Probate Judge's Remarks Reveal Reasons for Judicial Resistance to Conservatorship Reform

By Thomas F. Coleman

Although I am not a PVP attorney, I attended a recent mandatory training for court-appointed attorneys who serve on a Probate Volunteer Panel operated by the Los Angeles County Superior Court. I wanted to see if things had changed much since I filed a complaint last year with the State Bar of California, alleging that these mandatory trainings were seriously deficient.

My complaint to the State Bar was based on observations I have made during my audits of the trainings over the past three years. Although these educational forums are mandated by the Superior Court, they are conducted under the auspices of the Los Angeles County Bar Association. Since the State Bar authorizes the local bar to award continuing education credits to those who attend, it seemed logical that the State Bar would want to know if these programs are deficient in any way.

To clear up one possible misunderstanding, the attorneys on the panel do not perform legal services as volunteers. They are paid fees. The word "volunteer" merely signifies that they choose to have their name placed on the list of attorneys eligible to be appointed to represent respondents in conservatorship cases. These attorneys are paid to advocate for and defend adults with cognitive and communication disabilities who may lose significant rights in these proceedings.

The clients that PVP attorneys represent include seniors in cognitive decline, men and women with intellectual and developmental disabilities, and other adults whose ability to understand and reason is challenged by medical or mental conditions. Without a court-appointed attorney to assist them, these involuntary litigants would not stand a chance to defend against the loss of significant rights or to resist the appointment of a conservator who may be someone who has been abusing them or financially exploiting them.

The role of PVP attorneys is critical to the administration of justice in these proceedings. Duties of confidentiality and loyalty attach to the attorney-client relationship. Due process and access-to-justice requirements of the Americans with Disabilities Act require PVP attorneys to get the training they need so they can provide *effective* representation to clients with special needs.

That is why the trainings for PVP attorneys are critical. That is why I have been so upset – as a disability rights advocacy attorney – at the deficiencies in prior trainings that I have audited.

When I saw the advertisement for the November 2016 training program, I decided to attend – hoping that the probate court would send a judge to impress on the PVP lawyers their duty to be strong advocates and defenders for their conservatorship clients. About midway into the first presentation, my hopes were dashed.

The first panel was titled "The PVP Report." Presenters were Judge David J. Cowan and PVP attorney Jeff Marvan. I knew things were getting off to a bad start when I looked in the written materials for this panel and noticed that the first legal authority cited was Local Rule 4.125.

Unique to Los Angeles, this rule gives PVP attorneys two roles. One is to represent the interests of the client. The other is to "assist the court in the resolution of the matter to be decided." This rule has bothered me since I first discovered it three years ago when I started to study the conservatorship system in California.

An attorney cannot serve two masters. An attorney must have undivided loyalty and complete fidelity to his or her client. Giving an attorney a secondary role to "assist the court" in resolving a case creates an actual or at least a potential conflict of interest. To the extent that an attorney's role as a pure advocate for a client is diminished in any way by a duty to act as a negotiator or case settler, Rule 4.125 conflicts with state law (Rules of Professional Conduct) and

federal law (due process duty to be an advocate for the client and ADA duty to provide effective advocacy services).

Mr. Marvan's verbal remarks called attention to the dual role under Rule 4.125. However, he did not mention that PVP attorneys could challenge it if they felt it might interfere with their ethical and constitutional duties to be loyal and effective advocates. When Judge Cowan chimed in, I was even more concerned.

Judge Cowan told the attorneys: "You are the eyes and the ears of the court." This was wrong on so many levels. A court investigator or a guardian ad litem can be the eyes and ears of the court – investigating the case and advising the court, but not advocating for a particular position. An advocacy attorney, however, is not an extension of or an adjunct to the court. If he or she is "the eyes and ears" of anyone, it would be of the client and not of the court.

In my auditing of PVP reports over the past few years, I have seen attorneys put information in these reports that are adverse to the retention of rights by their client. I have seen them cite Rule 4.125 as they advocate positions that surrender rather than defend the rights of their clients. By reinforcing this "eyes and ears of the court" nonsense, Judge Cowan was giving permission to the PVP attorneys to disregard their constitutional and ethical duties so they could help the court resolve cases.

I have sometimes wondered why probate judges would give such emphasis to resolving cases. That question was answered when Judge Cowan made another amazing remark during his presentation

He advised the attorneys that each day he takes the bench he has a crushing load of cases to process. There may be 75 probate cases on his 8:30 docket. Then he has another 15 to 20 limited conservatorship petitions to contend with on the 9:30 calendar. Members of the audience, including me, could not help but empathize with the predicament of judges in the probate division. On the one hand, they should be concerned with administering individualized justice in these cases. On the other hand, they must dispose of cases in a rapid-fire fashion or be confronted with an even larger caseload the next day or the next week.

No wonder the court has adopted Rule 4.125 which imposes a duty on lawyers to help the court resolve cases. When it comes to individualized justice versus administrative survival, which of these competing interests do you think wins the day?

The implied message of Rule 4.125 – reinforced by the directive that attorneys must be the "eyes and ears of the court" – was buttressed by additional judicial admonitions. Judge Cowan made sure to remind attorneys that "we know who you are" – a reference to fee claims that are above the norm.

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The ability of the court to control the PVP list – who gets on, how many cases they are appointed to, and how much they are paid in any given case – is central to the ability of probate judges to keep PVP attorneys towing the line. Attorneys may have the perception, perhaps justifiably, that if they do not please the court, they may not get future appointments with the frequency the attorneys would like. More appointments means more money for the lawyers – something which is a matter of economic concern to them just as the expeditious resolution of cases is a matter of administrative concern to the judges. "You scratch my back, I'll scratch yours" is built into a system where the judges are the ones who control the PVP appointment system.

The attorneys know that limited conservatorship cases are not money makers. Since the clients in most of these cases are indigent and rely on SSI or other government aid to live, the attorneys are paid by the county for their services in these cases. They receive $125 per hour and have a 12 hour presumptive limit on billable time.

However, if they play ball – keeping their hours to a minimum and fulfilling their Rule 4.125 duty to help the court resolve cases expeditiously – they may receive ample appointments in the money-making cases. These are estate conservatorships where they receive $250 per hour *or more* and often get approval from judges for extra hours.

It appears to me there is a symbiotic relationship between accepting low-paying limited conservator-

ship cases – expediting case settlements which helps the court keep their dockets from backlogging – and getting appointments on lucrative cases with additional hours and at higher hourly rates.

Then, for the finishing touch, Judge Cowan instilled fear into the attorneys. If they don't keep the hours down, and help the court keep the overall legal services budget low, the county will eliminate the PVP system altogether. He told them that there has been talk of having the Office of the Public Defender represent conservatees, thus making PVP attorneys obsolete.

You could hear a pin drop when that message was delivered. Some of these attorneys receive 70 or more conservatorship appointments each year. Some are making $100,000 or more annually just on PVP appointment cases. This stream of income will dry up unless the attorneys keep the hours down, thus keeping the fees down, and help the judges resolve cases in an efficient manner.

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I used to wonder why probate judges would care whether conservatees are represented by court-appointed attorneys rather than public defenders. My wonderment evaporated the moment I connected the dots and realized that court control over appointments and fee payments is the only leverage that judges have for managing their case loads.

If judges lost the power to decide who gets on the PVP list, who gets how many appointments, and how much the attorneys get paid, their sole function would be adjudicating individual cases. The judges would lose the best leverage they have for controlling how quickly cases are resolved – control of the PVP attorneys.

If public defenders represent clients in these cases, and if they engage in effective representation, cases may remain open much longer. More motions, more objections, and more hearings will take up more court time. The judges may not like this, but they will have no power over the public defenders to make them move cases through the system more quickly.

As an institutional force, the Office of the Public Defender could hire investigators and clerical staff to assist the attorneys provide more effective representation. The cost to the county may be the same as the PVP system, but the amount of court time each case consumes could be significantly higher. The mere thought of this – and the thought of losing control over the attorneys who appear before them in these cases – is probably what is fueling judicial resistance to some of the reform proposals I have been advocating for the past few years.

Immediately after the first panel was done, and Judge Cowan and attorney Marvan left the stage, the next speaker took the podium. Attorney Laura Conti, herself a PVP attorney, spoke on "The Role of the PVP." Her verbal presentation must have come as a surprise to Judge Cowan and those who operate the PVP system. Her materials in the printed program did not give attendees a clue that she would speak about the Americans with Disabilities Act and how it applies to court-appointed attorneys who represent limited conservatees.

Ms. Conti spoke for 20 minutes, outlining the services that PVP attorneys must do to give clients the competent and effective representation required by due process and the ADA. Attorneys should do a more thorough investigation than they currently do – reviewing regional center IPP reports and school IEP reports, interviewing the medical doctor who prepares the capacity declaration, perhaps having a capacity assessment expert appointed under Evidence Code Section 730, and maybe seeing the client on more than one occasion. Plus she mentioned that vetting cases for possible abuse – since people with disabilities are at high risk for abuse – is a function of a PVP attorney.

Judge Cowan had said something in his earlier remarks that, at least to me, reinforced the validity of what Ms. Conti was saying. He advised the attorneys that their service in an initial conservatorship proceeding is a one shot deal. Once a petition is granted, it is unlikely the client will ever see the inside of a courtroom again, perhaps for the rest of their lives. Due to the nature of their disabilities, these clients lack the ability to get the attention of the court or

schedule a court hearing again. This initial hearing is it. The attorneys better get it right the first time since there will probably never be another court hearing for their clients.

With Judge Cowan's one-time-only reality check still fresh in my mind, what Ms. Conti said about the need for thorough investigative and advocacy services made a lot of sense to me.

When she was done, I had an opportunity to speak during the break to the attorney sitting next to me. The attorney almost immediately spoke up and said: "Yeah, right. What she said sounds nice in theory, but the judges would never let us put in that many hours on a case."

When I told her that the PVP attorneys could, as a group, buck the system and put in the hours that were necessary to provide effective services, she shot back: "Sure. But then the county will eliminate the PVP panel and have the public defender take over. We will lose this source of income."

Federal intervention may be the only hope for meaningful and lasting reform. Without pressure from a higher authority, the State of California has no incentive to reform the conservatorship process.

So there it was. The PVP system, with judges in control of appointments, fees, and reappointments, allows the judiciary to control the attorneys. The attorneys know this and so pleasing the court is a top priority – more so than effective advocacy. The judges fear losing control of the system, and therefore they keep the budget limited so as not to upset the county officials. The threat of transferring the legal services system from court-control to the public defender's office is enough to keep the court in line. In turn, the court reminds the PVP attorneys to keep fees down, and thus keep services to a minimum . . . or they all will be replaced.

Judge Cowan's remarks at this PVP training program helped me to finally put the pieces of the puzzle together and see the big picture. Unless the Legislature allocates more funding for court services and staff, and increases the county's budget for legal services for attorneys representing conservatees, the status quo will remain — expedited case flows; minimal legal services; and low fee claims, resulting in assembly-line efficiency rather than individualized justice for clients who need special attention.

Federal intervention may be the only hope for meaningful and lasting reform. Without pressure from a higher authority, the State of California has no incentive to reform the conservatorship process. It may be like the deficient medical and mental health services that were occurring in the state prison system. It took a federal court to intervene in order for the situation to improve.

Whether it is brought by the Department of Justice or by one or more disability rights organizations, a federal lawsuit may be the only way to bring reform to the conservatorship system in California. Federal litigation did cause major reform in the prison system – however reluctantly the state complied with judicially-mandated systemic changes. Federal intervention may be what it takes for the state judiciary to reform the conservatorship system in California, and for the Legislature to supply the funds needed to make the reform become a reality.

Whatever it takes, and however long it takes for reform to occur, Judge Cowan's remarks at the PVP training helped me to decipher the encrypted basis of judicial resistance to my ongoing calls for conservatorship reform.

Such knowledge makes me think that, while reform-minded disability rights advocates start to plan for federal litigation, transferring legal services to the Office of the Public Defender may be a worthwhile experiment. I am already formulating an action plan as to how that office could provide ADA-compliant legal services in a cost-efficient manner – perhaps at or close to the cost of the current PVP system.

Another option would be for a cadre of PVP attorneys to challenge the system through collective political action or even litigation. Whatever reform method ultimately occurs, something must give. The status quo simply cannot continue. ◊◊◊

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