

November 10, 2019

Mr. Alan Steinbrecher
Chair, Board of Trustees
State Bar of California

Re: Public Comment and Request for Action

Dear Mr. Steinbrecher:

On behalf of Spectrum Institute, I am submitting these written comments and attachments to the Board of Trustees in lieu of my personal appearance at the board's meeting on November 14. I will be in San Francisco that day and very much wanted to address the board in person. Unfortunately, the Judicial Council has scheduled its meeting at the same time and I have an ongoing commitment to appear at its meetings to advocate for reforms in the probate conservatorship system.

The State Bar of California should be playing a major role in protecting the right of seniors and other adults with disabilities to effective representation of counsel in judicial proceedings. That right is being routinely violated both in policy and practice in probate conservatorship proceedings. Conservatees and proposed conservatees are all too often victims of willful violations of ethics and professional standards by court-appointed attorneys who represent them. Because of their cognitive disabilities, this population lacks the practical ability to access the complaint system of the State Bar. As a result, individuals and the class as a whole are not able to receive the remedial and prophylactic benefits of the complaint system.

I would like to have ongoing conversations with the Executive Director of the State Bar and the staff who operate the complaint system, the office of attorney regulation, and the office of certification about these matters.

This communication to you follows years of unsuccessful attempts to engage the leadership of the State Bar on these issues. This track record reflects poorly on the Supreme Court of California since the State Bar operates under the supervision of that Court.

I look forward to receiving a positive response to this request – one that sets in motion a series of meetings and conversations focused on improving legal services for seniors and people with disabilities who find themselves involuntarily entangled in probate conservatorship proceedings.

Respectfully yours,

A handwritten signature in blue ink that reads "Thomas F. Coleman". The signature is fluid and cursive, with a large initial 'T' and 'C'.

Thomas F. Coleman
Legal Director
Spectrum Institute
(818) 482-4485

p.s. Please share this communication with all members of the Board of Trustees. I was only able to find email addresses for a few of them.

Attached: Comments on Strategic Plan; ADA Request to State Bar

cc: Members of the State Bar Board of Trustees
Ms. Leah Wilson, Executive Director
Mr. Jorge Navarrete, Supreme Court Administrator

A Commentary by Spectrum Institute
on the 2017–2022 Strategic Plan
of the State Bar of California

Board of Trustees Meeting / November 14, 2019

**The Strategic Plan is Failing Seniors and Other
Adults with Disabilities Who Are Involuntary
Litigants in Probate Conservatorship Proceedings**

Mission Statement

“The State Bar of California's mission is to protect the public and includes the primary functions of licensing, **regulation and discipline** of attorneys; the advancement of the **ethical and competent practice of law**; and support of efforts for **greater access** to, and inclusion in, the legal system.”

Comment: The goals articulated in the mission statement of the State Bar are not being implemented effectively in probate conservatorship proceedings. Seniors and other adults with cognitive disabilities are sometimes not being represented by counsel at all, and when they do receive appointed counsel, many of these attorneys are not providing services that are ethical and competent. These litigants are not receiving the benefit of the State Bar’s regulatory system and do not have meaningful access to the discipline system. The State Bar should develop specific methods to give these litigants greater access to ethical and competent representation and when that does not occur to give them access to the complaint and discipline system.

Goal 2:

“**Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California . . .**”

Objectives:

“No later than July 1, 2021, create a fully articulated preventative education approach to include a self-assessment component as well as client trust accounting modules which may be mandatory for some attorneys.”

Comment: There should be a preventative education approach developed for public defenders and private attorneys who are appointed to represent seniors and other adults with disabilities in probate conservatorship proceedings. Due to their cognitive and communication disabilities, most of these litigants are not able to access the complaint and discipline system of the State Bar. Therefore, a preventative education approach should be developed to reduce the risk of incompetent representation and ethics violations by these attorneys.

Goal 4:

“Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias . . .”

Objectives:

“Study and implement improved programmatic approaches to increasing access to justice.”

Comment: The State Bar should review problems that have been identified, in both policy and practices, that deprive seniors and other adults with disabilities from having access to justice in probate conservatorship proceedings. Many of these problems have been identified by family members of conservatees who have seen these problems firsthand and by disability rights organizations that have identified the problems through research and investigation of the conservatorship system. Once the State Bar becomes familiar with these problems, it should develop programmatic approaches in legal education, regulation, and discipline to increase access to justice for this vulnerable population.

Goal 5:

“Proactively inform and educate all stakeholders . . . about the State Bar’s responsibilities, initiatives, and resources.”

Comment: Litigants represented by public defenders and appointed private attorneys in probate conservatorship proceedings should be considered stakeholders for purposes of this goal. These individuals and the various disability rights organizations advocating for their rights need to be informed of exactly how the State Bar will ensure that adults with cognitive disabilities will have meaningful access to the State Bar’s discipline system and how they will benefit from proactive education and regulation of attorneys by the State Bar. Right now, this population is not being considered by the State Bar as it develops goals and objectives and as it implements its strategic plan.

Conclusion

The State Bar of California receives state funds and is therefore subject to Government Code Section 11135. This statute incorporates the protections and mandates of Title II of the Americans with Disabilities Act. The ADA requires that once a public entity is aware that a recipient or beneficiary of its services has a disability that may preclude the meaningful participation in or the receipt of benefits of those services, it should take proactive measures to ensure meaningful participation.

The State Bar has adopted regulations regarding ethics and professional responsibilities to ensure that recipients of legal services have ethical and competent legal representation. When these standards are violated, the State Bar has a system of investigation and discipline to address alleged violations. This regulatory and disciplinary system is premised on an assumption that clients can identify transgressions and report them to the State Bar for investigation. This assumption does not realistically apply to clients with serious cognitive and communication disabilities. The State Bar, *and the Supreme Court as supervisor of the State Bar*, have never acknowledged this access-to-justice gap for clients with such disabilities. Section 11135 and Title II of the ADA require an investigation into this problem and the development of effective approaches to correct it.

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Disability and Guardianship Project

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October 1, 2019

Leah Wilson, Executive Director
Alan Steinbrecher, Chair
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Ensuring ADA-Compliant Trainings for Court-Appointed Conservatorship Attorneys

Dear Ms. Wilson and Mr. Steinbrecher:

Last week the Judicial Council of California approved a new rule requiring court-appointed attorneys representing clients in probate conservatorship proceedings to receive training on a variety of topics. The rule is effective January 1, 2020.

Our organization proposed these new training requirements several years ago and have been monitoring the work of the Judicial Council ever since. With the adoption of this rule, the role of the Judicial Council has essentially ended. Now it is the responsibility of the State Bar to ensure that the intended beneficiaries of the rule – seniors and people with disabilities – have attorneys who are properly trained on all of the required topics. This responsibility, of necessity, involves the Mandatory Continuing Legal Education (MCLE) credit approval process.

The State Bar has two procedures for MCLE credit approval: single activity approval and multiple activity approval. In the former process, a provider must submit materials to the State Bar for approval of a specific seminar or educational venture. In the latter process, a provider such as a local bar association, obtains blanket approval in advance which permits it to offer MCLE credits for any and all of its educational activities.

The multiple activity approval process has not worked well in places such as Los Angeles County. For several years, the superior court and the county bar jointly conducted training programs for court-appointed attorneys who represent clients in probate conservatorship proceedings. Audits of those trainings revealed that many topics which should have been covered were not and that misinformation was being provided on topics that were covered. Unethical practices were sometimes promoted by the trainings. The multiple activity MCLE approval process contributed to this problem. Organizers of the trainings essentially had been given a blank check from the State Bar and they abused the trust that is inherent in such blanket pre-approval.

These deficient trainings contributed to deficient representation of vulnerable adults who, because of cognitive disabilities, had no way of realizing that their attorneys were performing deficiently. Due to their disabilities, these clients were not able to file complaints with the State Bar. As a result, the attorneys were allowed to engage in deficient advocacy and defense in case after case. Audits of dozens of cases in Los Angeles confirmed ineffective representation by such attorneys.

Spectrum Institute filed a complaint with the United States Department of Justice alleging that deficient trainings, ineffective representation, and the lack of a monitoring mechanism to ensure quality representation for these litigants with cognitive disabilities all constituted violations of the Americans with Disabilities Act. That complaint is still under review by the DOJ.

We once filed a complaint with the State Bar about deficient trainings in Los Angeles County. When we received no response from the State Bar for nearly a year, we wrote to the Supreme Court. Since the State Bar is an arm of the Supreme Court, that judicial entity is essentially the administrative supervisor of the State Bar. In response to our communication, the Supreme Court contacted the State Bar to nudge it into action.

When we started to receive inquiries from various staff members at the State Bar – communications which gave us hope that the State Bar would get proactive – we withdrew the specific complaint that was pending. We hoped that the State Bar would take actions to ensure that seniors and people with disabilities would receive effective representation by well-trained attorneys. Unfortunately, that never happened.

These staff members were either transferred to other positions, left the State Bar entirely, or simply stopped communicating. So our hope for pro-active measures by the State Bar was short lived. To this day, despite years of communications to officials and state members of the State Bar about deficient trainings and deficient representation, and their adverse effects on seniors and people with disabilities, the State Bar has taken no action whatsoever to address these problems.

The adoption of this new training rule provides an opportunity for the State Bar to use its authority to ensure that only high quality trainings receive MCLE credit approval. It could appoint an advisory committee of academics and practitioners with expertise in constitutional law, disability rights, capacity assessments, less restrictive alternatives, the ADA, and other topics mandated by the new rule. These advisors could review applications from providers who want to conduct trainings under the new rule and make recommendations for approval or disapproval of MCLE credit.

The State Bar, as an arm of the Supreme Court, is a public entity with duties under Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, and Section 11135 of the Government Code. These laws cover all activities of the State Bar, including its MCLE approval process and its complaint procedures. Failure to protect litigants with significant disabilities – in light of the problems that have already been brought to the attention of the State Bar – would constitute a violation of these state and federal laws. Of necessity, this would implicate the Supreme Court since it is the public entity that oversees the State Bar.

We look forward to learning what the State Bar will do to ensure that the intended beneficiaries of the new training rule actually receive the ultimate benefits the rule was designed to achieve.

Respectfully,



Thomas F. Coleman

Legal Director

tomcoleman@spectruminstitute.org

cc: Jorge E. Navarrete, Supreme Court Administrator
Rebecca Bond, Disability Rights Section, U.S. Dept. of Justice

ATTACHMENTS

Status of ADA Complaint to the Department of Justice

Guardianship Matrix: Participants and Issues in a Conservatorship Proceeding

Materials Submitted to the Judicial Council in Support of the New Rules

Letter from Jorge Navarrete, Administrator of the California Supreme Court

Communications with the State Bar (2014 - 2018)

New Training Rules Approved by the Judicial Council on September 24, 2019

Letter and Attachments Are Available Online:

<http://disabilityandabuse.org/state-bar-mcle-request.pdf>