PVP Training on Limited Conservatorships – Part II

by Thomas F. Coleman

Part I of the PVP training essay focused on my review of materials used in the training of court-appointed attorneys in 2013. After completing that essay, I attended a PVP training conducted by the Los Angeles County Bar Association on April 26, 2014.

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.

Judge Levanas also got it right when he reminded attorneys that a probate judge cannot make good decisions without the help of competent PVP attorneys. "How we do our job is largely in your hands," he stated.

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.

Unfortunately, at the end of his presentation, the attorneys were left with the impression that they could chose to do either, and that they could not get into trouble with the Supreme Court or the State Bar regardless of the choice of advocacy they made.

To be fair, 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.

Giving such advice to attorneys does not make them better advocates for clients. In fact, from the perspective of the rights of a client, and from the perspective of the wishes of a client, it makes them worse advocates. Court-appointed lawyers are supposed to be advocates for the client, not advocates for their own opinions.

When an attorney tells the court that they disagree with the client's stated wishes, and explains why they disagree, the attorney is sharing information adverse to the existing rights of the client. Would it be permissible for a criminal defense attorney to tell the court that his client pleads not guilty, but that the attorney personally believes that the client is guilty? Obviously, that is a rhetorical question.

The centerpiece of the "you get to choose the type of advocacy" message of Judge Levanas, was his citation of the case of *Conservatorship of Drabik* (1988) 200 Cal.App.3d 185.

Approximately five times during his discussion of "stated wishes" versus "best interest" advocacy, Judge Levanas said that the *Drabik* decision was a ruling by the California Supreme Court. He said that the Supreme Court ruled that, in cases where a conservatee can communicate, but has questionable capacity, it is "unclear" whether an attorney should advocate for the clients wishes or his best interests.

More than once he said that since attorneys can only get into trouble if they do something that is disapproved by the Supreme Court or the State Bar, and since the Supreme Court said that the type of advocacy for clients with questionable capacity is "unclear," attorneys can decide for themselves the type of advocacy they will provide to a client.

There are two major problems with what Judge Levanas said. First, *Drabik* was not a ruling by the California Supreme Court. It was a decision by an intermediate appellate court.

Second, and just as important, the opinion of the Court of Appeal in *Drabik* did not *decide* or *rule* on the type of advocacy that attorneys must provide to a client with questionable capacity.

The decision before the Court of Appeal in *Drabik* involved a man in a coma. So the actual ruling in *Drabik* is limited to conservatees in a coma – conservatees who cannot communicate. In such a situation, the court did *rule* that an attorney can advocate for the best interests of the client, since it is impossible to discern what the client wants.

That was the only situation briefed by the parties, argued to the court, and ruled on by the judges. The discussion by the court of other scenarios was just that: a discussion. One without the benefit of briefing or argument. It has no more precedential value than an interesting law review article written by a jurist. It is called "dicta."

Judge Levanas did mention a ruling by the Supreme Court of Connecticut declaring that attorneys for a conservatee must advocate for the client's stated wishes and may not advocate for what the attorney believes to be the client's best interests. But he undercut the usefulness of that information in several ways. He did not mention the citation or name of the case. He also emphasized that despite the direct pronouncement of the court on the issue, it was an out of state ruling, and that our Supreme Court says that the answer is "unclear" and so attorneys are free to decide for themselves.

Later in the program, an attorney and a different judge specifically discussed the role of PVP attorneys in limited conservatorship cases. This was one of two panels that focused exclusively on conservatorships for adults with developmental disabilities, whereas the rest of them were geared toward conservatorship proceedings in general.

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

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

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

An attorney-client relationship is established between a PVP attorney and a proposed conservatee from the moment the court enters an order appointing the attorney to represent the proposed conservatee. It continues until the court enters an order relieving the attorney as counsel of record.

Business and Professions Code Section 6068 (e)(1) mandates that attorneys preserve the secrets of the client. "Secrets" are not limited to attorney-client communications, but include attorney work product.

Confidentiality applies regardless of the nature or source of the information gathered by the attorney. It applies to anything that might be detrimental to the client.

Thus, any information a PVP attorney gathers from reading records, interviewing people, or from any other source, is confidential and may not be disclosed without the informed consent of the client.

Although two or three presenters vaguely mentioned the notion of "confidentiality," none of them discussed Rule 3-100 or Section 6068. These provisions, as applied to limited conservatorship proceedings, would result in radical changes in the way PVP attorneys are expected to perform.

No more could PVP attorneys act as de-facto court investigators and blab everything they learn to the court and the other parties (and the public) in their PVP reports. No longer could PVP attorneys use information they gather to assist the court in taking rights away from their clients.

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 a 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.

Another problem with this seminar is that not once did any speaker mention what probate courts and attorneys must do to comply with the Americans with Disabilities Act – in court or out of court – in a limited conservatorship proceeding. Not one word on reasonable accommodations under the ADA.