality) = MC410

By Thomas F. Coleman
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An attorney does not have to be an Einstein to realize that a client with an intellectual or communication disability may need an accommodation in order to receive access to justice in a legal proceeding. When such disabilities become apparent, a lawyer has an obligation under state and federal law to take appropriate remedial action.

With the commemoration of the 25th anniversary of the Americans with Disabilities Act in the rear-view mirror, all attorneys should be aware that federal law requires government entities and businesses to provide reasonable accommodations to people with disabilities. This includes court-appointed and privately-retained attorneys.

Title II of the ADA requires courts to take appropriate actions to ensure that litigants with disabilities have access to justice and have an opportunity for meaningful participation in legal proceedings. Title II applies to attorneys who are appointed by the court and whose fees are paid with public funds.

Title III of the ADA requires professional offices, including law offices, to provide reasonable accommodations to clients with disabilities that necessitate such accommodation in order for them to receive the benefit of the services being provided.

There are several California statutes that impose a duty on lawyers to provide reasonable accommodations to clients with disabilities. Civil Code Section 51.4 (California Access Law) protects the right of people with physical or mental disabilities to "equal access" to business establishments. Civil Code Section 51 (Unruh Civil Rights Act) says that a violation of the federal ADA is also a violation of this statute.

The Rules of Professional Conduct also apply to legal services performed for clients who have disabilities. Under Rule 3-110, a lawyer shall not intentionally fail to perform legal services with competence. In order to show competence in a matter, a lawyer must "apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."

When these state and federal legal mandates are applied to the representation of clients with cognitive and communication disabilities, several principles become evident.

First, when a lawyer becomes aware that his or her client has such a disability, the lawyer should assess whether he or she has the skill necessary to provide competent services to a client with such special needs. Does the attorney have knowledge about this type of a disability? Can the attorney effectively interview the client and ascertain the client's true wishes? What types of accommodations should be used to ensure that the client receives access to justice and can have meaningful participation in the case?

If a lawyer does not have the requisite skill – or the necessary mental and emotional disposition for that matter – he or she might still represent the client if the lawyer acquires the skill before the service is scheduled to begin. (Rule 3-110, (c). The lawyer may not need to become personally skilled to provide competent services if other professionals can be associated who will help fill the accessibility gap.

For example, if a client is deaf or hard or hearing, a sign language interpreter may be all that is necessary to ensure that the client receives access to justice in courtroom proceedings. However, for clients with intellectual or developmental disabilities, other accommodations will be necessary. Additional steps must be taken to ensure that such clients have the most effective communications with their attorneys that are possible and that they understand the court proceedings and participate in them in the most effective way that is reasonably possible.

Providing disability accommodations to clients with cognitive and communication disabilities is especially important in conservatorship cases. Lawyers appointed to represent proposed conservatees know from the get-go that the client probably has a significant mental disability and may have serious problems communicating and understanding. These lawyers also know that important liberty interests are in jeopardy. Court-appointed conservatorship lawyers, therefore, have an even stronger incentive to acquire the skills necessary to provide effective representation to clients with special needs.

There is a tool available to attorneys to assist them in meeting the needs of these clients, and at the same time fulfilling their legal duty to provide competent representation and ensure access to justice for such litigants. It is Judicial Council Form MC-410. It was formulated under the authority of Rule 1.100 of the California Rules of Court which regulates disability accommodations in judicial proceedings.

This form may be used by attorneys to request the court to provide disability accommodations for their clients. The form is submitted by the attorney to the court on an ex-parte basis. The request for accommodation is confidential. A brochure published by the Judicial Council explains that "The process for requesting accommodation under Rule 1.100 is not adversarial."

My research suggests that MC-410 is seldom used in conservatorship cases. That is probably because the form is never mentioned in training programs for court-appointed attorneys who represent disabled clients in such cases. That is shame. The use of this form should be routine in such proceedings, or for that matter in any case where the client has a significant disability.

One use of the form would be for an attorney to request the appointment of an accommodation-assessment expert to assist the attorney in formulating a disability-accommodation plan for the client – to ensure access to justice in the proceeding, from the beginning to the end. If the client is indigent – which many conservatees are – the attorney would be entitled to have an expert appointed for such purpose, at county expense, under Evidence Code Section 730.

Perhaps it is time for bar associations to shine a spotlight on the MC-410 form, not only for the benefit of clients with disabilities, but for the benefit of lawyers who might someday find themselves on the receiving end of a complaint to the State Bar of California for violating state and federal disability rights laws and rules of professional conduct.

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