Conservatorship Reform: More Than Attorney Education is Needed

By Thomas F. Coleman
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The Judicial Council has just released for public comment a set of new educational requirements for court-appointed attorneys in probate conservatorship proceedings. The proposals have been under consideration by its Probate and Mental Health Advisory Committee for several years.

There may be as many as 60,000 adults living under an order of conservatorship in California. They include seniors with mental challenges, adults with developmental disabilities, and others who have cognitive disabilities due to medical illnesses or injuries. The Spectrum Institute, a nonprofit organization advocating for conservatorship reform, estimates that some 5,000 new probate conservatorship petitions are filed annually in California.

Spectrum Institute presented the advisory committee with a list of deficiencies in the conservatorship system in November 2014. At the top of the list was the failure of court-appointed attorneys to advocate effectively for conservatees and proposed conservatees. The advocacy group asked the Judicial Council to adopt new training requirements and performance standards for court-appointed attorneys in these cases. In May 2015, a detailed proposal for such requirements and standards was submitted to the advisory committee.

Later that year, the Judicial Council authorized a multi-year project for the advisory committee to develop new rules in this area. After months of review, the committee dropped the idea of performance standards because it believed only the Legislature and State Bar have authority to do so. The committee decided to limit its focus to new educational requirements.

The work product of the committee, proposing amendments to Rule 7.1101 of the California Rules of Court, was released by the Judicial Council on Dec. 13. The subject matter on which attorneys would be required to receive training are quite extensive.

Topics include: (1) the rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities under state and federal law, including the Americans with Disabilities Act; (2) a lawyer's ethical duties to a client, including a client who has or may have diminished functional ability, under the California Rules of Professional Conduct and other applicable law; and (3) techniques for communicating with an older client or a client with a disability, ascertaining the client's wishes, and advocating for those wishes in court.

A New Law Should

- Mandate appointment of counsel for all conservatees and proposed conservatees without an attorney
- Specify that the role of counsel is to act as a zealous advocate
- Direct the State Bar to adopt performance standards for lawyers assigned to represent such clients

In addition, attorneys would be required to have training on special considerations for representing older clients or those with disabilities, including: (1) risk factors that make a person vulnerable to undue influence, physical and financial abuse, and neglect; (2) effects of physical, intellectual and developmental disabilities; (3) mental health disorders; (4) major neurocognitive disorders; (5) identification and collaboration with professionals with other professions; and (6) identification of less restrictive alternatives to conservatorship, including supported decision-making.

While these requirements, if adopted, are necessary to improve the quality of legal representation of clients in conservatorship proceedings, they are not sufficient to ensure they have access to justice. However, the authority to mandate more than new educational requirements may not be in the purview of the Judicial Council.

The California Advocates for Nursing Home Reform asked the advisory committee to propose a new rule clarifying the role of an appointed attorney for a

conservatee or proposed conservatee as a "zealous advocate." Both Spectrum Institute and the California Advocates for Nursing Home Reform suggested new rules on performance standards for such attorneys to ensure they provide effective advocacy and defense services. The advisory committee declined to follow these suggestions, arguing that only the Supreme Court or the Legislature has the authority to specify the role of an attorney and adopt performance standards.

Clarifying the role of appointed attorneys is crucial to litigants with disabilities receiving equal protection and access to justice. Some judges expect attorneys to be zealous advocates, while others want attorneys to override the stated wishes of clients if they believe a client's best interests require such an approach. Attorneys representing non-disabled clients would never dream of advocating against their client's wishes and promoting their own beliefs instead. If they did, attorneys could be the target of a malpractice lawsuit or a complaint to the State Bar. Clients with disabilities deserve the same type of advocacy as those without disabilities. New legislation should clarify this.

Legislation is also needed to clarify that all conservatees and proposed conservatees are entitled to an appointed attorney, even if they don't request one. Under current law, even without a request, litigants with developmental disabilities *automatically* receive an attorney if a petitioner files for a *limited* conservatorship. However, if a petitioner files for a *general* conservatorship, a developmentally disabled litigant may be required to represent himself or herself. Giving a petitioner this type of control does not make sense.

Appointment of counsel for litigants in general conservatorship proceedings is not required under current law, unless they specifically request one. The problem is that many, if not most, of these litigants do not know the role or value of an attorney and so they will not ask for one. As a result, in some areas of the state, judges are not appointing attorneys even though they know these involuntary litigants have serious disabilities that make it impossible to effectively represent themselves. This "catch 22" – you must request even though you can't request – needs to be eliminated. Probate Code Section 1471 should require appointment of counsel regardless of whether a petitioner files for a general or a limited conservatorship.

A bill is currently being developed by a coalition of advocacy groups that will build upon, and move beyond, the new educational requirements likely to be adopted by the Judicial Council in 2019. The bill would: (1) guarantee appointed counsel for all conservatees and proposed conservatees; (2) specify that the role of counsel is that of a zealous advocate; and (3) direct the State Bar to develop performance standards for such attorneys. The State Bar can look for guidance to Maryland and Massachusetts where such standards already exist.

The Judicial Council should be applauded for developing these new educational requirements. But how will they help litigants with disabilities receive access to justice if they do not have an attorney, or if appointed attorneys advocate for what they think is best and ignore the stated wishes of a client? New legislation can and should fill this access-to-justice void in probate conservatorship proceedings.

Spectrum Institute, California Advocates for Nursing Home Reform, and The Arc of California recently filed a complaint with the Sacramento County Superior Court for failing to appoint attorneys in many general conservatorship proceedings. Spectrum Institute has also filed a complaint with the U.S. Department of Justice against the Los Angeles County Superior Court. The complaint cites deficient advocacy services of court-appointed attorneys there. These complaints allege that courts are violating their obligations under Title II of the Americans with Disabilities Act by failing to provide equal access to justice to persons with known disabilities.

Having an attorney – one that performs competently – is an essential component of access to justice under the ADA. New legislation entitling litigants in general conservatorship proceedings to effective representation by zealous advocates will bring California closer to compliance with the ADA.

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