

The Domino Effect *Judicial Control of Legal Services*



A Report to the
California Supreme Court
on the Code of Judicial Ethics

Trilogy on Legal Services

Submitted by:



Contents

Request to Modify Code of Judicial Ethics	i
Executive Summary of Report	iii
Report	
<i>Part One: Trilogy on Legal Services</i> The Discovery of Individual Injustices Leads to Audits Showing Ongoing Ethical Violations in the PVP Legal Program	1
<i>Part Two: Trilogy on Legal Services</i> Judges Should Not Be Managing and Directing Legal Services Programs	21
<i>Part Three: Trilogy on Legal Services</i> There Are Viable Alternatives to Court-Run Legal Services Programs	29
Exhibits	
Table of Contents: Exhibits to Part One	40
Table of Contents: Exhibits to Part Two	42
Table of Contents: Exhibits to Part Three	43
Proof of Service	44



Spectrum Institute is a nonprofit organization promoting equal rights and access to justice for people with disabilities – including and especially people with intellectual and developmental disabilities. The organization functions through two projects. The Disability and Abuse Project does research, education, and advocacy on issues involving disability and abuse. That project is directed by Nora J. Baladerian, Ph.D. The Disability and Guardianship Project does research, education, and advocacy on issues involving access to justice in adult guardianship and conservatorship proceedings. That project is directed by attorney Thomas F. Coleman. Reports and other materials published by Coleman on this topic are found online in the Digital Law Library on Guardianship and Disability Rights. (www.spectruminstitute.org/library) *Pursuit of Justice* is a documentary film that tracks the work of Coleman, Baladerian, and a small and growing network of advocates and supporters as they work to reform California’s conservatorship system and state adult guardianship systems nationwide. (www.pursuitofjusticefilm.com)



Disability and Guardianship Project

555 S. Sunrise Way, Suite 205 • Palm Springs, CA 92264
(818) 230-5156 • www.spectruminstitute.org

September 21, 2018

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Administrative Docket

Re: Request to Modify the California Code of Judicial Ethics
Per California Constitution, Article VI, Section 18(m)

To the Court:

Spectrum Institute is writing to the Supreme Court pursuant to the court's authority under Article VI, Section 18(m) of the state Constitution. That provision gives the court administrative authority to establish a Code of Judicial Ethics to regulate the conduct of judges both on and off the bench.

Based on research we have been conducting over the past six years, we are requesting the Court to modify the Code to clarify that judges may not operate or direct a legal services program involving attorneys who appear before the judges or their court in individual cases.

Our research shows that judges of the Los Angeles Superior Court have been managing a court-appointed attorney program in the probate court. Instead of adjudicating cases in an impartial manner, the superior court has been deciding which attorneys get appointed to cases, how much they get paid, and whether they are appointed to future cases and if so, how many. This financial control has a tendency to influence the conduct of the affected attorneys. We believe that such judicial practices are not limited to the Los Angeles area but are occurring in other counties as well. Many superior courts operate legal services programs involving court-appointed attorneys.

Our research shows that judges of the Los Angeles County Superior court are managing the Probate Volunteer Panel – a legal services program that assigns attorneys to conservatees and proposed conservatees. In addition to controlling that program, judges are making presentations at the training programs and, in doing so, attempting to influence the manner of attorney advocacy and defense.

Judges are telling court-appointed attorneys what to do and what not to do in their cases. Some judges tell them to be the “eyes and ears of the court.” Some tell them to advise the court of what is in their client's best interests – even if this conflicts with what the client wants. Other judges tell them they should not do that – that doing so would violate ethical duties of loyalty and confidentiality. Some judges tell attorneys not to challenge laws or procedures that restrict the voting rights of clients – advising them to bring such challenges in federal court (knowing full well that the attorneys have no authorization to represent clients in conservatorship cases in federal court). When the superior court reduced the number of court investigators as a budget cutting measure, judges instructed court-appointed attorneys to fill the gap and to act as de-facto court investigators.

In support of this request to the Court, we are submitting a report titled “The Domino Effect: Judicial Control of Legal Services.” The document contains three reports: A Trilogy on Legal Services.

Part One of the Trilogy shares the results of our investigation of the PVP system and the role of judges in shaping the advocacy services of the court-appointed attorneys on that panel. Our research involved reviews of several specific cases, as well as audits of dozens of others. The audits show a pattern of inadequate legal services by many of these attorneys – deficiencies which we believe are implicitly authorized by the judges who manage the PVP program and who also adjudicate the conservatorship cases. We also attended several training programs. We observed unethical practices by the judges who made presentations – the same judges who hear cases involving these lawyers.

Part Two of the Trilogy shares the results of our research regarding policy statements and position papers of national judicial and legal organizations. These statements and papers uniformly are opposed to judges operating and directing legal services programs. They favor legal services programs being managed by an independent entity – one in which judges who adjudicate cases are not involved. Ethical reasons are cited as to why judges should stay in their own lane – adjudicating cases – and leave it to others to manage and direct the advocacy services of attorneys.

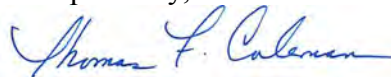
Part Three of the Trilogy shares the results of our research regarding options and alternatives to court-operated legal services programs. There are models in other states that are working well. There are various approaches taken in other areas of California. Even in Los Angeles County, there are many programs providing legal services for indigent litigants that do not have judicial control or management. This occurs in criminal law, juvenile delinquency law, and juvenile dependency law. Despite these options, and despite some discussions by Los Angeles County officials of taking control of the PVP panel away from the court, it appears that judges are resisting the loss of power over the court-appointed attorneys who appear before them in conservatorship cases.

We call our report *The Domino Effect* because the violations of ethics by judges who run legal services programs have an adverse effect on the legal ethics of and performance by the attorneys, which in turn has an adverse effect on the quality of services being received by clients.

As society's awareness of ethical standards has evolved over the years, changes have been occurring in Los Angeles, statewide, and throughout the nation. The trend is toward independence for attorneys and away from control by judges of the delivery of legal services. There is a growing national consensus that judges should have no more control over court-appointed lawyers than they do over privately-retained attorneys. Judges should be able to adjudicate issues that arise in individual cases, but they should not be coaching attorneys on how to advocate or defend cases and they should not be controlling the income stream of attorneys who appear in their courtrooms.

The current Code of Judicial Ethics is apparently insufficient – or else the practices revealed in Part One of the Trilogy would not be occurring repeatedly and openly. We therefore request the Court to modify the Code of Judicial Ethics to clarify that it is unethical for judges to manage legal services programs involving attorneys who appear before them or their court in individual cases.

Respectfully,

A handwritten signature in blue ink that reads "Thomas F. Coleman". The signature is fluid and cursive, with the first name "Thomas" and last name "Coleman" clearly legible.

Thomas F. Coleman

Attorney at Law (State Bar No. 56767)

tomcoleman@spectruminstitute.org

cc: See Proof of Service

Judicial
Control



Attorney
Obedience



Harm to
Clients



Part One of the Trilogy on Legal Services (pp. 1-20) focuses on how the PVP Legal Services Program of the Los Angeles County Superior Court is actually operated. Funding for legal services provided to indigents in probate conservatorship proceedings comes from the County of Los Angeles. Funding for legal services for litigants who do not qualify as indigents comes from the assets of these litigants. The PVP program is managed and operated by the judges of the Los Angeles Superior Court. Part One documents deficiencies in specific cases as well as showing a pattern and practice of legal services that have been unduly influenced by judicial management and coaching – to the detriment of the clients. The training programs for PVP attorneys have contributed to unethical practices and inadequate legal services by many of these attorneys.



Part Two of the Trilogy on Legal Services (pp. 21-28) 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.



Part Three of the Trilogy on Legal Services (pp. 29-38) looks at methods of providing legal services to indigents that do not involve judges operating the programs. There are models in Oregon and Massachusetts that can provide guidance to the California Supreme Court as it considers a new canon that prohibits judges from controlling or directing legal services programs. Several alternative methods are already being used in Los Angeles in the mental health division, juvenile dependency division, juvenile delinquency division, and criminal division. The judicial branch should focus on judging cases, not coaching and directing the type of legal services that attorneys deliver to clients who appear before the judges or their courts. It is not necessary for a judge or a court to operate a legal services program. Other options are available.



The Discovery of Individual Injustices Leads to Audits Showing Ongoing Ethical Violations in the PVP Legal Program

Part One: Trilogy on Legal Services

by Thomas F. Coleman

Six years ago I had no idea what PVP meant. I had a vague awareness of conservatorship proceedings. I had only passing familiarity with the Americans with Disabilities Act. I had not given any thought to whether people with intellectual and developmental disabilities were casting ballots in federal, state, and local elections.

Little did I know that in June of 2012 my life would change. I had no idea that I would be drawn into case after case, which would cause me to pay attention to a legal services program operated by the Los Angeles County Superior Court known as the “Probate Volunteer Panel.” Little did I know that my discovery of individual injustices would prompt me to conduct audits of dozens of cases and to conduct a thorough review of the PVP system. Little did I know that my discoveries would cause me to create a Disability and Guardianship Project and that, thousands of pro bono hours later, I would be creating a report for the California Supreme Court to expose the violations of judicial ethics that permeate the PVP system and the resulting adverse effects on people with disabilities.

The bottom line of my research conclusions indicate that judicial control of the PVP legal services program involves violations of the Code of Judicial Ethics, which in turn promote violations of the Rules of Professional Conduct by PVP attorneys, which in turn cause violations of the constitutional and statutory rights of conservatees and proposed conservatees. This domino effect deprives conservatees and proposed conservatees – involuntary litigants who have cognitive and communication disabilities – of access to justice in violation of the federal and state constitutions and in contravention of the Americans with Disabilities Act and its state civil rights counterpart.

The first dot involved the case of Mickey Parisio in 2012. Mickey, a man in his thirties, had an intellectual disability. He lived with his parents who were his conservators. My colleague, Dr. Nora Baladerian received information suggesting that Mickey was being abused by his parents. She asked me to investigate. After interviewing witnesses and viewing disturbing photos, Nora and I took action that led to Mickey being removed from the home of his parents and being hospitalized. Unfortunately, when the probate court failed to take remedial action to protect Mickey, he was released back to the custody of his parents. A few weeks later, he was dead. An autopsy report contained information suggesting that Mickey might have died due to abuse or neglect. The report stated that further investigation was needed in order to determine the manner of Mickey’s death. Neither law enforcement nor the probate court did the necessary follow-up investigation.

When I later reviewed the file in Mickey’s conservatorship case, I learned that a PVP attorney had been appointed to represent him after he was hospitalized. My review of the records showed that

the PVP attorney did not conduct a proper or thorough investigation. He did not talk to relatives who witnessed the abuse. He did not interview neighbors who would have informed him that they sometimes heard screams for “help” emanating from Mickey’s house. He did not talk to the detective who investigated the case. He did not call Mickey’s doctor to check on the mother’s claim that her use of military-grade handcuffs on Mickey was prescribed by the doctor. He did not contact Nora and me to find out if we had any relevant information on the case. Instead, after talking to the alleged abusers who said all was well, and going through the motions of a surface investigation, he reported to the court that no corrective action was needed. Had the PVP attorney conducted a thorough investigation, Mickey may not have been released back to his parents. He might be alive today.

The second dot involved the case of Gregory Demer in 2013. Gregory is an autistic man in his twenties who was placed under an order of conservatorship in 2005 when he turned 18. The original order transferred authority to make financial and medical decisions to his conservator. Gregory retained the right to make his own social decisions. His parents, who were divorced, were parties to ongoing litigation in the conservatorship proceeding. Gregory generally did not want to spend weekends with his father – telling various people on many occasions that he feared his father and that he did not like his father because he was often mean to Gregory. When Gregory was periodically with his father on a weekend, he would be forced to attend church – an activity that Gregory said he disliked immensely. When Gregory engaged in a pattern of resistance to these weekend visits, the father sought and obtained a court order forcing Gregory to spend every third weekend with him. This order was entered despite the fact that Gregory retained the right to make his own social decisions.

Gregory’s mother – a party to the conservatorship proceeding – felt the order requiring forced weekend visits violated Gregory’s constitutional rights. She filed a notice of appeal to challenge the order on Gregory’s behalf. While the appeal was pending, she found her way to Dr. Nora Baladerian and sought her advice. Nora asked me to investigate, which I did.

I discovered that Gregory had a PVP attorney assigned to represent him in the ongoing conservatorship proceedings. While the attorney sometimes vacillated between mild and moderate advocacy for Gregory’s stated wishes, the attorney ultimately succumbed to pressure from the court and stipulated to an order requiring Gregory to spend every third weekend with his father. Because the attorney had abandoned advocacy for his client’s repeated and forceful objections to such visitation, the attorney obviously did not appeal from the order. As a result, Gregory’s mother filed an appeal. She had to do the heavy lifting. Unfortunately, the Court of Appeal published an opinion affirming the order of forced visitation. Never actually reaching the merits of the case, the opinion was decided on a procedural issue. The court declared that the mother lacked “standing” to assert the rights of her son. Since Gregory’s attorney had participated in the violation of Gregory’s rights, he had not filed any pleadings in the appellate court. I was informed by someone who attended oral argument, that Gregory’s PVP attorney was seen in the audience passively observing the proceeding.

When the case was remanded back to the trial court, Gregory was assigned a new PVP attorney. She rubbed salt into the wounds by actively advocating that the right to make social decisions should be taken away from her client. She ignored numerous letters from friends and professionals who knew

Gregory well and who said that he was quite capable of making his own social decisions. She took her client into the judge's chambers and questioned him as though he were a hostile witness, trying to get him to say that he liked spending time with his father. Although her strong-arm tactics did not succeed, the judge stripped Gregory of his social rights and transferred authority to make social decisions to his professional conservator. Based on my investigation of this case, I filed an ADA complaint against the Los Angeles County Superior Court, as next friend for Gregory Demer. It alleged that the court itself was responsible for the violation of Gregory's right of access to justice and to effective advocacy services. The court would never have allowed an attorney to openly advocate against a client's wishes in a proceeding where the client did not have a disability. The surrender of Gregory's rights by the first PVP attorney, and the active advocacy against Gregory's firm and repeated wishes by the second PVP attorney, were ADA violations of the highest order – violations for which the court was responsible since it was aware of and acquiesced in the violations.

The third dot involved the case of Stephen Lopate in 2014. Steven was an autistic 18 year-old who lived with his mother. She had just filed a petition for a limited conservatorship. The court appointed a PVP attorney to represent Stephen in the case. When his mother reported to Dr. Nora Baladerian what had transpired when the attorney came to their house, Nora asked me to investigate, which I did. Steven's mother, Teresa, advised me that the attorney spoke to her but basically ignored Stephen who was present at the dining room table. He did not ask Stephen any questions. He did not inquire into Stephen's mode of communication. The attorney apparently assumed that Stephen was not able to communicate – which was not the case. Stephen can communicate by pointing to letters on a keyboard. When the attorney left the house, Teresa said that her son asked her if the lawyer thought that Steven was deaf because he never once addressed a comment or a question to Stephen while he was at their home.

Teresa asked me whether her son would lose his right to vote. She said that when she asked that question of the PVP attorney, she was told that Stephen would be disqualified from voting because voting was inconsistent with conservatorship. This prompted me to research state and federal laws on the voting rights of people with disabilities. I concluded that the attorney was wrong and I confronted him with my research. Since he had already filed a report with the court that would result in the loss of his client's voting rights, he later filed an amended report so that Stephen could retain his right to vote. Without my intervention, Stephen would have been stripped of his voting rights.

Stephen's court-appointed lawyer engaged in other activities that worked to the detriment of his client. Despite Stephen's expressed fears of his father – for good reasons – and his wish not to have to visit with him – the lawyer took steps that resulted in Stephen having to communicate with his father via Skype. Stephen did not want to do that, but the lawyer recommended it to the court anyway. The lawyer also violated Stephen's rights under the ADA by refusing to accept Stephen's chosen method of communication. Instead, the attorney insisted on using "yes" and "no" flash cards to elicit Stephen's answers to questions the lawyer posed. This did not work. The lawyer would have known that, had he been properly trained in effective communication with autistic clients.

When I connected these three dots, I suspected that perhaps these were not isolated failures by these particular PVP attorneys. Perhaps the PVP system was itself flawed. Maybe systemic deficiencies were causing or contributing to the failure of court-appointed attorneys to provide effective assistance of counsel – competent advocacy and defense services – to the conservatees and proposed

conservatees whom they were appointed to represent in these proceedings. I decided to conduct some audits of the PVP system – reviewing case files and attending the mandatory training programs in which PVP attorneys were required to participate. The audits confirmed my suspicion that persistent structural flaws permeate the PVP legal services program.

The next dot was an audit of voting disqualification orders in 2014. Based on Stephen's experience of nearly losing his right to vote because of a misinformed PVP attorney, I researched state and federal laws on the voting rights of probate conservatees. I discovered that state law required judges to disqualify a conservatee from voting if he or she could not complete an affidavit of voter registration. But what does that mean? Are there not federal laws that protect the voting rights of people with disabilities? Shouldn't these PVP attorneys be versed in voting rights laws that protect their clients?

I learned that federal law allows people with disabilities to have assistance with the voting process. Therefore, people like Stephen could have someone help them complete an affidavit of voter registration. Any interference with that right would violate federal law. Also, the Voting Rights Act of 1965 prohibits states from imposing literacy tests as a qualification for voting. States may not require potential voters to prove that they can "read, write, or interpret, or understand any matter." These federal protections would apply to people in conservatorship proceedings.

I decided to conduct a mini-audit of conservatorship cases handled by PVP attorneys in Los Angeles. After reviewing court files in more than 60 cases, and discovering that 90% of the proposed conservatees had been disqualified from voting, I decided I had enough information. In most of these cases, it was the PVP attorneys who checked a box in their own report that triggered the loss of voting rights of their clients. I also discovered that a self-help clinic to which the court refers petitioners for assistance was also contributing to the problem. It was coaching parents and other petitioners to check a box in the petition that would result in the automatic loss of voting rights of the proposed conservatee. I sought help from the Secretary of State and the DOJ to fix this mess.

Another dot was an audit in 2015 of PVP reports and fee claims. After I filed an ADA complaint against the superior court with the United States Department of Justice on behalf of Gregory Demer – based on the actions of his two PVP attorneys – I decided to conduct an audit of court files in 43 other cases. One sample involved 18 cases handled by a particular PVP attorney whom I called "Attorney X." Another involved 25 cases of six other PVP attorneys in cases processed by a particular judge in "Courtroom X."

A report that I filed with the DOJ about these audits explained: "A review of the activities of Attorney X and of the practices in Courtroom X shows a pattern of ongoing violations of Title II of the ADA. Instead of modifying policies and practices to increase access to justice, the exact opposite has occurred. Mandatory procedures designed to protect the rights of proposed conservatees were frequently waived. Optional procedures that would increase the likelihood of a just result were not utilized even though they could have been done without exceeding the court's time guidelines. As a result, proposed conservatees were not afforded the process they were due. Cases were rushed through the system. Shortcuts were used. Steps were missed. Efficiency, not quality, seemed paramount to the court and the attorneys the court appointed."

Some other comments in the report highlight systemic problems that may be the result of the judges who decide these cases being the ones in charge of the PVP legal services program. Here are a few excerpts from the report that are relevant to this problem:

Whether Attorney X gets a passing grade for his performance in the 18 cases reviewed, depends on the benchmark to which his performance is compared. If it is contrasted with what he was taught in court-mandated training programs, and what the court has implicitly ratified by approving his fee claims for payment, then he probably would receive a passing grade.

By signing a general order setting a presumptive limit on hours of service at 12 hours, the court has indicated a policy decision to keep hours down. By approving fee claims in which attorneys sought payment for 6 hours or less, and allowing the attorney to be reappointed to dozens of future cases, the court has implicitly approved of the performance of the attorney in these specific cases. The pattern of approval and reappointment, without judicial criticism, is tantamount to an official stamp of approval of what the attorney did and did not do in these cases. The court examines the fee claims. The court reads the PVP report which details what the attorney did, and the court can note what the attorney did not do. In reviewing the fee claim and the PVP report, the court is aware of what documents the attorney did and did not review, of which people the attorney did and did not interview.

When the performance of Attorney X and of the attorneys in Courtroom X are compared with the training programs they have attended, the attorneys would also receive a passing grade. The trainings have not created much in terms of expectations other than going through the motions and keeping the judges happy. The judges appear to be happiest when cases are expedited and fee claims are kept to a minimum.

Two more dots were audits of cases in 2012 and 2013. After reviewing case records available online for October 2013 and all cases handled in the downtown courthouse for the entire year of 2012, I wrote a commentary that explained some of my findings and observations.

Cases are run through the system with assembly line efficiency and speed. Probate investigator reports - which are required by law - are routinely waived. In a considerable number of cases, judges grant petitions even though the Regional Center report - also required by law - has not been filed.

In 85 cases that I examined for the month of October 2013, nearly 100 percent of the petitions were granted without a contested hearing.

Attorneys for proposed conservatees are not demanding trials on the issue of conservatorship, nor are they demanding hearings on any of the rights that are being taken away from their clients, like voting rights.

I reviewed all of the cases filed in the downtown courthouse in 2012. Appointments of attorneys to represent proposed conservatees (PVP appointments) were not made on a fair rotational basis. A few attorneys received 30 or 40 appointments, while many received only 2 or 3.

This observation of favoritism by judges in the appointment process, with some attorneys getting way more cases than their fair share, was later affirmed when I reviewed fee payments to PVP attorneys during 2012 to 2015. I obtained the fee payment lists for these years in response to an administrative records request I filed with the court. Some attorneys received as many as 80 or more appointments, while others received as few as two or three. There were about 220 PVP attorneys on this appointment list and about 2,000 new cases filed annually during that time frame. Therefore, if cases were assigned in a fair rotational basis, each attorney would receive about 10 cases per year. A fair assignment process was certainly not occurring. Favoritism seems to have prevailed.

In addition to my review of online dockets and probate notes, and the list of fee payments, I went to the downtown courthouse and reviewed computer records in 61 limited conservatorship cases filed between August and December 2012. The following are some of my findings and observations:

I was looking into several areas that had bothered me when I previously had done the online reviews: (1) the lack of investigations and reports by the Probate Investigator's Office; (2) the granting of petitions without the judge having had the benefit of reading the Regional Center report; (3) PVP attorneys advising the court that their client does not have the ability to complete an affidavit of voter registration; (4) the routine granting of all "seven powers" to petitioners. What I found in the on-site review of actual documents in the court files confirmed what my online research suggested was happening.

In all but a few cases, PVP attorneys recommended that the court restrict the rights of their clients in all seven areas and grant all seven powers to petitioners. In a few cases, the attorneys recommended that their clients retain decision-making authority on social and sexual matters.

In all but four cases, PVP attorneys advised the court in writing that their clients were not able to complete the affidavit for voter registration. This nearly always resulted in a court order disqualifying the conservatee from voting. In two cases, the court disregarded the attorney's advisement and declined to take away the conservatee's

right to vote.

It was not uncommon for the court to grant a petition, without a Probate Investigator's Report and even though the Regional Center report had not been filed. With the Regional Center report absent, the approval of the petition was primarily based on the allegations of the petition and the PVP report. In many files I saw specific notations that the PVP report would be used in lieu of the Probate Investigator's report.

In one case, the conservatee wanted to make decisions on residence, social, sexual, and marriage issues. The PVP attorney did not make a recommendation on this. An evidentiary hearing was not conducted. The client ultimately lost these rights pursuant to a stipulation by the PVP attorney.

Additional dots involved a review of several mandatory PVP training programs. It was in 2014 that I first started to focus on potential systemic problems with the PVP legal services program. Based on deficiencies of performance by attorneys in some individual cases, and based on a pattern that became evident when I audited dozens of case files, I wondered whether part of the problem could be attributed to the mandatory PVP training programs that the court required the attorneys to attend. Therefore, I decided to review materials from the training program in 2013 and to start attending such programs in the future.

My review of the materials from the 2013 training program – a seminar implicitly endorsed by the superior court – caused me great concern. Speakers were advising attorneys to engage in practices that were either improper, unethical, or highly questionable. These are some of my comments about the 2013 training materials:

[One speaker's] presentation suggested three possible roles for the PVP attorney: an advocate for the client; assisting the petitioner in preparing essential legal forms; and as a mediator in a contested proceeding.

An attorney cannot represent a proposed conservator and a proposed conservatee. This presents a classic conflict of interest. So I question the assertion that PVP attorneys play a "dual role" in a limited conservatorship case. As for the possible third role as a mediator, that would also conflict with the role as an advocate for the proposed limited conservatee.

A PVP attorney should have only one role: to advocate for and give advice to the proposed conservatee.

The first PVP training program I attended in person occurred in April 2014. The following are some of my comments about the alarming things I saw and heard at that seminar:

While much of the content of the training was harmless procedural or technical information, some aspects of the presentations were critical to effective advocacy. Unfortunately, some of the "practice tips" by attorneys were contrary to rules of professional conduct and ethics, while some of the comments by judges were incorrect or harmful to appropriate advocacy.

An opening presentation by Michael Levanas, Presiding Judge of the Probate Court, was very helpful in its early stages. He emphasized how the job of a PVP attorney was so important because the proposed conservatee faces the prospect of having his or her liberty taken away and losing various rights. Even though the probate court is a "protection" court, it is dealing with major encroachments on a person's freedom.

The first substantive topic of the seminar-The Role of the PVP Attorney - was the focus of extensive remarks by Judge Levanas. He spent a great deal of time discussing whether a PVP attorney should advocate for the "stated wishes" of the client or for what the attorney personally believes to be the "best interests" of the client.

Judge Levanas did explain that his personal preference was for an attorney to advocate for the "stated wishes" of the client. However, he went on to say that if the attorney disagrees with the client's wishes, then the attorney should tell the court the client's wishes as well as the attorney's own opinion of what is in the client's best interests.

Later in the program, an attorney and a different judge specifically discussed the role of PVP attorneys in limited conservatorship cases.

The judge on this panel reminded attorneys that the court investigators are not doing investigations and reports in limited conservatorships, at least not in initial filings. Therefore, the PVP attorney report will be used "in lieu of" a court investigators report. This point was reiterated by the attorney on this panel. She said that prior to starting a PVP investigation, attorneys should ask themselves "What would a Probate Investigator do?" "You are a substitute for the Probate Investigator," she said. "The court is relying on you to do what the Probate Investigator does."

While what she said may be true, in practice, it is also contrary to rules of professional conduct for attorneys, ethical principles, and constitutional standards for effective assistance of counsel.

An attorney cannot be a de-facto court investigator and an effective advocate at the same time. An investigator should be neutral and

objective, and takes direction from the court. Communications to an investigator are not privileged. The work product of an investigator will be shared with the court regardless of whether the information is harmful or helpful to what the conservatee wants.

Under the requirements of the [14th] Amendment to the United States Constitution, attorneys must be diligent and conscientious advocates for their clients. Communications to attorneys are privileged. The work product of attorneys is confidential and may not be disclosed to the court or anyone else without the informed consent of the client. An attorney may not disclose information that could harm the interests of the client.

Telling PVP attorneys to do what a Probate Investigator would do is basically advising attorneys to violate Rule 3-100 of the Rules of Professional Conduct of the State Bar of California.

That rule prohibits an attorney from disclosing confidential information without prior informed consent of the client. That rule is not limited to communications from the client to the attorney. It includes the attorney's work product. Work product is any information, from any source, obtained by the attorney during the course of the attorney-client relationship.

Another aspect of the seminar disturbed me greatly. This had to do with the voting rights of proposed conservatees.

A judge mentioned that the issue of voting rights arises in limited conservatorship cases. He said the test for voting rights being retained by a conservatee is whether he or she is capable of completing an affidavit of voter registration.

The judge gave an example of a mother who told the judge: "That's not a problem. I can fill out the form for him." Having said that, the judge began to laugh, adding: "That's not the way it works." Following his lead, the audience began to laugh. The judge then moved on to another topic.

I did not find the story amusing or educational. Not only was it misleading, it was detrimental to effective advocacy by PVP attorneys. The "take away" from the judge's remarks was that if limited conservatees cannot fill out the forms themselves, they should be disqualified from voting. The judge must be unaware of federal voting rights laws that restrict the authority of states from limiting the voting rights of people with disabilities.

People with disabilities may have someone else help them fill out a voter registration application or help them fill out a ballot in an election. Also, states may not use any test or device to make someone show they can read or write or show they can interpret or understand any matter. So it would be a violation of federal law for a probate court make someone prove they can understand and complete a voter registration application on their own.

The next mandatory PVP training program occurred in September 2014. It focused exclusively on limited conservatorships for adults with intellectual and developmental disabilities. About 80 attorneys attended, 20 of whom indicated that they had never represented a client in a limited conservatorship proceeding. Based on the advertised program, I was hopeful that this program would be better than the others I had previously reviewed. I soon discovered that my hope was misplaced. The following are some of my comments about this program:

The handouts were woefully inadequate. Some agenda items that were advertised were either not covered at all or were handled in a surface and perfunctory manner. Information presented contained statements that were incorrect and sometimes contradictory.

The issue of voting rights probably found its way onto the agenda of the training program because of complaints that the April training had misinformed PVP attorneys about the right of a conservatee to have assistance in completing an affidavit of voter registration.

The fact that a complaint had been filed against the Los Angeles Superior Court with the United States Department of Justice just two months ago probably also had something to do with it.

The segment on voting rights was presented by an attorney from a non-profit legal services organization, and Judge Michael Levanas, Presiding Judge of the Probate Court.

Judge Levanas told the attorneys that the Probate Court would not be deciding any federal constitutional issues. He emphasized that if anyone wanted to raise such issues, they should do so in federal court.

In effect, Judge Levanas was telling PVP attorneys not to waste their time raising federal voting rights objections in limited conservatorship cases. His statements were both ethically inappropriate and procedurally incorrect.

Federal issues are raised in state court every day. Evidentiary objections based on assertions of Fifth Amendment rights, or motions to suppress based on Fourth Amendment rights are routine. State and federal courts have concurrent jurisdiction over federal constitutional

issues.

It is settled law that “Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . .” (Robb v. Connolly (1884) 111 U.S. 624, 637)

For the Presiding Judge of the Probate Court to advise court-appointed attorneys that the judges will not consider federal voting rights objections in limited conservatorship proceedings is itself a violation of the voting rights of people with disabilities.

Judge Cowan reminded the attorneys that court investigators are not appointed on limited conservatorship cases, therefore the court expects them to “be the eyes and ears of the court.” Another presenter confirmed that such investigators are not involved. Having PVP attorneys serve as de-facto court investigators, to gather information about the client and share it with the court, is a breach of confidentiality (and loyalty) of the highest order.

In the question-and-answer session at the end (after dozens of attorneys left the seminar because they were given permission to leave), Judge Levanas explained how and why a decision was made to stop using court investigators and to start relying on PVP attorneys as substitute investigators.

He said that a presiding judge before his time stopped using court investigators for budgetary reasons. I was surprised when he admitted that it was improper to expect PVP attorneys to assume such a role. But despite this opinion, the fact is that for several years, and right up to the present time, that is what PVP attorneys are doing because court investigators are not assigned to these cases.

In March 2015, the Los Angeles County Bar Association sponsored a lunch-time recruitment seminar for PVP attorneys. It was titled: “Thinking of Becoming a PVP.” There were three speakers in addition to Maria Stratton, the new presiding judge of the probate court. I taped the presentation and it was later transcribed. Here are some of my comments about what I heard:

She and other speakers began to raise issues that have simmered for years and that have been swept under the rug by “the system.” Problems that were unflattering to the court were now being aired openly, not only by some of the panelists but by the Presiding Judge herself.

Virtually any lawyer can get on the PVP list. When they apply to be on the panel, attorneys certify they are qualified. No one checks to

see if they truly are. There is no monitoring or even spot checking on this.

Once an attorney is on the list, the attorney is on it forever. There is no system to take attorneys off. However, there is a “black list” procedure where an individual judge can prevent an attorney from getting appointed to any conservatorship case in his or her courtroom. The attorney is not informed. Each judge has unilateral veto power. No reason must be given.

The Probate Examiner’s office selects attorneys for specific cases. Names of 210 attorneys are supposed to be rotated. However, that does not appear to be happening, since some attorneys get dozens of appointments while others get none, or perhaps one or two a year. Panelists grumbled about this.

There is no procedure to file complaints about attorney misconduct. If one attorney sees a PVP attorney violating ethics, there is no internal administrative method to handle this awkward situation.

Some judges press PVP attorneys to step out of their role as an advocate and defender of their client’s rights. They want the attorneys to disclose information to the court that may be adverse to the client. Judge Stratton admonished attorneys to refuse the temptation to do so even if they get flack from these judges.

In May 2015, the County Bar Association sponsored a training program that featured a presentation by Maria Stratton, the new presiding judge of the probate court. I attended the program and was amazed that what she was telling the PVP attorneys was completely contrary to what they had learned from judges and other presenters in prior seminars. Even though I liked what I heard and thought that it conformed to constitutional and ethical requirements for attorneys, this was still a bench officer – a judge before whom these attorney may appear in conservatorship cases – coaching the attorneys on how to advocate. She was coaching them on what to do and what not to do in the course of advocating for and defending their clients. Again, even though I liked what I heard, it amazed me that judges are allowed to coach the attorneys whose cases they will later decide.

The following are quotes of some comments made by Judge Stratton during the presentation:

My attitude is that you get appointed on a case, and you have what you have, and you roll with it. And you roll with it as an advocate.

I know there’s kind of a tension between do I come in and tell the judge what I think is in my client’s best interest, or do I come in and tell that judge this is what my client wants to do and this is the way we’re going to proceed with the litigation . . . While maybe in the background you are trying to persuade the client to do what you think

is in their best interest . . . [Y]ou may have clients who are telling you “I want to do this, I want to do that” and in the back of your mind you’re thinking “that is such a bad decision.” For many of them, the clients that you get, they are impaired – either intellectually impaired or they’re impaired by the mental and medical and physical condition that has happened to them because they’re elderly. So you do have a delicate balance because you’re trying to talk them into taking your advice because as a lawyer you’re their counselor, but as a lawyer you’re also their advocate. So when they’re telling you “I don’t want this conservatorship, I’m fine, let’s take it to trial,” that’s what we as a judge need to know.

So if your client is telling you “I’m opposed to this conservatorship, I’m fine, I don’t need any help,” then the judge needs to know that. It’s not going to be forgotten, it’s going to be put in the [judge’s] brain just like everything else, all the other facts, but it is a critical fact that the judge needs to know.

When people come in and they say in their PVP reports – and I’ve seen some like this – “Well, I think my client should have a conservatorship.” Well, you know what, I appreciate your opinion but I need to know what your client wants first, before I know what you want. And maybe I shouldn’t even really hear what you think if it’s contrary to what your client wants.

Your client says “I want a trial” or “I want a hearing” or “I don’t want this particular person as my conservator,” the judge needs to know that. And maybe you shouldn’t be saying, “and by the way judge, even though my client says she doesn’t want a conservatorship, she is so demented she doesn’t really know what she wants and she really needs one.” No, you can’t say that. That’s being disloyal to your client.

While ultimately the judge is going to take into account, perhaps, what the best interests of your client are, if the client’s best interests aren’t what the client wants, then you don’t have any business telling me what your opinion about what the best interests are. I will get that from the court investigator’s report, or I’ll get that argument from the other side – the conservator or the conservator’s counsel whose coming in to tell me why it’s in the client’s best interest to have a conservator and to have a particular conservator.

For the most part, you’re going to have court investigator reports and that court investigator is writing it from the best interests point of view, not any other point of view. So as bench officers we need to hear your client’s side of the story, because we’re already getting the

best interests side from the court investigators. You don't have to worry that we're not going to get it. That is the goal of the court investigator's report, to tell the judge what the court investigator recommends is in the best interest of the client.

The next and final PVP training program I attended was in November 2016. Some of the comments made by presenters, including and especially Probate Presiding Judge David Cowan were very disturbing to me. Here are some of my comments about these presentations:

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.

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.

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 conservatorship 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.

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.

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.

There was one final dot that I connected in 2017 – the case of Theresa Jankowski. In 2017, a petition was filed by a financial professional seeking an order to place Theresa Jankowski – an 84 year old woman with no relatives – into a conservatorship. The petitioner wanted to be appointed as a paid conservator so she could take control of all aspects of Theresa's life – both personal and financial. Theresa objected. She hired an attorney to help her find alternatives to conservatorship. The court appointed a PVP attorney to represent Theresa in the proceeding. The court did not acknowledge her chosen attorney, and his co-counsel, as her legal advocates. Over time, conflicting evidence developed – some suggesting the need for a conservatorship and some suggesting that alternative supports and services would make a conservatorship unnecessary. The PVP attorney latched onto the evidence favoring conservatorship and rejected the evidence favorable to his client's stated wishes to oppose conservatorship and to oppose this particular person as a conservator. The PVP attorney advocated for what he personally decided was in his client's best interests.

I wrote an article for the Daily Journal newspaper about the case. In it I suggested that the judge in the case should remove the PVP attorney for violating his duty to advocate for his client and for breaching ethical duties of confidentiality and loyalty. I also sent a statement of concern to the judge handling the case pursuant to Rule 7.10 of the California Rules of Court which allows ex-parte communications to share information that could help the court protect the client's rights and welfare.

The judge, who was retiring, transferred the case to Probate Presiding Judge David Cowan. Judge Cowan sent my communication to the parties and set a hearing, in *his* courtroom, on the issues I had raised in my materials. Concurrently, he scheduled a hearing on a motion filed by Theresa's private attorneys to disqualify the PVP attorney for breaching the duties I had mentioned in my ex-parte communication. However, Judge Cowan did not inform the parties that on at least two occasions in settings outside of the courtroom, he had coached PVP attorneys that they should act as the "eyes and ears of the court." Thus, he was planning to rule on issues that he had taken a firm position on in seminars where he was directing attorneys on how to advocate in conservatorship cases.

When I discovered that Judge Cowan had heard argument on the matters, and planned to issue a ruling in the coming days, I sent him another communication. It directed his attention to statements he had made coaching attorneys to act as investigators rather than advocates with duties of confidentiality and loyalty. My communication suggested that he, on his own motion, should disclose to the parties that he had made prior out-of-court statements on these matters, recuse himself, and transfer the case to another judge for an impartial hearing on the contested issue of the proper role of a PVP lawyer. Judge Cowan declined to follow my suggestion. He stated in writing that he was choosing to ignore my communication and that if I wanted to be heard I should inject myself into the litigation as an "interested person." He issued a written ruling, with a lengthy opinion, in which he doubled down that it is permissible for an attorney to abandon his role as an advocate for the client's stated wishes and to conduct best interests advocacy instead. His ruling likened the role of an attorney for a proposed conservatee to that of an attorney for a child in a custody dispute in family court. He tried to bolster his conclusion that zealous advocacy was not

required by claiming that probate conservatorship disputes are not adversarial proceedings.

Although the substance of this ruling is bothersome, the fact that Judge Cowan chose to ignore his duties under the Code of Judicial Ethics was even more troubling. These canons called for him to disclose the prior out-of-court positions he had taken and to recuse himself from deciding this issue because a reasonable person knowing about his public positions on this issue would doubt his ability to be impartial in deciding whether the PVP attorney had acted improperly in Theresa's case.

Conclusion

Theresa's case was not only the last dot in a mosaic showing a pattern of legal and ethical violations by judges and attorneys in the PVP legal services program, for me it was the last straw. Attorneys were following the coaching and direction of the judges who control the PVP system. The judges were in control of who was added to the list of attorneys eligible for appointment, the appointment process showed favoritism, the judges controlled how much the attorneys would be paid, and the judges controlled whether they would receive future appointments. The attorneys who complied with judicial preferences likely felt they would be rewarded with appointments to more lucrative cases. The attorneys likely feared that if the judges lost control of the system, the board of supervisors might decide to have the public defender's office represent these clients, thus eliminating a significant source of income for many of the PVP attorneys.

The judges depend on their control of these attorneys for keeping cases moving along and clearing their dockets. Attorneys who file motions, make objections, and demand evidentiary hearings – or even who challenge the system itself – can be dealt with by being blacklisted from appointments to cases in their courtrooms. The attorneys are not even informed that have been blacklisted.

Apparently, the current Code of Judicial Ethics are not specific enough to prevent judges from engaging in activities such as those explained above. The California Supreme Court should direct its Advisory Committee on the Code of Judicial Ethics to hold public hearings about judicially-operated legal services programs such as the PVP program controlled by judges of the Los Angeles County Superior Court. Other courts operate similar programs. After such hearings, the committee should prepare a new canon to prohibit judges from entering the advocacy arena in this way. Judges should judge cases, not coach and direct the advocacy activities of attorneys who represent clients with cognitive and communication disabilities – clients who generally cannot complain to the court, file complaints with the State Bar, or file complaints with the Commission on Judicial Performance.

The State Bar of California, the National Center for State Courts, and other organizations have taken formal positions that judges should not be operating legal services programs. This is especially true of judges before whom the attorneys in such programs will appear in specific cases.

Judges are not able to control the advocacy activities or methods of privately retained attorneys, pro bono attorneys, or public defenders. These attorneys are free to advocate and defend according to their client's wishes and adhere to their ethical and legal duties as attorneys. They are free to file motions or demand evidentiary hearings without fear of financial or other reprisal. Institutional legal services programs operated within the executive branch, such as public defenders, are especially free to challenge practices of judges and courts in a powerful way.

Unfortunately, people with disabilities who find themselves involuntarily drawn into conservatorship

proceedings, and who are appointed an attorney who is under the control of the court, are at a distinct disadvantage. This disadvantage not only implicates violations of judicial ethics and violations of professional ethics by lawyers, it runs contrary to constitutional protections and federally protected statutory rights such as the right to access to justice and equal advocacy services pursuant to the Americans with Disabilities Act and California Government Code Section 11135.

A new section in the Code of Judicial Ethics should address and remedy the problems created when judges move out of the role of adjudicating cases and use financial strategies and coaching tactics to shape the way attorneys represent their clients. The shaping of advocacy should result from policies adopted by the State Bar, quality assurance controls required by those who fund the legal services programs, legislative directives, and the decisions of appellate courts in specific cases.

The domino effect of violations of judicial ethics triggering violations of legal ethics which cause violations of the rights of clients with disabilities needs to be addressed. The California Constitution gives the California Supreme Court the duty to establish Canons of Judicial Ethics to regulate the conduct of judges both inside and outside of the courtroom. When existing canons do not seem adequate to prevent judicial abuses, a new canon can be promulgated to fill the void. It is time for that to occur now.

The Canons of Judicial Ethics should specifically prohibit judges from operating legal services programs – especially when the programs involve attorneys who are likely to appear before the same judges or the same court that operates the program. A neutral third party – whether it is a public defender, a law firm or nonprofit organization selected by the county – will better serve that function.

Methodology for the Study of the PVP Legal Services Program

Probate Code Section 1470 authorizes a court to appoint legal counsel to represent a conservatee or proposed conservatee in a probate conservatorship proceeding if the individual is not otherwise represented by legal counsel. Section 1471 mandates the appointment of the public defender or private legal counsel to represent a conservatee or proposed conservatee under various circumstances.

State law requires counties to provide indigent conservatees or proposed conservatees with legal counsel at county expense in probate conservatorship proceedings. In some counties, the task is given to the public defender. In other counties, it is delegated by the board of supervisors to a law firm through a contract. In yet other counties, supervisors allow the superior court to operate and manage a legal services program for court-appointed counsel.

In the County of Los Angeles, the board of supervisors has chosen to allow the Los Angeles County Superior Court to fulfill the county's statutory mandate by operating a court-managed and court-supervised Probate Volunteer Panel. In this relationship between the county and the superior court, the judges recruit attorneys to serve on the panel, appoint them to individual cases, mandate attendance at specific training programs, set the level and amount of their fees, and decide whether

to retain them on the panel and appoint them to future cases. Judges also decide whether to appoint them to higher fee cases paid from the estates of the clients.

The PVP program is operated by the superior court without any quality controls by the county and without oversight by any state agency. The PVP program is controlled by the local judges before whom the attorneys appear in individual cases.

I have been studying the PVP program for six years. I have had personal meetings with probate presiding judges Michael Levanas and Maria Stratton to discuss the program. I have listened to lectures by these two judges, as well as Judge Daniel Murphy and Judge David Cowan.

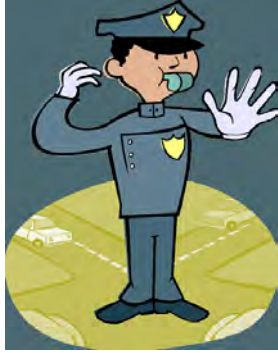
I have attended several educational programs for PVP attorneys sponsored by the Los Angeles County Bar Association, listening to presentations by judges, attorneys, and other speakers. I have also reviewed the training materials from these programs as well as other programs prior to my initial review of the PVP system.

I have interviewed several attorneys who represent clients in probate conservatorship proceedings. I have closely monitored several individual cases, including two cases involving young men with autism, the case of a man with an intellectual disability, and that of an 84 year-old woman.

I have audited dozens of court files, including a review of the reports and fee claims submitted by PVP attorneys. I have reviewed documents supplied to me by the court pursuant to administrative records requests. This includes a list of fees paid to PVP attorneys over the course of a three year period.

Based on my review of the PVP system, I have: (1) filed statements of concern with judges in two cases; (2) written letters asking elected officials to reform the system; (3) filed an ADA complaint with the county and met with county supervisors; (4) filed two ADA complaints with the U.S. Dept. of Justice; (5) sent letters of concern to the Chief Justice of California; (6) submitted proposals to the Judicial Council; (7) testified before the California Senate Judiciary Committee; and (8) written dozens of essays, commentaries, and published op-ed articles.

While this is not an academically-controlled study, I believe my review is the most comprehensive study – perhaps the only one – ever conducted of this PVP legal services program.



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.

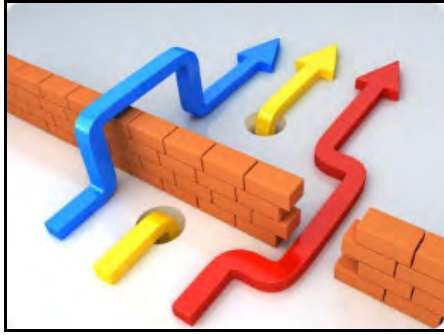
At the core of these policies and position papers are principles embodied in the canons of judicial ethics and the rules of professional responsibility. Impartiality and the appearance of impartiality should guide the activities of judges, both in and out of the courtroom. Loyalty, confidentiality, and 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.



There Are Viable Alternatives to Court-Run Legal Services Programs

Part Three: Trilogy on Legal Services

By Thomas F. Coleman

Part Three of this Trilogy looks at methods of providing legal services to indigents that do not involve judges operating the programs. Several alternative methods are used in Los Angeles in the mental health division, juvenile dependency division, juvenile delinquency division, and criminal division. Alternative methods from other states are also addressed in Part Three. It is not necessary for a court to operate a legal services program. There are other options.

Oregon

As early as 1994, there was a call in Oregon to move the control of indigent defense services from the judiciary to an independent commission. That recommendation came from the Oregon State Bar's Indigent Defense Task Force. A more powerful impetus for change, however, came from a legislative study commission established at the request of the Judicial Department in 1999. A report issued by the National Legal Aid and Defender Association in 2003, titled "The Implementation and Impact of Indigent Defense Standards," explained:

The legislative study commission found that the direct involvement of judges in authorizing assigned counsel compensation and expert witness fees, and other case-related expenses, was in direct conflict with national standards relating to both independence and adequacy of representation.

Referring to budget deficiencies to pay for legal services, the 2003 report explained that: "The study commission found that the primary reason for such indigent defense funding shortfalls was direct competition with other priorities of the judicial branch." This correlates to information in Part One of this trilogy where it was reported that judges who ran the PVP panel in Los Angeles wanted court-appointed attorneys to assume the duties of court investigators. Why? Because the judges had decided to reduce the court's budget by laying off court investigators. To fill the gap of necessary services, they pressured the attorneys to step outside of their proper role and to violate ethical duties by becoming the "eyes and ears of the court" like the court investigators had previously done.

According to the 2003 report: The problem of judicial interference with attorney autonomy was solved because "The new system removed judges from the process entirely." The new independent state commission enters into contracts with local indigent defense service providers. The contracts "contain safeguards protecting the independence of the provider agency as well as individual

attorneys furnishing defense representation.” Since all of the contracts are overseen at the state level, “local judges cannot control the appointment of specific lawyers to their courtrooms.”

Massachusetts

The 2003 Legal Aid and Defender report cited Massachusetts as a national model. The legal aid program for indigent persons in that state is operated by the Committee for Public Counsel Services (CPCS). The program includes criminal and civil commitment cases, as well as adult guardianship proceedings. According to the report:

Massachusetts is the only state where a majority of indigent defense standards are statutorily required and imposed statewide. A statute directs the statewide public defense agency to write, monitor and enforce standards in a variety of areas, covering both public defender offices and private assigned counsel.

Most indigent defense services in the state are provided under the supervision of CPCS’ assigned counsel plan. CPCS contracts with 12 local bar advocate programs to monitor and provide supervision for the private bar accepting cases at the local level. Assignment of cases is based solely on scheduled court days staffed on a rotational basis, to reduce the risk of undue judicial influence in the selection of attorneys. CPCS also has a public defender division with approximately 130 staff attorneys handling Superior Court cases through 13 regional offices.

Assigned counsel for respondents in guardianship cases are regulated by CPCS. They are assigned to cases by the commission, not by judges. The commission sets qualifications to get on an approved list of attorneys. The lawyers must attend an intensive five-day training program. They are then paired with a mentor – a seasoned attorney with experience in this area of practice. They stay in the mentorship until the mentor certifies they are ready to handle cases on their own. They must attend refresher courses periodically. They must “abide by a set of rigorous performance guidelines that set attorney responsibilities at every stage of the case.”

The CPCS program includes the enforcement of the performance standards by the local county bar advocate programs. This includes reviews of performance that may result in financial auditing. Performance reviews are designed to “assure that zealous advocacy consistent with CPCS’ published performance guidelines is provided in all cases.” The legal aid report adds:

To fulfill this requirement, each program must employ supervisors to evaluate appointed counsel, provide assistance and training, and to investigate complaints. Written guidelines require that all attorneys receive careful supervision and guidance.

California

Massachusetts appears to be the gold standard in terms of the operations of a publicly-funded legal services program. It applies to attorneys assigned to represent clients in adult guardianship proceedings, which are the equivalent of California's conservatorship proceedings.

California has no state-operated or state-monitored legal services program for indigent conservatees or proposed conservatees. Since appeals by conservatees are rare or nonexistent, California's appellate courts play almost no role whatsoever in providing guidance to judges and attorneys who handle conservatorship cases. Each superior court is pretty much left to its own devices.

Although a 2014-2015 report issued by the San Mateo County Civil Grand Jury specifically focuses on indigent defense programs in criminal cases, some of the observations made in the report would apply to conservatorship legal defense as well. The report states:

In California, no statewide authority dictates the type of defense program, monitors the adequacy of the defense program, or collects data regarding the level of funding provided by counties for indigent defense. These responsibilities fall on each county. Of the 58 counties, 33 have a Public Defender's Office, including every county with a population over 500,000 except San Mateo County. Twenty-four counties contract for indigent defense using a variety of contract agreements.

According to someone associated with the California Public Defender's Association and who is employed as a deputy public defender in Santa Barbara, about 12 counties use the services of the public defender to provide legal representation for indigents in probate conservatorship proceedings. Superior courts in other counties have an assigned-counsel system that is either operated by the court itself or is operated by a private firm or nonprofit organization under contract with the county.

A report issued in 2000 by the National Legal Aid and Defender Association explains some of the variations that exist throughout California in terms of legal representation of indigent clients in probate conservatorship proceedings. It states:

[P]ractice varies in counties across California with respect to representation by Public Defenders in conservatorships. For example, in Los Angeles County the Public Defender represents conservatees in LPS conservatorships, but not in "Probate" conservatorships. In the latter cases, representation of conservatees is provided by attorneys appointed from the Court's Probate Volunteer Panel. In LPS cases, the Los Angeles County Public Defender does not provide representation to conservatees who have large estates. Rather, private attorneys are appointed from a panel that services the county's dedicated Mental Health Court. In San Diego County, the Public

Defender represents conservatees in only LPS conservatorships of the person. All estates are handled separately as Probate Conservatorships in which representation is provided by a panel of appointed lawyers. In Orange County, the Public Defender provides representation in both LPS and Probate Conservatorships of the person. It does not participate in probate conservatorships of the estate. On rare occasion, it has been appointed over its own objection for the closing of Public Guardian LPS conservatorship estates. Otherwise, it does not represent conservatees in LPS estates. In Ventura County, the Public Defender represents conservatees of the person and estate in both LPS and Probate proceedings. However, when the Public Defender is appointed in cases with extensive or complex estates, it withdraws in favor of a specially-trained panel of private attorneys.

The Legal Aid report explains that the various approaches that exist across the state have arisen “for historical and practical reasons not related to the constraints of law.” The county governments and court systems “pick and choose” which proceedings will be handled by the public defender and which will be handled by assigned-counsel systems operated by the court or some other agency under contract with the county.

The decision as to which method of legal representation will be used for indigents in probate conservatorship proceedings is really one that is made by the board of supervisors in each county. As explained above, representation is handled differently among the counties.

Los Angeles County

In Los Angeles County, sometime in the distant past, the board of supervisors decided to allow the superior court to operate a legal services program that provides counsel for indigents who are respondents in probate conservatorship proceedings. I have not been able to determine when this was decided, nor have I been able to ascertain the reasons why. Why was the public defender not chosen for probate conservatorships as it was for LPS conservatorships? No one that I questioned about this, including the acting head of the Public Defender’s Office, had an answer.

The options that are available to the board of supervisors can be seen through a review of its choices for representation in criminal, juvenile dependency, juvenile delinquency, and family law cases.

The board of supervisors has implemented three different methods of legal representation for indigents in criminal cases. None of them involve a court-operated program. The public defender has been the primary source of legal representation for indigent criminal defendants since 1914 when the office was established. But due to rules prohibiting conflicts of interest, the public defender can only represent one defendant in a multiple defendant criminal case. For years, the method of handling this problem was for the superior court itself to run an assigned-counsel system. It had a “conflicts panel” of attorneys. The judges in the criminal division handled appointments in their

own courtrooms. This devolved into a system of favoritism where some attorneys received the bulk of appointments from certain judges.

The judges in the Central District of the Los Angeles Superior Court decided to change the system for that district in 1986. That year, the court entered into an agreement with the Los Angeles County Bar Association to operate an Indigent Criminal Defense Appointments Program. This allowed the judges to operate their courtrooms and not have to manage a criminal defense legal services program.

In 1993, the board of supervisors decided to create an Alternate Public Defender's Office to represent indigent defendants in these conflict cases. This office became the secondary source of legal defense when the public defender declared a conflict of interest. But because the alternate defenders might also need to declare a conflict, the county bar continued to operate the ICDA program in the central district of the superior court. In 1994, the board of supervisors decided to expand the ICDA program countywide.

Thus, for criminal cases handled in the Los Angeles County Superior Court, there are now three legal defense programs. None of them are operated by the judges who hear criminal cases. There is the Public Defender's Office and the Alternative Public Defender's Office – both of which are departments of the County of Los Angeles. Then there is the ICDA program operated by the Los Angeles County Bar Association under contract with, and funded by, the county. Criminal defense attorneys for indigent clients are not under the influence or control of the judges they appear before any more than privately-retained attorneys are.

Juvenile delinquency cases processed by the Los Angeles County Superior Court have a variety of legal services programs serving the needs of indigent juveniles. The board of supervisors has chosen to designate the Public Defender and the Alternate Public Defender as the two primary sources for legal services in these cases. However, when both of these offices are unavailable due to a conflict of interest or other reasons, the county has contracted with the Los Angeles County Bar Association as a third alternative. The mandate of the Independent Juvenile Defender Program is “to oversee a panel of independent attorneys who represent indigent youth facing criminal charges in juvenile court.” Thus, for juvenile delinquency cases handled in the Los Angeles County Superior Court, there are three legal defense programs. None of them are operated by the judges who hear juvenile delinquency cases.

The board of supervisors has established two primary sources of legal representation for indigent litigants in juvenile dependency cases. The old system of judges running a court-appointed-counsel system was abolished by the board years ago. Now, there is one source for attorneys representing parents and another source for attorneys representing minors – neither of which are under the direct control or management of the judges who hear these cases.

The Children's Law Center of California (CLC), formerly known as Dependency Court Legal Services, was founded in 1990. This program appears to be operating under a contract with the superior court. Apparently, the funds for these legal services comes out of the court's own budget from allocations provided by the State of California. The website of CLC says that the court “created

a policy designating CLC as the first choice for representation of children” in dependency court proceedings. CLC says that it is “the largest non-profit, public interest law firm in the nation dedicated solely to protecting the rights of abused and neglected children.” The firm only represents children. Indigent parents in dependency proceedings receive legal representation through another source.

Los Angeles Dependency Lawyers (LADL) is a nonprofit organization that is run by representatives from its executive office and from five separate law firms. The central office of LADL is run by an executive director, while each of the five law firms is headed by a law firm director. The entire operation of LADL involves 109 lawyers. The attorneys are assigned by an administrator to individual cases where they represent parents involved in the proceedings.

As with criminal law and juvenile delinquency law, the legal services programs for child dependency proceedings are not managed by the judges of the court before whom the attorneys appear.

Family law is another area of legal practice where indigent legal services are needed. In some cases, especially high conflict cases, judges may decide that it is necessary for a child to be represented by counsel – an attorney independent of the attorneys who are representing the parents. This maybe a divorce proceeding or another proceeding where custody or visitation issues are involved. Appointment of counsel for minors in these cases is completely discretionary with the court.

A memo from the Chief Executive Officer of the County of Los Angeles dated April 15, 2011, provides important information about Minor’s Counsel under then-current operations and discusses a proposal for the creation of a Family Law Panel to be operated by the Los Angeles County Bar Association. The current system, managed and operated by the Family Law Division of the Los Angeles Superior Court, is explained as follows:

Minor’s Counsel is an attorney appointed by the Court to represent the child or children in a particular case. Once an attorney is appointed by the Court, the Court may also order the county to pay the fees if the parents qualify as indigent under the court’s financial guidelines.

The memo explains in some detail the statutory framework for the source of funds to pay for these legal services in family law cases. The memo states that there are two statutory directives, which, unfortunately are conflicting. Under Family Code Section 3153(b), the county must pay for the fees of Minor’s Counsel in family law cases if the parents are unable to do so. However, when the state reorganized the superior courts to make them state courts in 1997, the government code classified “court operations” – which are funded by the state and not the county – to include attorneys appointed by the court to represent minors in child custody and visitation disputes. The memo explains that these statutory contradictions have caused inconsistencies in courts throughout the state. In counties such as Los Angeles, Ventura, and Orange, the county government provides the funds for Minor’s Counsel. Whereas in other counties, such as San Diego, state funds are used from a line item in the court’s own budget.

The memo explains that because the county pays for the fees and costs of Minor's Counsel in family law cases, the county has put pressure on the superior court to take steps to reduce these fees and costs. Although the memo does not directly say this, it is clear that the judges of the superior court are involved in political negotiations with the county about the size of the budget for Minor's Counsel. To satisfy the needs and demands of county financial officers and the board of supervisors, the supervising judge of the family law division of the superior court has issued a general order to reduce fees and cut costs. In order to continue to receive appointments on these cases, the order states that counsel must agree to comply with the mandates of the order.

The memo explains that in response to requests from the county, the judges took action to reduce fees and costs. This includes setting a maximum hourly rate of \$125 per hour, a limit on total annual compensation, and guidelines as to the number of hours that can be compensated. As a result of the court's response to the demands of county executives, the budget for Minor's Counsel was cut by nearly \$2 million per year.

Attorneys who receive such appointments in family law cases are independent practitioners. They are not employed by the court. They do not have a bargaining unit. They also do not have an association to represent them. Thus, they have no bargaining power. The order of the court is a take-it-or-leave it matter. Since these attorneys are dependent on an income stream from such appointments, they are clearly under the control of the judges of the court before whom they appear in these family law cases. They are not truly independent of the judges. The Minor's Counsel program in the family law division is very much run like the PVP legal services program in the probate division. Both of these programs are managed and operated by judges. The judges decide who is on the panel, who gets appointed to individual cases, how much they will be paid, and whether they will receive future appointments. The attorneys are beholden to the judges for their income.

The memo also discusses a proposal to remove control of the Minor's Counsel program from the court and instead transfer it to the Los Angeles County Bar Association. This would be similar to transitions that have occurred in the past with respect eliminating court control of panel attorneys in criminal cases and juvenile cases. Although the county executive office discussed this proposal with the bar association and the court, the idea hit a roadblock. The memo does not state this as a fact, but reading between the lines suggests that the obstacle to this transition was the court. The power to appoint attorneys is one that is not given up lightly.

According to the proposal, which was Attachment V to the memo, the panel of qualified attorneys would be developed by the bar association. There would be a qualifications committee to screen applicants. There would be an investigative committee to monitor billing practices and handle questions of competency or complaints and to conduct timely and fair investigations, if needed.

Appointments to individual cases would be handled by the county bar project, not individual judges. Appointments would be on a rotating basis.

Benefits to the court were described as including: freeing the courts of administrative duties

involving appointments, review, and monitoring attorneys. The rotation system would insure a fair distribution of cases and eliminate the fear that a few attorneys would dominate the program. Benefits to the county were described as including: potential cost savings, and improving oversight of lawyers in terms of qualifications, training, continuing education, and billing practices.

A memo from the Auditor-Controller to the board of supervisors, dated July 28, 2011, indicated that the county was asking the family law court to take other cost-cutting measures in terms of the Minor's Counsel program. One of the requests of the court was to reduce the hourly rate for attorneys even lower.

By having a legal services program operated and controlled by the court, judges are placed in a difficult position. They may like the power they have over attorneys by judges running the program but having that power means they must enter the political arena and negotiate with the board of supervisors. If they agree to cut the legal services budget, this may adversely affect the ability of lawyers to provide effective advocacy and defense services. If they do not cut the budget or don't cut it sufficiently, the supervisors may decide to transfer the program from their control to the control of an independent agency such as the bar association, a non profit organization, or a law firm selected by the county.

This fear of losing control of the operations of a legal services program surfaced in a training program for PVP attorneys in November 2016. The supervising judge of the probate division candidly advised attorneys that if, in the area of county-funded legal services, they did not keep fees and costs down, the county might take the program away from court control and transfer it to another entity such as the Public Defender. The judge was boldly reminding the attorneys that such a transfer would adversely affect their income.

Although such an admonition may have been unethical – by stepping out of the realm of impartiality and transgressing on attorney independence – the content of the message was factually correct. There had been discussions of possibly eliminating court control of the PVP program. I should know. I was the one who initiated such discussions.

A few years ago, I approached the then-acting head of the Public Defender's Office. I explained the many flaws of the PVP system, including how the judges are able to control the advocacy of the attorneys – and not in a good way. I explained that many of the attorneys were allowing themselves to be manipulated – probably out of fear of judicial retaliation by having their appointments eliminated or reduced, or by not getting appointments in the more financially lucrative cases. Money has a way of controlling behavior. I asked the acting head of the office to explore the possibility of the Public Defender taking on the representation of clients in probate conservatorship cases, just as they do in LPS conservatorship proceedings. Over the course of two years, we had several such discussions.

I was informed that management at the Public Defender's Office had discussed with county officials the possibility of that office representing probate conservatorship clients. Such discussions took place with officials in the Executive Office and the County Counsel's Office. Apparently, judges

in the Probate Division of the Los Angeles County Superior Court learned of this. Hence, the admonition of the Probate Presiding Judge to the PVP attorneys that they better tow the line or they might lose this stream of income.

No such transfer of operations occurred. Public defenders do not handle conservatorship cases in probate court – PVP lawyers do. Unfortunately, the probate court judges control the PVP attorneys.

Conclusion

The services of attorneys on the Probate Volunteer Panel of the Los Angeles County Superior Court are funded by the County of Los Angeles, but the PVP program is totally controlled by the superior court. Staff of the Probate Division operates the appointment system, under the direction of the probate judges. Evidence shows that appointments have not been done on a fair rotational basis.

Judges control or influence the content of the PVP training programs. They speak at those programs and coach attorneys – telling them to be the “eyes and ears of the court” or to act as de-facto court investigators. They tell the attorneys that the court will not entertain objections or motions on voting rights issues.

It appears that the PVP panel is operated in the same way as the conflicts panel of the Criminal Law Division or the court-appointed counsel program of the Juvenile Dependency Division were handled decades ago. It is a system of patronage, favoritism, judicial control, and attorney submission. Ethics violations permeate the system. The county funds the program and allows the court to run it any way the court wants – so long as the budget is kept at a amount acceptable to the board of supervisors or county finance officers.

What the actual agreements are between the County Executive Office and the Presiding Judge of the Superior Court is a mystery. When I submitted administrative records requests to the court, asking for any documents showing a MOU or contract or financial agreements between the court and the county, I was told that the court had no documents responsive to that request. That is hard to believe. Is a budget line item of millions of dollars handled by a wink, a nod, and a handshake between the Executive Officer and the Presiding Judge? That does not make sense.

The court should have an incentive to agree to a transfer of control of the PVP program from itself to some independent agency or organization selected by the county. The court is the target of a complaint to the United States Department of Justice challenging its management of the PVP program as being an ongoing series of violations of the Americans with Disabilities Act. That complaint is currently under review by the DOJ in Washington, D.C.

The county should have an incentive to make such a transfer occur. The county was advised that its failure to ensure quality controls in the PVP program was contributing to the ADA violations being committed by the superior court. The complaint to the DOJ originally targeted only the court, but was later expanded to include the county.

Both the court and the county should have an incentive to move the PVP program from the court to another entity – and in the process make operational and program changes so that legal services for probate conservatees and proposed conservatees provide access to justice and meaningful communication as required by the ADA and its state law counterpart.

The court and the county have previously had little incentive to make this change. They may have felt that no one would complain or that no one – perhaps other than the Legislature – had the authority to make them change the current PVP system. The complaint to the DOJ may have seemed like a remote threat to the status quo.

What the county and the court may not realize is that there is now an agency in the executive branch of state government with authority to investigate the improprieties described in Part One of this Trilogy on Legal Services. Many of those deficiencies can form the basis of a complaint to that agency for violations of Government Code Section 11135.

That statute prohibits disability discrimination by any state-funded government entity. It makes a violation of Title II of the ADA a violation of Section 11135. As of January 1, 2017, the state Department of Fair Employment and Housing has jurisdiction to enforce Section 11135. It may receive and investigate ADA complaints against government entities, seek to conciliate, and if conciliation is not successful, to prosecute the violating entity in a civil action. DFEH has indicated a willingness to accept and investigate ADA complaints against the superior court.

Furthermore, what the judges operating the PVP program may not realize is that the actions described in Part One of this Trilogy on Legal Services violate the Code of Judicial Ethics. While amendments to the canons appear necessary in order to make the matter more clear, existing sections of the canons are violated when judges operate a legal services program involving lawyers who appear in their courts in individual cases. Existing canons are violated when judges coach attorneys and encourage them to violate their ethical duties under the Rules of Professional Responsibility or their constitutional duty to provide effective assistance of counsel to these vulnerable clients. What the judges who operate the PVP program or who coach attorneys in such a manner may not realize is that such conduct can form the basis of complaints to the Commission on Judicial Performance.

There is no need for the PVP program to be operated by judges. There is no need for the judges to be coaching attorneys. As the information in Part Three of the Trilogy on Legal Services shows, there are ample alternatives for the court and for the county to consider. While the models in Oregon and Massachusetts can provide an example, the court and the county need look no further than what is being done in the Criminal Law Division, the Juvenile Dependency Division, or the Juvenile Delinquency Division.

Options abound. Incentives for change exist. It is now just a matter of whether the necessary change will occur through voluntary choice or as a response to a mandate from an entity with authority to make the change occur. That might be the DOJ, or DFEH, or the Legislature, or perhaps the Supreme Court through an amendment to the Code of Judicial Ethics.

The Domino Effect *Judicial Control of Legal Services*



A Report to the
California Supreme Court
on the Code of Judicial Ethics

Exhibits

Trilogy on Legal Services

Submitted by:





Part One of the Trilogy on Legal Services focuses on how the PVP Legal Services Program of the Los Angeles County Superior Court is actually operated. Funding for legal services provided to indigents in probate conservatorship proceedings comes from the County of Los Angeles. Funding for legal services for litigants who do not qualify as indigents comes from the assets of these litigants. The PVP program is managed and operated by the judges of the Los Angeles Superior Court. Part One documents deficiencies in specific cases as well as showing a pattern and practice of legal services that have been unduly influenced by judicial management and coaching – to the detriment of the clients. The training programs for PVP attorneys have contributed to unethical practices and inadequate legal services by many of these attorneys.

Contents

<u>Exhibit 1</u>	Letters to State and Local Officials and Administrators	1
	April 9, 2014 – Hon. Hannah-Beth Jackson, Senate Judiciary Chair	
	May 15, 2014 – Hon. Michael Levanas, Probate Presiding Judge	
	May 23, 2014 – Hon. Kamala Harris, Attorney General	
	June 1, 2014 – Ronald Brown, Los Angeles County Public Defender	
	August 29, 2014 – Louis Rodriguez, State Bar President	
	September 22, 2014 – Hon. Tani Cantil-Sakauye, Chief Justice	
	November 25, 2014 – Craig Holder, State Bar President	
	January 7, 2015 – Hon. Carolyn Kuhl, Presiding Judge	
	February 16, 2015 – Hon. Maria Stratton, Probate Presiding Judge	
	June 9, 2015 – Kelly Emling, Chief Deputy Public Defender	
	October 20, 2015 – Elizabeth Parker, State Bar Executive Director	
<u>Exhibit 2</u>	News and Op-Ed Articles – 2015 - 2018	18
	Disability Complaint targets Superior Court (Los Angeles Times)	
	Deja Vu for Disability Rights at Justice Department (Daily Journal)	
	Legal Services Program Appears to Violate the ADA (Daily Journal)	
<u>Exhibit 3</u>	Complaints to the United States Department of Justice – 2015	23
	Press Release – The Power of Many	
	Class Action Complaint Against the Los Angeles Superior Court	
	Expanding Scope of Complaint to Include Los Angeles County	
	Press Release – The Power of One	
	Gregory Demer Complaint Against the Los Angeles Superior Court	
	Letter to Hon. Loretta Lynch, Attorney General of the United States	
	Letter to Vanita Gupta, Chief, DOJ Civil Rights Division	
	Letter to Elizabeth Johnson, Senior Attorney DOJ	

<u>Exhibit 4</u>	Materials on the Deficiencies in the PVP Program – 2014 - 2016 Denial of Access to Justice: Who is Responsible under the ADA? A Report to the Senate Judiciary Committee Scope of Roundtable Conference – 2014 Several Areas that Need Improvement – 2014 Investigators Cannot Comply with Legislative Mandates – 2014 The Appointed-Attorney System Should Be Reformed – 2014 Examples of PVP Injustice – Gregory, Stephen, and Michael Role of the Courts: An Example of Failure to Protect – 2012 Letter to Judge Mary Thornton House – 2018	52
<u>Exhibit 5</u>	Deficiencies in PVP Training Programs Evaluation of 2013 Training Evaluation of April 2014 Training Evaluation of September 2014 Training Evaluation of March 2015 Seminar Evaluation of September 2016 Training	90
<u>Exhibit 6</u>	The Last Straw – The Case of Theresa Jankowski – 2018 Access to Justice for the Disabled – Daily Journal Letter to Judge Mary Thornton House Reply from Judge Mary Thornton House Minute Order from Judge David Cowan Letter to Judge David Cowan Regarding Canons of Judicial Ethics	121



Part Two of the Trilogy on Legal Services 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.

Contents

<u>Exhibit 1</u>	ABA’s Basic Principles for civil right to counsel – 2010 Website of National Coalition for a Civil Right to Counsel	1
<u>Exhibit 2</u>	Resolution and Report to the House of Delegates – 2006 Website of the American Bar Association	6
<u>Exhibit 3</u>	Ten Principles of a Public Defense Delivery System – 2002 Website of the American Bar Association	8
<u>Exhibit 4</u>	The Judicial Underpinnings of the ABA Ten Principles – 2011 Website of the National Legal Aid and Defender Association	11
<u>Exhibit 5</u>	Guidelines for Involuntary Civil Commitment – 1986 Report of the National Center for State Courts	14
<u>Exhibit 6</u>	Guidelines on Indigent Defense Services Delivery Systems – 2006 The State Bar of California	21
<u>Exhibit 7</u>	Standards Relating to Counsel for Private Parties – 1980 Institute of Judicial Administration – American Bar Association	30
<u>Exhibit 8</u>	Providing Educational Presentations at Specialty Bar Associations Formal Opinion 2018-012: Committee on Judicial Ethics Opinions	34



Part Three of the Trilogy on Legal Services looks at methods of providing legal services to indigents that do not involve judges operating the programs. There are models in Oregon and Massachusetts that can provide guidance to the California Supreme Court as it considers a new canon that prohibits judges from controlling or directing legal services programs.

Several alternative methods are already being used in Los Angeles in the mental health division, juvenile dependency division, juvenile delinquency division, and criminal division. The judicial branch should focus on judging cases, not coaching and directing the type of legal services that attorneys deliver to clients who appear before the judges or their courts. It is not necessary for a judge or a court to operate a legal services program. Other options are available.

Contents

<u>Exhibit 1</u>	The Implementation and Impact of Indigent Defense Standards National Legal Aid and Defender Association – 2003	1
<u>Exhibit 2</u>	Evaluation Report and Recommendation to the County of Riverside National Legal Aid and Defender Association – 2000	13
<u>Exhibit 3</u>	San Mateo County Private Defender Program Report of the San Mateo County Civil Grand Jury – 2015	17
<u>Exhibit 4</u>	About Us Website of the County of Los Angeles Alternate Public Defender	22
<u>Exhibit 5</u>	Indigent Criminal Defense Program (ICDA) Website of the Los Angeles County Bar Association – 2018	23
<u>Exhibit 6</u>	Independent Juvenile defender Program Website of the Los Angeles County Bar Association – 2018	26
<u>Exhibit 7</u>	CLC History Website of the Children’s Law Center of California – 2018	28
<u>Exhibit 8</u>	About Us Website of the Los Angeles Dependency Lawyers, Inc.	30
<u>Exhibit 9</u>	Analysis of the Professional Appointee Court Expenditure System Chief Executive Office, County of Los Angeles – 2011	32
<u>Exhibit 10</u>	Minors’ Counsel Cost Review Auditor-Controller, County of Los Angeles – 2011	58
<u>Exhibit 11</u>	Materials to Supervisors and Public Defender about PVP Program Spectrum Institute: emails, letters, analysis – 2014-2015	65

PROOF OF SERVICE FORM

PART 1: **Delivery by U.S. Mail:** Proof of Service by Mail.

I, Michael A. Vasquez, declare that I am over the age of eighteen years and not a party to the action. My business address is at the offices of Spectrum Institute, located at: 555 S. Sunrise Way, Suite 205, Palm Springs, CA 92264

On, September 21, I served the Letter (Request to Modify the California Code of Judicial Ethics) and the Report to the California Supreme Court on the Code of Judicial Ethics, by placing a true copy in the United States mail enclosed in a sealed envelope with postage fully prepaid, addressed as follows:

See Attached List

PART 2: I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 21, 2018, at Cathedral City, California.

Michael A. Vasquez
Michael A. Vasquez

Request and Report to the California Supreme Court

Mailing List

Via Postal Mail

Advisory Committee on the
Code of Judicial Ethics
Hon. Richard D. Fybel (Chair)
455 Golden Gate Avenue
San Francisco, CA 94105

Committee on Judicial Ethics Opinions
Hon. Ronald B. Robie (Chair)
455 Golden Gate Avenue
San Francisco, CA 94105

Commission on Judicial Performance
Ms. Nanci E. Nishimura (Chair)
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94012

Judicial Council
Rules and Projects Committee
Hon. Justice Harry Hull (Chair)
455 Golden Gate Avenue
San Francisco, CA 94102

The State Bar of California
Commission on Access to Justice
Hon. Mark A. Juhas (Chair)
180 Howard Street
San Francisco, CA 94105

Attorney General of California
Civil Rights Enforcement Section
Ms. Angela Sierra (Chief)
300 S. Spring Street
Los Angeles, CA 90013

Los Angeles County Superior Court
Ms. Sherri R. Carter (Executive Officer)
111. N. Hill Street
Los Angeles, CA 90012

Los Angeles County
Ms. Sashi A. Hamai (CEO)
713 Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012

Department of Fair Employment
and Housing
Mr. Kevin Kish (Executive Director)
2218 Kausen Drive
Elk Grove, CA 95758

United States Department of Justice
Ms. Elizabeth Johnson (Senior Attorney)
Disability Rights Section – NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

Via Email

Spectrum Institute
Disability and Guardianship Project
Project Advisors
<http://spectruminstitute.org/guardianship/consultants.htm>

Spectrum Institute
Disability and Abuse Project
Listserv Users
<http://www.disabilityandabuse.org/listserv.htm>