Judges Should Not Be Managing and Directing Legal Services Programs

Policy Statements and Position Papers

Part Two: Trilogy on Legal Services

By Thomas F. Coleman

Part Two of the Trilogy focuses on policy statements and position papers published by national legal and judicial organizations opposing the practice of judges running legal services programs – especially when they involve attorneys who will be appearing before judicial officers of the court that is managing and directing the program. These policies and papers are premised on the need for legal services programs to have independence – not to be influenced by the judiciary to any greater extent than judges are allowed to influence privately-retained attorneys. Problems with court-run legal services programs – such as the PVP program in Los Angeles – include favoritism, conflicts of interest, a desire by attorneys to please bench officers, and the lack of judicial impartiality.

The following pages of Part Two of the Trilogy includes excerpts from papers and reports published by the American Bar Association, Institute of Judicial Administration, National Legal Aid and Defender Association, National Center for State Courts, California Supreme Court Committee on Judicial Ethics Opinions, and State Bar of California.

The underlying and uniform message that permeates these papers and reports is clear: judges should not be managing and directing legal services programs. Doing so has an adverse effect on the quality of the programs and the effectiveness of the legal services.

American Bar Association – 2010

Basic Principles of a Right to Counsel in Civil Legal Proceedings

In 2010, the ABA released a position statement titled "Basic Principles of a Right to Counsel in Civil Legal Proceedings". The document was approved by the House of Delegates. It was endorsed by more than a dozen different state and local bar associations. Among them are state bar associations in Maine, Washington, Colorado, New York, Connecticut, and Minnesota. Local bar associations that endorsed the position statement includes organizations in the District of Columbia, City of New York, County of New York, County of Los Angeles, City of Philadelphia, and City of Boston.

The ABA position statement built upon a prior resolution adopted by the ABA in 2006 that urged states to provide legal counsel as a matter of right at public expense to low-income persons in legal proceedings where basic human needs are at stake. Guardianship and conservatorship proceedings

focus on securing and protecting the basic human needs of people with cognitive and other disabilities that put those needs at risk. The need for attorneys in such proceedings was recognized by the ABA when it adopted a resolution in 1987 that called for the appointment of counsel, as an advocate, for respondents in guardianship and conservatorship proceedings. The ABA saw the appointment of counsel as a way to ensure due process in such proceedings.

Principle #4: "Counsel complies with all applicable rules of professional responsibility and functions independently of the appointing authority." The commentary to Principle #4 states:

> In accordance with a number of national standards relating to the provision of publicly-funded legal representation in both civil and criminal contexts, Principle 4 requires that counsel must function independently of the appointing authority. In particular, the *ABA Standards of Practice for Lawyers Representing Children in Custody Cases* provide that the court must ensure that appointed counsel operates independently of the court, court services, the parties, and the state. Further, the *NCSC Guidelines for Involuntary Civil Commitment* require that attorneys be appointed from a panel of lawyers eligible to represent civil commitment respondents and in a manner that safeguards "the autonomy of attorneys in representing their clients."

American Bar Association – 2002

Ten Principles of a Public Defense Delivery System

In 2002, the ABA House of Delegates approved a resolution urging state and local jurisdictions to use 10 principles in the creation and implementation of publicly-funded legal defense services.

Principle #1: "The public defense function, including the selection, funding, and payment of defense counsel, is independent." The comment to Principle #1 states:

> The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.

National Legal Aid and Defender Association – 2011

The Judicial Underpinnings of the ABA Ten Principles

In 2011, the National Legal Aid and Defender Association published a paper discussing the judicial underpinnings of the ABA Ten Principles of a Public Defense Delivery System. It leads with a discussion of Principle #1 – Independence – by observing that many attorneys reasonably fear financial repercussions if they challenge the court that is running a legal services program. The basis for this fear is further explained:

> While the majority of judges strive to do justice in all cases, political pressures, publicity generated by particular notorious crimes, or administrative priorities such as the need to move dockets quickly can all make it difficult for even the most well-meaning judges to maintain their neutrality. In systems where judges predominantly control the appointment of counsel, attorneys quickly learn that filing motions will lengthen the life of a case, reduce the attorney's profit, and incur the judges's displeasure. If the attorney wants the judge to appoint them to any cases in the future, then keeping the judge happy takes precedence over zealously representing the client.

National Center for State Courts – 1986

Guidelines for Involuntary Civil Commitment

In the 1980s, the National Center for State Courts created an Involuntary Civil Commitment Project. The project received financial support from the John D. And Catherine T. MacArthur Foundation. As part of the project, a National Task Force on Guidelines for Involuntary Civil Commitment was convened. The task force consisted of 15 judges, advocates, professors, and mental health professionals from all parts of the nation.

In 1986, the task force released a report titled "Guidelines for Involuntary Civil Commitment." It was published in the September-October 1986 issue of the Mental and Physical Disability Law Reporter. In a section on "Legal Representation," there was a subsection on "Appointing Attorneys for Respondents" that called for the appointment of counsel for all respondents in these cases from a panel of attorneys. On this topic, paragraph (b) stated:

> The manner in which attorneys are appointed from the panel of attorneys eligible to represent civil commitment respondents should safeguard the autonomy of attorneys in representing their clients. To accomplish this objective, an independent third party, such as the local bar association or a legal services organization, should be responsible for maintaining the panel. The court should appoint attorneys from that panel serially, unless an attorney's absence or

> other compelling reasons require otherwise.

Commentary to this recommendation elaborated on the reasons for it:

> Paragraph (b) provides that an independent third party, such as a local bar association, control the appointment of attorneys. This procedure ensures the attorney's autonomy and avoids undue deference being paid to a judge's or referee's particular views concerning procedure, preparation, and disposition. Attorneys should be sure who their clients are and should not be beholden to the judge or the court who selected them.

State Bar of California – 2006

Guidelines for Indigent Defense Services Delivery Systems

In 2006, the State Bar of California released Guidelines for Indigent Defense Services Delivery Systems. The report and guidelines were approved by the Board of Governors of the State Bar on October 22, 2005. The guidelines were produced by a Working Group appointed by the Board of Governors in May 2005. The Working Group consisted of nine attorneys and a representative from the Judicial Council's Administrative Office of the Courts. The attorneys included a district attorney, public defenders from several areas of the state, private defense attorneys, and representatives from private defender and alternative defender programs.

Guideline #1 stresses the need for independence. "The decisions of the defense provider must not be effected by political influence and must be unaffected by judicial intervention, except to the same extent that a privately retained counsel may properly be influenced by rulings of the court." The commentary added: "Of equal importance, and more likely to occur, is the situation where there may be no actual lack of independence, but there is an appearance of a loss of independence. When a judge appoints the attorney, or it is done on an ad hoc basis, the appearance of undue influence is great, and points to the necessity for basing appointments on a rotational system."

The commentary also makes it clear that an administrator of a legal services program cannot be the court itself, because: "Faithful adherence to the independence guideline may also compel the administrator to challenge court practices that interfere with the duty of client loyalty." Part One of the Trilogy demonstrated how client loyalty can be infringed when judges in a court-run program need to divert attorney services to fill the gap created when they lay off court investigators due to budget cuts. Having PVP attorneys serve this function – knowing they are paid with county funds, not money out of the court's own budget – preserves court funds for other purposes.

The commentary highlights another reason for having a legal services program run by an entity other than the court itself. Policies and practices of the judges that infringe on the right of indigent litigants to effective legal services, "may require assigned counsel attorneys to file writs, challenges,

for cause, and peremptory challenges against offending judicial officers." How would that work out if the judges are themselves running a legal services program that decides how many cases the challenging attorney receives or how much he or she will be paid?

The commentary adds: "The obligation to protect independence may also make it necessary to alert the public to such behavior by a judicial officer." The comment is quite relevant to the PVP legal services program in Los Angeles. In the six years I have been studying that program, I have not seen or heard of one PVP attorney filing a writ, or an appeal, to challenge the ruling of a judge. I have not seen or heard of one public comment against the PVP system by the attorneys on the panel. It is a closed system with the PVP attorneys turning a blind eye to the deficiencies in the system.

The commentary also delves into professional standards of attorneys in a legal services program. "Procedures should be established by the administration to monitor attorney conduct in order to enforce reasonable standards of representation." Having standards and a monitoring mechanism is a matter of logic and common sense. And yet, the court-operated PVP system does neither. There are no performance standards – other than the implicit pressure to please the judges who run the program. There are no monitoring mechanisms either. Everything is done ad hoc.

Guideline #4 stresses the need for quality control. The commentary states: "There should exist a mechanism whereby the quality of the representation provided by indigent defense providers is monitored and accurately assessed, employing uniform standards." It adds: "Each jurisdiction should maintain a written complaint procedure for complaints made against an attorney who is providing indigent legal representation." It also states: "To assure consistent quality representation, each jurisdiction shall establish written procedures, using uniform standards, to periodically monitor and accurately assess the performance of attorneys."

None of these recommendations are employed by the judges who run the PVP system in Los Angeles. Policies are either implied or verbal – changing when the probate presiding judge changes. There are no quality assurance controls. Since there are never any appeals by conservatees, the judges are free to operate the program, and run their courtrooms, without any monitoring.

Institute of Judicial Administration & the ABA – 1980

Standards Relating to Counsel for Private Parties

In 1979, the ABA House of Delegates approved a set of standards recommended by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association.

Standard 2.1(d) – Independence. "Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship." The commentary to that standard states:

> Attorneys, however retained or secured, must enjoy professional

> independence and clients, whether rich or poor, are entitled to rely on their relationship with counsel in all matters covered by that relationship. There is no justification for allowing considerations of politics generally, or of judicial preference, to intrude on the lawyer's independence.
>
> [I]ndependence from judicial influence cannot be assumed. The willingness of some judges to direct lawyer's performance and thereby compromise their independence has been established beyond serious doubt. . . . Indeed, there is reason to believe, that even after *Gault*, courts and judges may systematically constrain the effective capacity of counsel and client to determine the latter's posture in the proceedings.

National Legal Aid and Defender Association – 2003

The Implementation and Impact of Indigent Defense Standards

In 2003, under a grant from the National Institute of Justice, the National Legal Aid and Defender Association issued a report that discussed the implementation of the Ten Principles of a Public Defense Delivery System adopted by the ABA in 2002. The report stated:

> In the version of the Ten Principles published by the Justice Department, the reason for the primacy of the independence requirement is made explicit: to ensure that public defense services are "conflict-free."
>
> As stated in the Office of Justice Programs Report . . . "The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks." Courts should have no greater oversight role over lawyers for indigent defendants than they do for paying clients, the report states; oversight should be "by an independent board or commission, rather than directly by judicial, legislative or executive agencies or officials."
>
> Noting that prosecutors and privately retained counsel in the United States are independent, the National Study Commission on Defense Services concluded in 1976 that: "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."

California Supreme Court Committee on Judicial Ethics Opinions – 2018

Providing Educational Presentations at Specialty Bar Events

In 2018, a committee formed by the California Supreme Court issued CJEO Formal Opinion 2018-012 to address the role a judge may take and the type of comments he or she may make during a presentation to a specialty bar association. The opinion has particular relevance to the role that probate court judges have taken and the types of comments they have made at PVP training programs sponsored by the Los Angeles County Bar Association.

Addressing the content of such a presentation, the opinion states: "[A] judge must ensure that the content of the presentation does not create an appearance of bias." It references Canon 2A which states that "a judge shall act at all times in a manner that promotes the impartiality of the judiciary and shall not make statements that are inconsistent with the impartial performance of adjudicative duties of judicial office."

To achieve a sufficiently neutral presentation that will confirm to relevant canons, the opinion advises that comments must: (1) be presented from a judicial perspective; (2) avoid coaching; and (3) avoid statements that might cast doubt on the judge's capacity to act impartially.

This new ethics opinion casts serious doubt on the propriety of the comments made by probate court judges, including and especially presiding judges, at the PVP training programs and seminars for attorneys who receive appointments from the court to represent conservatees and proposed conservatees. These judges have definitely been coaching the attorneys on how to advocate and defend – what to do and not to do in representing their clients. Judges who tell them to be the eyes and ears of the court – and who then refuse to recuse themselves when the propriety of such tactics are challenged in a specific case – are crossing a line drawn by the canons.

If this were a sports game, any umpire who started coaching players on how to compete, would be disciplined if not fired. Conservatorship proceedings are not a game. They are serious circumstances where the fundamental rights of litigants are at stake. When judges take off their umpire hat and enter into the competition by coaching lawyers, they have crossed a bright line. Apparently, the existing canons are not sufficiently clear. Or perhaps the need of judges to control their dockets and the flow of cases is so strong that they become distracted and forget about the rules that limit the actions that ethically may be taken by a judge..

Conclusion

Whether it pertains to criminal or civil cases or whether it involves juveniles, children, or adults, the message of these policy statements and position papers is clear: judges should not be managing or directing legal services programs, especially when they involve attorneys who appear before their courts in cases. Judges should not be coaching attorneys on how to advocate for their clients.

Judges should not be in control of the income stream of attorneys who practice law in their courtrooms. Judges should adjudicate cases, not shape the manner of advocacy and defense services – except within the context of rulings in individual cases where they adjudicate issues that affect all lawyers regardless of whether they are privately retained or publicly funded.

At the core of these policies and position papers are principles embodied in the canons of judicial ethics and the rules of professional responsibility. Impartiality and the appearance of impartiality should guide the activities of judges, both in and out of the courtroom. Loyalty, confidentiality, and competent representation should be all that guide attorneys in the representation of clients. Judges should not cross the line into shaping advocacy or coaching attorneys to take roles or adopt practices that may adversely affect their clients. Attorneys should object if judges cross this line. When judges operate a legal services program, such coaching occurs and such push-back probably doesn't.

When the operations of the PVP legal services program described in Part One of this Trilogy is compared with the policies and positions in Part Two, the program operated by the Los Angeles County Superior Court receives a failing grade in terms of compliance with ethical requirements. The time has come for a major change in the way the PVP program is managed and operated.

Part Three of this Trilogy shows the various options that exist to move the PVP program from an ethical nightmare to an ethical model. However, such a shift may not occur unless the California Supreme Court clarifies the Canons of Judicial Ethics to prohibit judges from managing and directing a legal services program involving attorneys who appear on cases in their court.

Criticisms sent to the Los Angeles County Superior Court have either been ignored or rejected. Criticisms shared with the California Legislature have gone nowhere. The County of Los Angeles – the funding source of the PVP program – has declined to address this problem. The executive branch agency that theoretically could tackle the problem – the Attorney General – has a conflict of interest. That office represents and provides legal advice to state courts.

The solution to this ongoing ethical problem, therefore, rests with the California Supreme Court pursuant to its constitutional duty to adopt and enforce the Canons of Judicial Ethics.