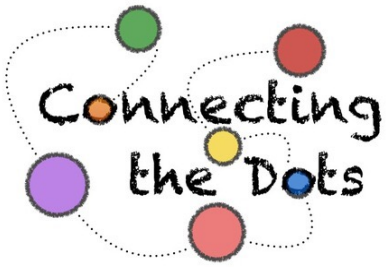

The Discovery of Individual Injustices Leads to Audits Showing Ongoing Ethical Violations in the PVP Legal Program

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 or 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 suspicious 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.
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> 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.
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> 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.
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> 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.
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> 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 then 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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 Ru1e 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 advertized 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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)
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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 Cannons 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.