

New Training for California Conservatorship Attorneys

One Step on a Long Path to Reform

by Thomas F. Coleman
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The Judicial Council of California is scheduled to adopt a new rule requiring conservatorship attorneys to receive education on a wide range of topics not mandated under current law. The requirements will affect public defenders and private attorneys who are appointed to represent seniors and people with disabilities in probate conservatorship proceedings.

The new rule is on the consent agenda of the Judicial Council's meeting on September 24, 2019. There are two important reasons that I will be in Sacramento to speak directly to the Chief Justice and other members of this rule-making agency of the Judicial Branch.

First, I want to compliment the Probate and Mental Health Advisory Committee for including several crucial topics in these new training requirements – topics that have been ignored or misrepresented in seminars sponsored by some local bar associations. Faulty trainings are under review by the Civil Rights Division of the United States Department of Justice as part of an ADA complaint filed some time ago by Spectrum Institute against the Los Angeles Superior Court.

Under the new rule, conservatorship attorneys will be required to gain knowledge about: (1) state and federal statutes (including the ADA), rules of court, and case law governing probate conservatorship proceedings, capacity determinations, and the legal rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities; (2) ethical duties to a client under Rules of Professional Conduct and other

applicable law; (3) special considerations for representing seniors and people with disabilities, including individualized communication methods; and (4) less restrictive alternatives to conservatorship, including supported decision-making.

My second reason is to emphasize how this new training framework is just a first step in a much needed multi-faceted process to reform the dysfunctional probate conservatorship system. Structural flaws in this system have been brought to the attention of the Chief Justice, Judicial Council, Supreme Court, State Bar, Attorney General, Governor, and other state and local

officials on many occasions during the last 15 years. And yet, despite some minor tinkering around the edges, the failure to institute fundamental changes has resulted in the unnecessary victimization of thousands of seniors and people with disabilities who have been targeted by these legal proceedings.



The next step forward is to ensure that the training materials used in these new mandatory education programs are accurate and complete. The speakers who make presentations at the seminars must be qualified. Audits done by Spectrum Institute of current training programs have shown that quality cannot be left to chance. There is a crucial need for the State Bar to approve only those trainings that meet specific standards. It cannot be assumed that local bar associations will have accurate and complete training programs or use qualified speakers to address these important topics.

Education is good but without performance

standards to follow, these conservatorship attorneys can either use this new information or ignore it. Audits done by Spectrum Institute of dozens of probate conservatorship cases in Los Angeles revealed that appointed attorneys are often not providing these vulnerable clients with effective assistance. The pattern of deficient legal services is part of the pending ADA complaint with the DOJ. Adherence to performance standards should be mandatory, not optional.

The California Supreme Court has authority to direct the State Bar to develop performance standards for attorneys appointed to represent conservatees and proposed conservatees. In developing such standards, the State Bar will not have to start from scratch. Excellent standards and guidelines have been adopted in Massachusetts and Maryland. The State Bar can also consider the ADA-compliant performance standards submitted by Spectrum Institute to the Department of Justice.

Once such standards are developed by the State Bar, with approval by the Supreme Court, the next step will be to develop a method to monitor compliance with them. Due to the nature of their cognitive and communication disabilities, clients of appointed attorneys in conservatorship proceedings generally lack the ability to complain about deficient performance. As a result, they lack meaningful access to the existing complaint procedures of the State Bar.

To meet its ADA responsibilities to provide access to its services, the State Bar will need to find ways to address this problem. Perhaps performance audits of a representative sample of cases handled by appointed attorneys can help fill this access-to-justice gap. The State Bar could also require public defender offices to routinely conduct performance audits of staff attorneys who represent clients in probate conservatorship proceedings for quality assurance purposes.

Each of these steps will help ensure that seniors and people with disabilities receive due process in legal proceedings in which their fundamental

freedoms are placed at risk. But none of these measures will do anything to help litigants who do not receive an appointed attorney and are therefore required to represent themselves in probate conservatorship proceedings.

As hard as it is to believe, some people with serious cognitive disabilities are not receiving court-appointed counsel in probate conservatorship proceedings. After a whistle-blower report disclosed such a problem in Sacramento and surrounding counties, Spectrum Institute conducted an investigation. An audit of cases in the Sacramento County Superior Court confirmed that judges there have been failing to appoint counsel in a significant number of cases.

An ADA complaint was filed with that court as a way to bring this access-to-justice deficiency to its attention. Unfortunately, court officials declined to acknowledge that a problem existed. A state civil rights agency was asked to intervene but brushed the matter off. As a result, the failure to appoint attorneys to represent seniors and people with disabilities in these proceedings appears to be a problem that will have to be addressed by the California Legislature or by the federal Department of Justice.

It has been said that a journey of a thousand miles begins with a single step. The Judicial Council is about to take a step on a long path toward comprehensive conservatorship reform.

This is an important step, to be sure, but one that may lead nowhere unless the Supreme Court and Legislature adopt additional reform measures that are uniquely within their jurisdiction. The question is whether the justices and legislators have the will to do so.

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