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Thinking Of Becoming A PVP? Probate Volunteer Panel Attorneys: Progress Now and Future Objectives

03/12/2015

Presented by: Trusts and Estates Section

Program Information:

The Trusts & Estates Section presents its upcoming luncheon featuring the Honorable Maria E. Stratton, Steven P. Beltran, and Andrea Van Leesten. The panelists will discuss the duties of Probate Volunteer Panel counsel versus those of a guardian ad litem, the nature of zealous advocacy in the PVP context, and how PVPs are selected and held accountable.

The PVP system is an integral, critical part of Probate Court operations. Don't miss this discussion of how it's working and where it's headed.

SPECIAL THANKS TO:



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Excerpts from Panel Presentation

(Part 1) Judge Maria Stratton:

Good afternoon it's a pleasure to be here today. I just want to give a shout out to those who are PVP lawyers now. The court really appreciates what you do for your clients. Can everybody hear me? OK, I'll shout. I just want to give a shout out to all of the PVP lawyers now. The court so appreciates what you do for your clients and the services that you provide to the court through your great advocacy you provide to your clients. We so appreciate it. Thank you for everything that you do for us.

With respect to those of you who are on the volunteer mediation panel, I just want to say thank you to you as well. I always say that if I took twenty random attorneys and sent them to the middle east, we would have everything solved in about two hours because I think you're all just great in what you do, especially in respect with the negotiating and active listening and with respect to each other but also in respect your clients. So thank you to all of your mediators as well.

I have been asked to give an overview of the PVP program and I have been given seven topics the last of which is double secret probation lists. So before we get to that really interesting topic, I will give you a little statistic which may be relevant to those of you on the PVP panel or those of you who are thinking of joining the PVP panel. In the fiscal year of 2013 and 2014, which goes from July 1st to last June 30th, we had 2,149 conservatorships cases filed and about half of those cases involved limited conservatorships which generally get PVP counsel appointed on those cases. We also had 1,705 guardianship cases filed and most of those cases minors counsel is appointed of the PVP panel list. This was about a 400 case increase over the previous year and it seems that the number of conservatorships grows each year because doctors get better at keeping us all alive longer and we get more conservatorships. So you can see that there is just about 4,000 cases each year that generally require PVP counsel.

Some of you may be wondering: "So then why is it that I only get one appointment a year if there are 4,000 cases a year that require PVP counsel." That is a good question and is something we are looking into. If you know now, it is not hard to get into PVP panel. You can look on the website or you can call Suzie Wong and she will e-mail you an application. We don't have a panel now who looks at the applications to determine if you are worthy or not. We figure if you meet the training requirements, you are in.

So how do you get appointed to particular cases? As you know the department has gone through a real budget crunch in the past couple years and we have been contracting some of our services. In Probate, Probate took a particularly huge hit. Because you know, we centralized all the Probate conservatorship and guardianship cases downtown, and, for a while, we only had three judges doing the work for the whole county. This year, we have been lucky enough to go up to six courtrooms plus commissioner Penny who is kind of floating as a settlement/substitute judge while people are gone, [we are] hoping next year we will be able to get her a courtroom as well. Because of the contraction of the Probate department, we lost a lot of Probate attorneys and Probate examiners who were basically administering the appointment of counsel. They were instructed to, just when an appointment order was made, go down through e-mail and go down to the next three people on the list, and the first one to take it is appointed. Those of you who have the court's number on your speed-dial are getting more

appointments than the rest and that doesn't seem fair. And now that we are in the process of trying to expand our services or at least not contract them any longer this year, we will be looking at that to see if there is a fair way to even out these appointments. I actually get a list every month of payments that go out to PVP counsel and minors counsel, and once a lawyer hits \$100,000 in payments, the presumption is that lawyers are not supposed to be making their main livelihood based on these appointments. I don't know if anyone really does stop appointing because I don't disseminate this list to the rest of the judges, and so they don't really know that someone has hit that \$100,000 mark. And generally people don't hit that mark until November or June of that fiscal year. We are hoping we are able to equalize the way the appointments are made.

How are lawyers removed from the panel? We have no formal removal procedure. You'll note that on the application it does say that PVP counsel serves at the pleasure of the poor. That was put in to make clear that you really shouldn't have any expectation to be put on cases or certain types of cases. When you do go on the panel you do serve at the pleasure of the poor. We occasionally get complaints from clients. And each judge has the discretion to deal with the complaints. We really don't have problems with complaints about PVP counsel. Certainly not to the extent that criminal judges have. I don't know if its just the population we are dealing with or that you are all just really great. I'd like to think that it is that latter. So as a consequence, since we don't have a lot of complaints, we don't have a formal complaint procedure.

Compensation as you know is set by court rules, and you may not know this but your compensation comes out of the county funds. Judges salary comes out of state funds. Compensation for counsel comes out of county funds. The county rate is \$125/hr. If you are paid by the state, you are paid \$250/hr. It may be raised this year, but there is no guarantee at all. Double secret probation list. There are no such lists any longer, but each judge has discretion of who to appoint. In 99% of the cases, the order of appointment is made by the Probate examiners and the judge never even sees who is appointed. In some situations, the judge might appoint a particular person to a particular case, because maybe the judge knows that that person has expertise, maybe dependency law and history of dependency proceedings going on. Maybe that lawyer has a certain skill at negotiating and the case requires a lot of negotiating. While about 99% of appointments are done without the individual knowing because it is set by the examiners, there are those particular cases where the judge says to the clerk, "Put so-and-so on this case." There are also particular judicial assistants who have more experience maybe than particular judges. I know when I started, I had a very experienced assistant who would say to consider so-and-so on the case because they have [a specific] type of talent, skill and experience. That occasionally happens.

If the judge has a bad experience with a PVP lawyer, the judge also has the discretion to say to the Probate examiner, "Don't put this lawyer in anymore of my cases." That is really done by a judge-by-judge basis. If the judge does act, that does not mean that the PVP lawyer is precluded from getting cases from the other bench officers. We don't even discuss that. It's not like we are in the back hallway saying, "You know who just did what today." People are pretty discreet. If people have an issue with somebody, they leave it between them and the lawyer. So I am happy to say that there are no secret probation lists, we really don't do that. We are very appreciative of what you do, even if we are giving you a hard time.

Probate Volunteer Panel Luncheon
Headed by Probate Division Presiding Judge Maria Stratton
March 12, 2015 (Part Two)

Steve Beltran: [I see] the core of the familiar faces and a lot of new faces and its nice to have the opportunity. The materials are a part of the packet you've got. Just as a segue to what we do, there are general conservatorships, which are typically for the elderly cases that we have, and limited conservatorships, which apply to developmentally disabled people, such as epilepsy or retardation, similar situations or mutations. And their services are typically outlined within the Lanterman Act which is Section 4500 in the Welfare Code. That is why I include this information for you, because it gives an outline and scope of what we do. If you get an appointment, you will be dealing with any one of those. Guardianship is another descriptive type of case that you would have. The materials that I provided you also gives you Section Code 1471 which provides that a court shall appoint counsel for most conservatees alleged to lack legal capacity and is unable to obtain counsel and asks the court for appointment whether or not that person lacks capacity. Now that's one of the records that you worked under.

What plays against 1471 is the local rule, 4.125, which is Exhibit 2 in your cases in the materials that I provided you, which broadly states that PVP counsel's primary duty is to promote the interests of his or her clients in accordance with ethical laws and ethical standards. That's very broad. PVP's secondary duty is to assist the court in the resolution of the matter to be decided, so PVP must give practical to ensure that the client is afforded opportunity to address the court directly. In practice, that comes out to the primary duty is to do what the client states that they want you to do.

We've had this discussion with Judge Stratton, which she states that she wants you to advocate your client's position. When we talk in the hypothetical, you can see how it is stated, what your clients says and what you might consider is their best interest is dealt with. Because the other extreme of this stated position is where your client is not able to give their position. There is a case that is referenced here that the conservatorship of Drabik (1988) 200 Cal. App.3d 185 which ruled that the best interest advocacy of the client is the attorney for the conservatee is permissible when the client is in a persistently vegetative state. Those are the extremes. If the client tells you *'I want this and I want that'* what can you say? You can go contrary to that state of opinion. And then in the mid-ground where your client may state a position but it is being unduly influenced, or your suspect it unduly influenced, and is merely parroting what their parents may be saying to them.

There are many cases for example with regional center clients, where the client will have all seven powers taken under the conservatorship but then issues come up without visitation or all seven powers, and that's what you need to know as a PVP. 2351.5 of the probate code describes all seven powers of the regional power of the limited conservatorship. And your client may be saying things, and your client may be under a limited conservatorship as an example, and be saying things to you but are coming from, as you suspect, their parents coaching or direction of what they should be doing. And this happens, and a clear example is that limited

conservatorships end up being an extension of a family. Now you have an adult developmentally disabled person whose visitation and all seven powers are at issue because both parents are seeking to be conservators and the adult may be living with one parent and is saying things that they want, but you don't know who is generating that. So those are the extremes that you need to look at. If you are not able to do other than represent the state of position of your client then it is in your authority to ask the state for the appointment of a best interest attorney. That is important when you are in that position where the client is stating to you what they want. You are clear and they are clear with you about what their position is. In some cases you may ask for their position to disclose confidentiality. Because that is a very important element for you to gather the information you need and to inform the court. That's just the outline of this level that is required of you as a PVP counsel under the probate code and local rules.

William L. Winslow: Lets go to a hypothetical. The tension between the advocacy and the fact that sometimes your client may ask you to take positions that are manifesting cranky or not practical, or you have the feeling that they are being pushed around one way or another. It's right behind the last ring divider in your materials. Why don't we start out by throwing out some issues to the panel that are raised.

Andrea G. Van Leesten: I think that it is always important that when you meet your client, you must always watch and observe. Who is your client? Who is your client? What conditions is your client in? And question your client. And most importantly, you need to listen to what your client is telling you. When Beth Winslow was planning this, we sat in the hallway, asking our colleagues as they came along and we asked them, what kind of things did they think were important. And one of our colleagues said that, for PVPs, the first person or the first story that you read begins to bias you, or rather, encourage the direction that you look to. And sometimes it is not your client. So, as a PVP, I am urging you to watch and observe your client. See what their limitations are. Try to imagine them as a young person, what would they be like? Question them. Question them. And listen to their answers. Watch the environment. Watch the people around you. Write and report. And more importantly, maintain your ethics. I did supply the last part of the handout which is the state bar rules on professional conduct for trusts and estates attorneys. And the dilemma that we are all going to get into is, best interest and who is your client. Defending your client. A couple of things I learned from Judge Stratton was in other counties that she happens to be a formal public defender, you protect and defend your client at all costs. And in so many, I know that we have come across. I have another wonderful colleague, whose name I should not mention, say that when you reveal all of your client's confidences or papers that they don't want other's to know, and put them in your report they become available in the public and you can find them and you can copy those reports and that can be deadly. So again, I want you all to think about your ethics. Especially as you look at the hypothetical. Because she says a couple of things, should we believe her because she told us that.

William L. Winslow: Now in relation to Steve, who is a good lawyer. I asked him, if you could say one thing to a PVP lawyer, you have two minutes to make one point. He said, resist the

temptation to take the first version of the facts that you hear as the frame around which you're going to organize the other information. And I thought it was a good point, which is why I am repeating it here. I also think it speaks to humans generally. It's hard to not take in new data based on what you hear first. That's why in general proceedings and in other places, who starts and who goes last is generally important.

Judge Maria Stratton: Well, I come from a public defense background, my attitude from a PVP counsel background is to advocate for what your client wants no matter how crazy it is. I spent three and a half years in a mental health ward, and you see a lot of clients asking for a lot of irrational things in a lot of their cases with a straight face, and they do. So as PVP counsel, I think you need to be prepared to make irrational requests to the court. Now, I know a lot of PVP counsel come in and say "well, you know, this is what should happen, Judge." Which is appreciated but we usually have a court investigator that goes back and tells us what the court investigator thinks should happen, which is on the same lines with what the PVP counselor says, since you are both rational human beings. But, I look to the court investigator to tell me what should happen, and I am looking to Debra's lawyer to tell me what Debra wants. How you get that information out of Debra and how you come to the conclusion of what Debra really wants depends on your skills as an attorney advocating for her. I think any judge at first appearance is going to look to PVP and say, have you talked to your client? Does your client want to be here? Because she has a right to be here. What does your client want to happen here? You might have to get up and say something that is against what you think really should happen. But if you determine what your client wants, the judge needs to know. That doesn't mean the judge is going to do it, but the judge needs to be able to leave that hearing knowing what your client wants, so that the judge knows what kind of proceedings to schedule next. Are we going to work out a trial? Are we going to work out a settlement? Are we going to try to send you to mediation? Are we going to have motions? Until the judge knows what your client wants, we are kind of at a standstill.

William L. Winslow: Well, I think that some of the judges, and some of the less experienced want guidance from the PVP and look to the PVP as the most authoritative view of the outcome.

Judge Maria Stratton: That's so true because that puts you in a bind, because some judges do just want to hear what you think is in the best interests of your client. They don't care about what your client wants. Because after all your client has been diagnosed with dementia. So how can it be proven what your client really wants?

William L. Winslow: It hasn't been proven that you client has dementia. What about asking your client, this is about being an ethical lawyer with your client. Say your client has told you something that you think may hurt his or her chances of your client getting what they want.

Judge Maria Stratton: These are discussions that you have to have with your client. If somebody walked into your office and said, "I am going to pay you \$100,000 flat fee to represent my interests in a conservatorship proceeding, you would maybe try to talk your client out of something stupid, but you took that case knowing up-front what your client wanted. I

don't see that this is any different except you are only getting paid \$125/hr. But you agreed to take the case, and so you are there to represent your client's interests. And that may upset some of the judges, because some of the judges may insist on hearing from you: "What do you think should happen, really?". You all have such great experience and it is really up to you to see how you are going to answer that question.

Steve Beltran: So should the PVP attorney then say, "Your honor, I am stating my client's position and if you want more information, perhaps you should appoint a best interest attorney?"

Judge Maria Stratton: You can say that. I'm telling you what my preference is, but I don't speak for the probate bench. There are going to be judges that pester you, I'm sure, "What do you really think, what do you *really* think?" and you know, I guess the answer is, when you took the case, what did you think you were taking it to do? And you can tell the judge that, "when I took the case, judge, I came in to tell you what I thought was in the client's best interest." Is that what you told the client when they walked in? And said this is a confidential communication, and I am not going to disclose anything unless you give me your permission? Is that what you told your client when you walked in with the client for the first interview? And said, "Hey I am here because the judge wants to know what's in your best interest?" or did you tell the client, "Hey, I am here because the judge wants you to be represented, and so I am here to find out what you really want." You really have to make it clear with your client what your role is. And if you told your client up-front, "Nothing you say is confidential to me, I am just here to make representation about what I think should really happen." And you made that really clear to your client, then, well that's a different situation. But if you go into your client and say, "The judge appointed me to be your attorney," then that means that you have an attorney-client relationship. And that means that what we say to each other is confidential and no one can force anything out of you. Talk to me under those circumstances. Then you set the parameters. But if you've done that, and if the judge says, "I want to know what you think," then you're right to say to the judge, "Look, I told the judge we were having a confidential communication, and I can't go back on that now just because you've asked me to. Maybe you need to take me off, and get somebody else that's going to do what you wanted, but I can't go back on that now." And maybe you will get some push back.

[multiple laughs at push back comment]

William L. Winslow: Andre, you've been at PVP since 2009, and last year you did not get one appointment.

Andrea G. Van Leesten: Here's the line I am supposed to read, I have had many appointments over the years but I did not get a single appointment, other than my reappointments, in 2014. But I constantly see the same individuals getting PVP appointments. I want to know, does the judge think this is a good thing in a concentration and why are we not using our old work horses? Are we giving our young work horses too much? are they too inexperienced? And lastly, who can I complain to if I am not looking at my computer? I am probably getting several appointments this very minute but I am not at my computer. Where am I? I am here, at the PVP.

Steve Beltran: Last year, I did get appointments. But they were all but one exclusively limited-conservatorship. Spanish-speaking only. That is a weird mix. But that is the typical kind of cases that I have been getting. And I have been qualified on that PVP panel for minor-counsel, dependency-work, conservatorships and special needs.

Judge Maria Stratton: I can't defend that. I don't think it's fair. I do know that we have a dearth of Spanish-speaking attorneys and they get a lot of work. I would say from my experience that 50% of the limited-conservatorships involve Spanish-speaking-only parents. That's huge. So if you are a Spanish-speaking attorney, that's probably where the bulk of your appointments are coming from. Because even though the conservatee is fluent in both languages, the conservatee's disabilities may prevent them from speaking to you. So it's important that the PVP counsel be able to communicate with the parents who are generally the caregivers. So if you are a Spanish-speaking attorney, you are probably getting those. I don't know why people aren't getting appointments, but it is certainly something that we will look into because I don't think it's fair. I do see the same people coming in on PVP appointments, and I don't know why. Someone has gotten to the probate examiners. [Laughs]

William L. Winslow: I think it makes people a little uneasy if it appears that someone's practice is dominated by PVP appointments. You can't help but wonder if that lawyer doesn't become somewhat inclined to please the judges. I don't know of a particular case that fits that description, I don't see that to be the case, by far, only a small sample.

Judge Maria Stratton: It's much easier being minor's counsel because then you are just doing best interest analysis. It's much easier and cleaner. It's really hard to be PVP counsel for the elderly and developmentally disabled, where you are trying to figure out what they want and are trying to advocate for them.

Steve Beltran: The bulk of the limited-conservatorship cases are very straightforward cases, they aren't very contested matters. What is happening more is where you see the extension of the custody battle issues coming into the context of limited conservatorships. Divorced parents fighting against each other for custody and visitation and sometimes to avoid paying support for the disabled child. A lot of those issues come up. The bulk of the one's that I see for limiteds for Spanish-speaking are very straightforward. There's a capacity-declaration, sets forth of limitations, the regional-senate report. A lot of times your client is not even communicative. The only thing that I guess you can argue, is best interest. But that means, that you have to do the homework to check out who these petitioners even are. Unfortunately these cases are money-generating for marginal-income families. So the ones that have the custody of that child are dependent on IHSS and other benefits they are going to get on behalf of that person they are taking care of. So you want to see the standard of care and what the history has been and what the interest is in that person. Why is someone who is not related, wanting to be a limited-conservator of a person who is severely debilitated. There are a lot of issues that come up.

William L. Winslow: Just an underlying issue about people speaking other languages besides English. I think there is a need across language groups-Mandarin, Korean, Persian, Armenian.

What I am asking you is to look around and talk to your colleagues. If you run into somebody that speaks a second language that is fairly commonly used in this county, which means that there are about ten of those, see what you can do about them serving once in a while as a PVP.

Judge Maria Stratton: And we will provide interpreters if you find yourself on a case that you can't communicate with your client. It is just a little hard. If you have someone in your firm that is bilingual, bring them in and it makes it easier.

William L. Winslow: Thank you. Just one last one about accountability. In Ventura county and some other counties, they do not use PVPs. The public defender represents the proposed conservatee. If the lawyer is in the probate court in Ventura and one public defender is constantly lazy and constantly disclosing client confidences or otherwise manifesting not doing the job, they can go to the pd's supervisor and say, "I have a complaint about Joe, Josephine. If you want him/her to hear it, I can make it in his or her presence, but I need you to know about it. To whom would I go to about this complaint in LA county? Is anyone really supervising the PVP's?"

Judge Maria Stratton: I would say go to the judge who is presiding on the case .

William L. Winslow: It looks like you are trying to get an advantage if you go to the judge and a potentially improper communication.

Judge Maria Stratton: I would say go to the supervising judge or report it to the bar. But you are right, if you are dealing with an agency lawyer you can go to the agency lawyer's supervisor, but you can't do that here because they are private lawyers. I am certainly open to taking complaints about people. If you feel like you can't talk to the judge because it's a pending case. I am willing to sit down with any of you and talk about something that is going on that is disturbing you ethically.

William L. Winslow: There are other complications with that approach, but I thought I would bring it up and I appreciate your willingness to help out on this. I think most of us have had a good experience with this program, but not 100% good.

Andrea G. Van Leesten: May I add one more thing? I think it is really important, especially for those who have been on PVP for a long time, I really think it is important that if you know younger attorneys, or attorneys who have not have had as much experience as you have, please mentor them. You can assist them. And just say, "Listen, I am available if you are on the panel and you want to talk to me about the kind of tools that I think you need to develop to become a good PVP attorney." I don't know how many of you have had an inadequately prepared PVP. I know that I did, and I know that I still have one on the case. He is such a great fellow. He is a great attorney and a nice person, and I spent a lot of time steering him in the right direction. And I am very optimistic that he will become a really great PVP attorney. All of you should really take up the demand if someone says that they need assistance or if you see that they need assistance.

William L. Winslow: I know that I run into cases where I feel that I don't know enough about a certain law or what have you. Where I am lucky is that being involved in bar stuff, I know lawyers all the time who help. Make some friends and have some people that you can reach out to. I can say, "I think I know what I am doing here, but right before I put that foot forward, incase it's going to land where it shouldn't, what do you think?" That's an invaluable resource. Make a friend. Be a friend with your fellow lawyers, especially in the bar activities. It's 1:30, so I think we should wrap it up. Thanks very much.