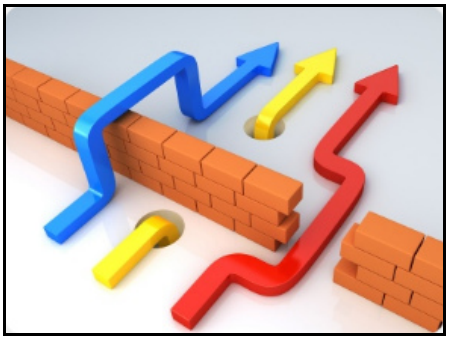

There Are Viable Alternatives to Court-Run Legal Services Programs

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 fo 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 section 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.