Spectrum Institute

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February 16, 2015

Honorable Maria Stratton
Presiding Judge, Probate Division
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Re: PVP Attorneys / Rule 10.84 (training); Rule 10.85 (secondary duty)

Dear Judge Stratton:

Thank you for the invitation to meet with you to discuss the concerns we have with the manner in which limited conservatorship cases are processed through the Los Angeles Superior Court.

Dr. Baladerian and I welcome the opportunity to explore ways to improve the situation, especially how all participants in this process can better protect the rights of people with developmental disabilities. She is not able to be present at our meeting on February 20. However, she is sending you a letter to advise you of her personal experience at a training for PVP attorneys conducted by the Los Angeles County Bar Association at the direction of the Probate Court.

I feel that it is important to acknowledge that you have just been appointed as the Presiding Judge of the Probate Division of the Superior Court. Therefore, you are not responsible for the manner in which limited conservatorship cases have been processed in the past. That has been the responsibility of others who have held positions of authority with the Superior Court. Unfortunately, they did not address or correct problems with the limited conservatorship system but instead "kicked the can down the road." As a result, such problems have multiplied and intensified.

So here we are. You as the new Presiding Judge of the Probate Court, and me as the Director of a Project that has studied the limited conservatorship system – and all of its various facets – in great detail and depth. I have written many essays and published many reports about deficiencies in this system – both statewide and in Los Angeles – and have proposed possible solutions. These essays, reports, and proposals, have been sent to the prior Presiding Judge of the Probate Court in Los Angeles, as well as the Chief Justice of California, Attorney General of California, Director of the Department of Developmental Services, President of the State Bar of California, Chair of the Rules Committee of the Judicial Council, and Chair of the Probate and Mental Health Advisory Committee of the Judicial Council. I recently reached out to the Presiding Judge of the Los Angeles Superior Court and to you. Each of these communications has included a request to meet to discuss the problems we have identified.

Of the requests for a meeting to discuss our concerns about this system – including concerns about the roles of judges, court investigators, court-appointed attorneys, and regional centers – so far only two officials have responded with an invitation to meet. The first was Justice Harry Hull, Chair of the Rules Committee of the Judicial Council. Dr. Baladerian and I will be meeting with him on March 9. The second is you.

At first I thought that the scope of our meeting would be to get acquainted, but when I thought more about it – and how valuable and limited your time is – I decided to make a few proposals for us to discuss at our meeting. I am proposing two actions you can take, as Presiding Judge of the Probate Court, to address some of the concerns we have raised.

One action would be for the Los Angeles Superior Court to delete the following sentence from Rule 10.85 of the local rules of court: "The secondary duty [of court-appointed counsel] is to assist the court with the resolution of the matter to be decided." As Presiding Judge of the Probate Court, you can recommend that the sentence concerning a "secondary duty" be eliminated.

Attorneys appointed to represent limited conservatees or proposed limited conservatees should have only one duty – to advocate for their clients. They should not have a "secondary duty" to help the court resolve cases. That would be the role of an independent mediator, not the role of an advocate for a client. Giving an attorney dual roles creates a conflict of interest. This not only violates professional ethics, it undermines the constitutional duty of an attorney to provide effective assistance of counsel.

The aforementioned sentence should be eliminated – immediately and without hesitation. Rule 10.85 is a local rule adopted by the Los Angeles Superior Court. It can be modified by the Los Angeles Superior Court without the need for approval by the Judicial Council or anyone else.

Another action you can take as Presiding Judge of the Probate Court is to require meaningful and appropriate trainings for attorneys who participate on the Probate Volunteer Panel (PVP) of the Los Angeles Superior Court. The panel is a creation of the Superior Court. The rules regarding mandatory training obligations of PVP attorneys are also a creation of the Superior Court. The content of mandatory trainings, and the qualifications of presenters at such trainings, are matters within the discretion of the Presiding Judge of the Probate Court.

The previous Presiding Judge of the Probate Court told attorneys at a PVP training – at which I was present – that he was the one who would decide when it was time for another training seminar. After he made this decision, he said that he would then turn the matter over to someone at the County Bar Association and that this person would put the entire training package together. From what was said to the attorneys, the impression was that the decisions about the content of the training and the selection of the speakers were items decided by the County Bar training coordinator.

This process needs to change. The Presiding Judge of the Probate Court needs to take an active role in selecting topics and approving speakers – making sure that the topics truly help PVP attorneys to be effective advocates for people with developmental disabilities, and that the speakers are qualified to make these presentations. The prior trainings that I have attended and other trainings that I have reviewed have not met either one of these standards.

I am enclosing two short critiques of prior PVP trainings mandated by the Superior Court (PVP Training on Limited Conservatorships – Part I; PVP Training on Limited Conservatorships – Part II), as well as a longer critique of the most recent limited conservatorship training (A Missed Opportunity – Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities).

I am also enclosing a 38-page guidebook titled "A Strategic Guide for Court Appointed Attorneys in Limited Conservatorship Cases." This guidebook is the most comprehensive and detailed information available to attorneys on their duties to such clients and what they need to learn in order to fulfill those duties.

I highly recommend that you consider enlisting the educational services of Spectrum Institute to conduct one or more trainings of PVP attorneys. The work we have been doing on limited conservatorships has been a function of our Disability and Abuse Project. However, that work is being transferred to our newly created Disability and Guardianship Project. We would enlist the services of Project Directors and Project Advisors for such mandatory trainings.

Some trainings would educate PVP attorneys on "how to" comply with the requirements of the Americans with Disabilities Act and satisfy the due process entitlement of clients to effective assistance of counsel. Another training would focus on legal and psychological requirements for assessments of client capacities in each of the "seven powers" involved in limited conservatorship evaluations and how to scrutinize such assessments by Regional Centers or court investigators and how to ask that unqualified opinions or unsubstantiated reports be stricken from the record. Yet another training would educate attorneys about the statutory and constitutional rights of clients and how to defend those rights from improper infringement, including the rights specified in the Lanterman Act as interpreted by sections of the Code of Regulations promulgated by the Department of Developmental Services.

Attorneys would learn about the First Amendment rights of adults with developmental disabilities, including their right to freedom of association. They would also learn about the constitutional right of adults to intimate association (including various types of consensual sexual conduct), as well as receiving a training on "Forensic Assessment of Capacity to Consent to Sex." Sexual rights should not be taken away without a proper forensic assessment of such capacity.

It is crucial that attorneys be trained on federal and state legal requirements that adults with developmental disabilities are entitled to live in the least restrictive environment. They must also be trained that judicial orders in a limited conservatorship need to be based on clear and convincing evidence that the client truly lacks the capacity to make decisions in the area on which the order transfers decision-making power from the client to a conservator. The transfer of such power should not be routine. It should not be based upon a stipulation by a court-appointed attorney unless: (1) the attorney has been properly trained on the criteria for a particular capacity assessment; (2) the attorney has done an independent investigation into the facts supporting the capacity assessment; and (3) the attorney has received training on how to interview clients with developmental disabilities and has used appropriate methods, including adaptive technology, to interview his or her client.

None of the prior trainings of PVP attorneys has ever touched upon or even mentioned these topics,

much less provided an adequate "how to" education about them. The prior trainings have purported to comply with local rule 10.84 which requires that "the Attorney must have comprehension of the legal and medical issues arising out of developmental disabilities and an understanding of the role of the Regional Center." In reality, this rule has never been complied with. The attorney cannot comply when the Superior Court delegates trainings to the Bar Association and the Bar Association fails to include necessary topics and have qualified speakers on them.

You are now the person in charge of the limited conservatorship process in Los Angeles County. It is your responsibility to ensure that court-appointed attorneys are properly trained and take steps to insure they provide effective assistance of counsel. You have an opportunity to bring the trainings into compliance with the requirements of due process, the statement of rights in the Lanterman Act, and the mandates of the Americans with Disabilities Act. The ADA imposes requirements on private attorneys. Section 504 of the Rehabilitation Act imposes requirements on local courts. Since court-appointed attorneys are engaging in "state action" because they are court appointed and court trained, they are also governed by Section 504. Such "state action" also subjects these attorneys to potential liability for federal civil rights violations (42 U.S.C. 1983).

I know that all of this may seem overwhelming – and to some extent it is – but the problems can be handled piece by piece, in a systematic manner. An educational plan needs to be developed.

I have two suggestions on how we can help the Superior Court with PVP attorney education.

First, we can develop and present an "overview" training so the PVP attorneys can become familiar with what they eventually need to learn. Right now, they "don't know that they don't know" what the law requires them to do in order to provide effective representation for clients with developmental disabilities. Therefore, the first training should acquaint them with these issues. After they realize how the limited conservatorship system is supposed to operate – to comply with state and federal constitutional and statutory requirements – then they will be ready, and hopefully eager, to get further trainings on the subject matter areas mentioned above (in sufficient depth to fulfill their duties and provide their clients with effective advocacy). The Disability and Guardianship Project of Spectrum Institute can conduct such an overview and introductory training, perhaps as a subcontractor of the County Bar Association, and definitely with your active participation and supervision as Presiding Judge of the Probate Court.

Another option, in addition to or as an alternative to the first suggestion, would be for PVP attorneys to attend the informational briefing for advocates that we are conducting on August 7. I am enclosing a brochure about that briefing. Not only would attendance at the briefing give the attorneys an overview of how the system and all of its individual phases should operate, but it would also give them a chance to hear the questions posed by parent-advocates, sibling-advocates, and self-advocates who are concerned about the rights of people with developmental disabilities.

As for any involvement we may have with formal trainings of PVP attorneys, this will not cost the court or the County Bar Association any extra money. By my calculations, the Bar Association collects about $45,000 or so from the attorneys who attend a PVP training. Our involvement in each training would cost no more than $20,000. So there is ample money to pay our fees as well as the food and beverage service for the day, bar association staffing to register attorneys, and any other

operational costs the Bar Association may incur.

It is true that when PVP attorneys modify their practices to comply with statutory and constitutional requirements, they will be spending more hours on each case. I did an analysis of a sample of cases and discovered that, on average, PVP attorneys were billing for less than seven hours per case. There is no way an attorney can fulfill his or her duties in seven hours. So the amount of their billings will increase. However, as you know, their fees are not paid from the budget of the Superior Court. Rather, they are usually paid by the County of Los Angeles, if not by the estate of the conservatee. So any improvements in the performance of these attorneys, and the resulting increase in fees, will not come from the budget of the Los Angeles Superior Court.

Whether there are additional costs or not should not be a controlling factor. People with developmental disabilities are entitled to equal access to justice. The way the system is currently operating – including and especially the performance of PVP attorneys – they are not receiving equal access to justice. This is a violation of the ADA, Section 504, and the due process right to effective assistance of counsel.

Let us together envision a day, in the not too distant future, when the trainings of court-appointed attorneys in Los Angeles County are a model for other counties throughout the state. Perhaps these new trainings will be monitored by the Judicial Council as a pilot project that it may endorse. It may also adapt them for use as trainings for judges who process limited conservatorship cases in all counties in California.

I look forward to discussing these issues with you on February 20.

Sincerely,

Thomas F. Coleman
Executive Director
Disability and Guardianship Project
Spectrum Institute

p.s. By the time the initial overview training has been completed in Los Angeles, a Workgroup on Limited Conservatorships created by the Probate and Mental Health Advisory Committee could have completed a survey of current practices in the probate courts in all counties. That would enable the Advisory Committee and the Judicial Council to determine the need for such trainings throughout the state.

cc: Justice Harry Hull
Hon. John Sugiyama