

A Missed Opportunity

Training Program Fails to Help
Attorneys Fulfill Ethical Duties and
Constitutional Obligations to Clients
with Developmental Disabilities



Thomas F. Coleman
Legal Director
Disability and Abuse Project
Spectrum Institute

September 20, 2014
www.disabilityandabuse.org/pvp-training

Preface

The Disability and Abuse Project has been engaged in an intense study of the Limited Conservatorship System in California, with a special focus on the Los Angeles Superior Court.

We engaged in independent research by reviewing court records, interviewing litigants, observing court proceedings, consulting experts, having conversations with judges, attending training seminars, and convening conferences.

Our work has resulted in a series of reports in which we have revealed our findings and made a significant number of recommendations to improve the system. We shared our concerns with officials and agencies, including: Chief Justice of California, Attorney General of California, Director of the California Department of Developmental Services, Board of Trustees of the State Bar of California, Presiding Judge of the Probate Court in Los Angeles, and the Public Defender of Los Angeles County. We also reached out to the State Council on Developmental Disabilities and its Area Boards, as well as the Association of Regional Center Agencies (ARCA) and the 21 Regional Centers.

Despite our best efforts, little has changed. In fact, in terms of the training of court-appointed attorneys, things have become worse.

This report examines the most recent Training Program conducted by the Probate Court with the assistance of the County Bar Association. The training program failed to help attorneys gain “comprehension of the legal and medical issues arising out of developmental disabilities” as required by local court rule 10.84.

Our next outreach will be to the Board of Supervisors of Los Angeles County. They have been paying the fees of these court-appointed attorneys with no questions asked and with no quality assurance controls in place. Instead of enabling poor performance with no-strings-attached fee payments, the Supervisors have the power to turn things around by imposing conditions on the funding of these attorneys to help insure that the intended beneficiaries of this funding receive effective assistance of counsel.

To use a phrase coined for the Watergate film *All the President's Men*, the next step for those of us seeking reforms in the Limited Conservatorship System is to “follow the money.”

A handwritten signature in blue ink, reading "Thomas F. Coleman". The signature is fluid and cursive, with the first name "Thomas" and last name "Coleman" clearly legible.

Contents

Preface	i
Contents	ii
Introduction	1
The Advertised Program	3
The Training Program	4
Interviewing and Communication Skills	5
Disability Accommodation	6
Capacity Assessments and Determinations	8
Voting Rights	11
Confidentiality	12
Conclusion	13
Appendix:	
Communications with Public Officials and Agencies	14
Biography of Thomas F. Coleman (disability advocacy)	15



2100 Sawtelle Boulevard, Suite 204
Los Angeles, CA 90025 / (818) 230-5156
www.disabilityandabuse.org
tomcoleman@earthlink.net

A Missed Opportunity

Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities

by Thomas F. Coleman

The Los Angeles County Bar Association and the local Probate Court have come under heavy criticism for failing to properly educate court-appointed attorneys who represent clients with developmental disabilities in limited conservatorship cases.

Los Angeles Superior Court judges appoint limited conservators in more than 1,200 cases per year. In the overwhelming majority of these cases, the adults who become limited conservatees lose their right to make decisions regarding their residence, education, finances, health care, marital status, sexual activities, and even their social relationships.

Although the proceedings are called “limited conservatorships” there is really nothing limited about what happens in most cases. In addition to losing these “seven powers,” about 90 percent of these adults are also stripped of their right to vote.

Petitions for limited conservatorships are usually initiated by parents who routinely ask the court to transfer authority over all decisions from their adult sons and daughters to them. They also routinely make allegations in the petition that result in the loss of voting rights for these proposed limited conservatees. The overwhelming majority of these petitioners are not represented by an attorney.

The law requires the court to appoint a probate investigator to screen these cases to determine if a conservatorship is needed, if it is the least restrictive alternative for providing protection to the proposed conservatee, whether any of these seven powers should be retained by the adult in question, and whether the person seeking to be appointed as conservator is a risk to the adult and whether someone else would be a better choice for this position of trust and authority.

Unfortunately, court investigators have not been appointed in limited conservatorship cases for the past few years. Why? Because a former Presiding Judge of the Probate Court wanted to save money and eliminating these investigators was the answer. Presiding Judges in subsequent years, including 2014, have continued this practice.

As a result, the only person who might oppose the need for a conservatorship, or the transfer of any of the seven powers, or the loss of voting rights, or the choice of conservator, is the attorney appointed by the court to represent the proposed conservatee.

When a petition for a limited conservatorship is filed, the law requires the court to appoint an attorney to represent the proposed conservatee. In some counties, this role is filled by the Public Defender.

In Los Angeles County, the Probate Court has created a panel of attorneys from which it selects a lawyer to represent a client in a specific limited conservatorship case. This is called the Probate Volunteer Panel and the lawyers are commonly called “PVP Attorneys.”

Court rules require that attorneys who represent clients in limited conservatorship cases “must have comprehension of the legal and medical issues arising out of developmental disabilities and an understanding of the role of the Regional Center.” (Local Court Rule 10.84)

Since these clients have a statutory right to counsel, they also have a due process right to have an attorney who provides “effective assistance.” To fulfill these obligations, PVP attorneys must acquire skills necessary to investigate, interview, and raise legal objections relevant to this specialized area of law.

No doubt about it, this is a very specialized area of law – one that requires attorneys to learn and acquire knowledge and skills that are not required in garden variety cases.

The Lanterman Act, on which the Probate Code's regulation of limited conservatorships is based, guarantees that adults with developmental disabilities have the same statutory and constitutional rights as adults without disabilities. It requires that a limited conservatorship be the last alternative, not the first choice for protecting a vulnerable adult. It insists that such adults should retain as many rights as possible.

The Probate Code sets a high evidentiary standard for the granting of petitions for limited conservatorship and for the transfer of any of the seven powers. Clear and convincing evidence must be shown before a judge grants such requests.

On each of the seven powers, such evidence must show that the adult in question lacks the capacity to make decisions in that area. For example, before authority over social decisions is transferred from the adult to the conservator, there must be clear and convincing evidence that the adult lacks the capacity to decide who to be friends with or who the adult does not want to socialize with.

Taking away the right to make such social decisions obviously implicates federal and state constitutional rights of freedom of speech, freedom of association, liberty, and privacy. A training designed to educate attorneys on how to be effective advocates for proposed limited conservatees surely would discuss the rights afforded by the Lanterman Act and relevant constitutional case law that may support challenges to the loss of constitutional rights.

There must be criteria for deciding whether a person has or lacks capacity to make decisions in each of these seven areas. What are those criteria? Who is qualified to render a professional opinion on capacity in each of these seven areas? What type of objections can an attorney raise to whether this criteria is supported by substantial evidence or

whether the person rendering the opinion is qualified to do so? Certainly a training of attorneys who represent proposed limited conservatees would address these important medical, psychological, and legal issues.

The role of PVP attorneys, and the need for effective representation, is critical to the integrity of the limited conservatorship process. The PVP attorney is generally the only lawyer in the courtroom on these cases. Most parents are not represented by counsel. Although the law mandates their involvement, court investigators have been omitted by an ex-parte judicial fiat.

The PVP attorney is all there is to keep the system honest, to ensure that constitutional and statutory rights are protected, to determine that lesser restrictive alternatives won't work, to analyze whether capacity assessments are accurate, and that clear and convincing evidence supports these determinations.

Once the court grants a limited conservatorship petition, and the powers are transferred and voting rights determined, the role of the PVP attorney is terminated by court order. Clients are not advised of their right to appeal. Even in rare cases when one of the parents objects to the court's order as violating the rights of their adult child, the parent is not allowed to challenge the order on appeal. The parent is said to lack "standing" to appeal. (In re Gregory D. (2013) 214 Cal.App.4th 62, 67-68) Therefore, the order goes unchallenged and a conservatee suffers.

So in most cases, there is only one opportunity to "get it right" and that is when the PVP attorney is representing the client before the petition is granted. This reality underscores the importance that PVP attorneys be well trained in "the legal and medical issues arising out of developmental disabilities."

This requires trainings to focus on statutory and constitutional rights, evidentiary requirements, and objections that can challenge a conservatorship or the transfer of particular powers. Seminars need speakers skilled on these issues. In-depth analysis and debate, not surface discussions, are needed.

The Advertised Program

The Los Angeles County Bar Association sent out an email on August 18, 2014, announcing a “Mandatory PVP Training Program for Limited Conservatorship Proceedings.”

The description of the seminar said: “This program provides training and education to PVP attorneys representing proposed conservatees in limited conservatorship proceedings. It is the course required by LASC Local Rule 4.124(b)(5) and helps to satisfy the educational requirements set forth in CRC 7.1101. The program will give an overview of the duties of PVP attorneys in limited conservatorship proceedings, with emphasis on voting rights, reasonable accommodations, confidentiality, Probate Code 2351.5 powers, and interviewing and communications skills.”

I had attended a “Mandatory/Refresher PVP Attorney Training Program” in April 2014 and was sorely disappointed by the presentations. I had also reviewed the handouts given at trainings in prior years and was likewise disappointed. In response, I wrote a review of the inadequacy of these training programs and pointed out issues that had been neglected. The review was sent to the Presiding Judge of the Probate Court (who mandates and oversees the trainings) and the Trusts and Estates Section of the County Bar Association (that produces the trainings under contract with the court).

My review complained that many important issues had been ignored in prior trainings, such as the constitutional and statutory rights of limited conservatees, voting rights, reasonable accommodations of disabilities, ethical duties of confidentiality and loyalty, interviewing and communication skills with clients who have developmental and other disabilities, and assessments of capacity in connection with the “seven powers.”

When I saw the agenda for the new training, I was elated. Most of the topics I had highlighted in my review were scheduled to be discussed.

I immediately signed up to attend the training program. I was eager to observe the PVP attorneys receive in-person training and to read the printed material in the handout they would receive.

Then I called my colleague, Dr. Nora J. Baladerian, a clinical psychologist who provides therapy to clients with developmental disabilities. She also conducts training programs for attorneys, law enforcement, and service providers on issues involving developmental disabilities.

Nora was especially interested in the agenda item on interviewing and communication skills since she does trainings and has produced written materials and training videos on this topic. So she registered to take the PVP training.

Nora and I were both optimistic about the training. We sincerely hoped that it would contain valuable information that would enhance the ability of PVP attorneys to provide effective representation to their clients with developmental disabilities.

Effective representation would require these attorneys to raise any arguably meritorious issues in order to protect the procedural, statutory, and constitutional rights of their clients. It would require them to understand the dynamics of each of the various disabilities their client may have, to learn how to interview such clients effectively, to evaluate the assessments of capacity on each of the seven powers, and how to raise objections and preserve issues for any potential appeal.

We knew that there was no way that such issues could be competently presented in a three-hour seminar. At a minimum, a series of 8 three-hour presentations would probably be needed. But if the handout materials the PVP attorneys received at this training program included the right documents, this training could lay the groundwork for the series that would be necessary. We remained optimistic.

On September 13, we drove to the offices of the Bar Association, registered, and received the packet of materials the organizers had prepared.

The Training Program

About 80 attorneys attended the training. About 20 percent of them indicated they had never handled a limited conservatorship case before, so for them this training was essential. The others had handled such cases, but I knew that in previous trainings they had received incorrect information on some issues and had never been trained on other vital issues. So for them, this training was important too.

What follows is my review of the overall program, the various presentations, and the handout materials. The review compares the content that was delivered with the content of the agenda that was advertised. It also discusses what the content of a competent presentation would be on each agenda item.

Unfortunately, once the handout was reviewed and presentations were heard, optimism was shattered and hope was replaced with profound disappointment. The handouts were woefully inadequate. Some agenda items that were advertised 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.

To be successful, a training program would have to teach attorneys to provide effective representation on a variety of legal, medical, and psychological issues. Raising arguably meritorious issues would require attorney to spot such issues first. A training that would help attorneys meet due process standards for effective advocacy would help them identify potential deficiencies in the system itself as well as analyze procedural and substantive matters in individual cases.

At a minimum, a training program would help attorneys to “have comprehension of the legal and medical issues arising out of developmental disabilities and an understanding of the role of the Regional Center,” as required by court rules.

This training did an adequate job of giving the attorneys an “understanding of the role of the

Regional Center,” but failed miserably in helping them to understand and comply with the due process requirement of effective representation and their obligations under the court rule for “comprehension of the legal and medical issues arising out of developmental disabilities.”

Interviewing and Communication Skills

None of the trainings of PVP attorneys conducted in the past few years has included a presentation on interviewing clients with developmental disabilities. This is a critical function for PVP attorneys, perhaps the most important task of all.

So when I saw “interviewing and communication skills” on the advertisement for the seminar, I was very pleased – especially since we had criticized the court for not including this issue in prior trainings.

The online description of the program listed someone with a Ph.D. as a presenter. Since he was the only presenter who was not an attorney and not a Regional Center employee, I assumed that he had been selected to make the presentation on interviewing and communication skills.

I asked my colleague, Dr. Baladerian, if she knew of him. She said she had heard his name but really did not know anything of his expertise on this topic. She searched for information about him online but the only thing she could find was that he was a licensed psychologist. No curriculum vitae. No website. No published articles. And really no mention of him professionally in any way. It seemed that this psychologist had kept a very low profile.

I called his office and left a voice mail message, asking him to call me back. I wanted to suggest that he contact Dr. Baladerian who often does presentations to attorneys and first-responders on this topic. He would benefit from brainstorming with her. He never returned the call.

When we looked in the printed program at the seminar, we saw this segment listed for a 30-minute

presentation by the psychologist. Nora and I looked at each other and grimaced. There is no way that such a presentation could be done in a professional and effective manner in that short time frame. When Dr. Baladerian presents on this topic the workshop lasts two days.

We looked in the program for the biographical summary of presenters, hoping to learn more about the credentials of the psychologist. Unfortunately, the program contained biographies of presenters from the PVP training given in April 2014, but nothing about the presenters for this training.

When I pointed this out to the clerical staff, an apology was soon made to the group and a new handout with biographies was distributed. The new pages contained no information on this psychologist. So everyone was about to hear a presentation from a speaker about whom we knew nothing.

For 30 minutes, the presenter read his remarks from a printed script, looking up at the audience from time to time. His presentation consisted of his own story – from childhood to the present time. He talked about his personal experiences in interacting with people who have developmental disabilities.

As for interviewing clients with developmental disabilities, his message was simple. Treat them like people.

The attorneys assembled in the room should have felt extremely disappointed. It was an interesting personal story, but they had paid good money to learn about and to acquire skills in interviewing and communicating with clients who have cognitive, emotional, and communication disabilities. They received no information on that topic.

The seminar moderator thanked the speaker, but did not apologize to the audience that the presentation did not respond to the agenda. People politely pretended that all was well.

Dr. Baladerian and I were extremely disappointed. I was embarrassed for the conference organizer,

knowing that he had to be aware that the presentation did not deliver on what had been promised.

Nora and I wondered how this all came to pass. What was the presenter told by the organizers? What was he asked to speak about? What were his credentials and was he properly vetted?

Nora offered to call him so she could inquire how he came to be a speaker and why he felt that his presentation would be acceptable, given the fact that a specific topic was advertised.

A few days later, Dr. Baladerian had a phone conversation with the presenter. She learned that he has a general clinical practice. He does not have experience or expertise in treating clients with developmental disabilities. He has never made a presentation on interviewing people with developmental disabilities.

Apparently, he was selected to be a speaker because he has two daughters with developmental disabilities and he knows someone at the County Bar Association.

Considering the importance of the topic, and the need for PVP attorneys to acquire knowledge about interviewing clients with developmental disabilities, the speaker should have been properly vetted. A person should have been chosen with academic credentials and professional experience in this area.

If the topic was how to conduct brain surgery for tumors, and the audience was medical doctors who wanted to learn about such surgery, a speaker would not be chosen because he was a family practitioner with a child who had undergone brain surgery. A conference organizer would not ask someone a personal favor to speak on a topic for which they were not qualified. Vetting would be done and a surgeon with experience would be selected to speak.

The Limited Conservatorship System in California was created more than 30 years ago. That system processes more than 5,000 cases each year throughout the state. Considering these facts, it is astound-

ing that educational materials do not exist specifically for court-appointed attorneys on how to effectively interview and communicate with clients who have intellectual and developmental disabilities. Apparently they don't.

Therefore, the next best approach would have been for the seminar organizer to hand out materials on the subject but which were developed for other legal contexts, such as interviewing victims of crimes or representing defendants with such disabilities in criminal cases. Some of the information presented in such materials would be relevant and helpful to PVP attorneys in their interviews and other communications with their clients.

For example, the Journal of the National Center for the Prosecution of Child Abuse has an [article](#) titled "Forensic Interviews of Children Who Have Developmental Disabilities." The Office for Victims of Crime of the United States Department of Justice has a free DVD and a [guidebook](#) that explain "Techniques for Interviewing Victims with Communication and/or Cognitive Disabilities."

There is a [powerpoint](#) presentation available online, prepared by a professional training and consulting organization, on "Effective Interviewing and Communication with Children with Disabilities." Although it applies to children, it contains valuable information that would pertain to adults with such disabilities as well.

The Florida Bar Foundation produced a [handbook](#) for defense attorneys titled "Developmental Disabilities and the Criminal Justice System." One section discusses communicating with an individual with an intellectual disability. Another focuses on communicating with a client who has autism.

Unfortunately, no resource materials on this topic were given to the attorneys who attended this training program. All they walked away with was the story of one psychologist about his experiences with people with developmental disabilities. Since it was read by the presenter, it could have been given to the lawyers rather than making them sit for

a half hour to listen as the presenter read it to them.

It is amazing, since effective communications between attorney and client are critical to competent representation, that the Bar Association has not paid to have materials on this subject developed for training programs.

The Association charges attorneys for the training programs but apparently does not pay its presenters. Therefore, each training program probably has a financial surplus. Some of that surplus could be used to pay experts to develop training materials and perhaps even pay experts to conduct trainings that are professionally prepared and that are delivered in a sufficiently long time frame.

As it now stands, we are left with a situation where court-appointed attorneys have not received any formal training on how to interview or communicate with clients who have cognitive and communication disabilities. They did not receive proper training at the most recent seminar nor did they at prior trainings.

Attorneys must now fend for themselves, leaving to chance whether clients with developmental disabilities receive effective assistance of counsel.

Disability Accommodation

Reports issued by the Disability and Abuse Project have criticized both the Probate Court and the Bar Association for failing to educate PVP attorneys about the need to provide accommodations to clients who have physical and/or intellectual and developmental disabilities.

Previous trainings made no mention of the ADA and its application to the court system and to attorneys who represent clients with disabilities. So I was pleased when I read in the advertisement for the Mandatory PVP Training that the agenda included the topic of "reasonable accommodation."

I wondered who the presenter would be and whether the conference planners would reach out to Angela

Kaufman for suggestions on how to educate attorneys on this topic. Angela is the ADA Compliance Officer for the City of Los Angeles.

The conference planners knew that Angela had attended a Roundtable Conference on Limited Conservatorships earlier this year. Because she attended that conference, it was clear that she was interested in the topic of ADA accommodations and modifications as applied to limited conservatees.

When I contacted Angela, she said that no one from the Probate Court or the County Bar Association had approached her about the PVP Training Program. Again, I wondered who the presenter would be and how he or she would train the attorneys.

When Nora and I looked at the agenda in the printed program, we discovered there was no specific presentation on disability accommodation. So we listened attentively to each of the several presentations to see who would mention the topic and what they would say about it.

Disability accommodation was mentioned briefly, perhaps for no more than two minutes, in the presentation of an attorney on “The Role of the PVP Attorney in Limited Conservatorships.”

He mentioned that attorneys should find out how their client communicates in order to take appropriate steps to accommodate their needs. He referred to court form MC410 which an attorney can use to request a disability accommodation from the court staff for times when the client is in court. A copy of the form was not included in the materials he supplied in the printed program.

Speaking of his materials, his handout was titled “PVP Attorney Considerations for Persons with Special Needs.” Despite the title, the content appears to be something that had been prepared for another purpose.

Much of the information in his handout was not relevant to limited conservatorships. For example, there was information on guardianships, general

conservatorships, conservatorships of the estate, special education, special needs trusts, estate planning, and government benefits. Of the eight pages, only one was directly relevant to the topic of limited conservatorships.

The presenter had not included written materials on the Americans with Disabilities Act, its application to the court system, its requirements on practicing attorneys in the delivery of services to their clients, or the consequences to attorneys for failure to give reasonable accommodations. Either he had not been asked to make a presentation on disability accommodation or he was asked to do so but did not include this topic in any meaningful way.

Judge Levanas mentioned disability accommodation for about two minutes in his presentation on the issue of voting. He made reference to the court form, MC 410, and said the court had a compliance officer. He mentioned assisted technology and sign language interpreters. He emphasized that people are entitled to have someone assist them in completing an affidavit of voter registration. That was it. He devoted about two minutes to disability accommodation in a most general way.

With Judge Levanas on the voting panel was an attorney who spoke about the voting registration process. In that context, the attorney said that conservatees are entitled to have help in registering to vote and that the Regional Center can help them. There were materials from Disability Rights California that people with disabilities are entitled to help in registering to vote and in the voting process itself.

Other than the mention of voter assistance, and a brief mention of form MC410, the topic of disability accommodation was not covered in any meaningful way by any presenter. It was advertised in a manner that lead me to believe that there would be a special presentation on that topic. It certainly deserved a separate presentation.

Like the topic of interviewing and communication with clients who have developmental disabilities, the subject of accommodations for the clients of lawyers

– in and out of court – could consume an entire day or more to be done responsibly. There is just so much area to cover.

Legal requirements and consequences for failure to provide disability accommodations would need to be addressed. Applicable state and federal law would be discussed. How the law applies to the court system itself would be examined. How it specifically applies to attorneys in their interactions with clients would be a major focus of a presentation. Adverse consequences to attorneys who do not comply properly, including complaints to the State Bar, lawsuits against them in state court, and actions against them by the United States Department of Justice would be included.

Then there would be a lengthy and detailed explanation of the various types of physical, cognitive, and communication disabilities, how they affect clients, and how those specific disabilities can be accommodated. This portion of the presentation alone could consume a few hours.

Even with a cursory presentation, perhaps a brief overview of the issues and an outline of what a longer training would entail, a presenter could have given the attorneys printed materials they could study after the training. Such materials are plentiful.

The printed program could have included a nine-page [journal article](#) titled “How to Make Your Lawfirm Accessible to People with Disabilities.” Published in 2011 by the State Bar of California, it includes information on how the ADA and its California counterpart apply to lawfirms. It explains how reasonable modification of policies and practices is required by lawfirms. It contains a wealth of information, and cites many authorities in the 59 endnotes.

It could have included an [article](#) from a special disabilities publication of the American Bar Association, released just last year, titled “Serving Clients with Disabilities: An Accessibility Guide for Lawfirms.” The article was co-written by Michelle Uzeta, a disability rights lawyer who practices right

here in Los Angeles.

The ABA article contains valuable information on sensory disabilities, mobility disabilities, mental health disabilities, even on cognitive disabilities.

There is a lengthy and detailed [analysis](#) by the Oregon Attorney General on whether the court system must provide a “process interpreter” upon request to assist a litigant with a cognitive disability to understand the proceedings. The information in this analysis could be very helpful to PVP attorneys who want to increase the prospects of their clients understanding what is going on in court in a limited conservatorship proceeding.

Considering the special needs of clients in limited conservatorship proceedings, the critical importance of accommodating those needs, and the failure of prior trainings to address the requirements of the Americans with Disabilities Act to PVP attorneys, the meager few minutes allocated to disability accommodation at the current training was appalling. What is especially disturbing is that resource persons, such as Angela Kaufman and Michelle Uzeta, were not utilized.

Capacity Assessments and Determinations

There are two critical aspects involved in limited conservatorship proceedings. One is process. The other is outcome.

We want the process to have integrity. Having effective assistance of counsel is essential to the integrity of the process.

We want the outcome to be correct. Having accurate capacity assessments and determinations are necessary in order to have a correct outcome.

A program to train attorneys on so-called “2351.5 powers” must be designed to help attorneys understand the criteria required for a capacity assessment on each of the seven powers, who is qualified to make such assessments, the process used to assess capacity on a specific power in a particular case, and

how to challenge improper assessments.

Presenters for a training on capacity assessments must be carefully chosen. Not only must they have knowledge of legal, medical, and psychological criteria and evaluation processes, they must also be able to discuss strategies for challenging shoddy evaluations and inadequate reports to the court.

Each Regional Center is a separate non-profit corporation. Each has its own policies and practices. Therefore, an employee of one Regional Center may be able to discuss the practices of that particular agency, but he or she lacks the knowledge needed to discuss or evaluate the practices of a sister agency.

Furthermore, Regional Center employees are not going to disclose the flaws and weaknesses in the processes used by their agency or advise attorneys on how to challenge those processes. The employees have a vested interest to discuss the issues in a way that puts the agency in the best light possible.

An attorney for a Regional Center is not going to reveal deficiencies in the evaluation process used by the agency he or she represents. In discussing section 2351.5 powers and capacity evaluations, the Regional Center attorney will not speak as an advocate for the rights of the proposed conservatee. That attorney's job is to protect the interests of his or her client – the Regional Center.

So while it is appropriate to have the Executive Director and the attorney for a Regional Center speak on the issue of 2351.5 powers, the most they can do is to discuss the process used by the specific Regional Center they work for.

Their role is not to train attorneys for proposed conservatees on how to be critical of evaluations, how to challenge the credentials of the evaluator, and how to cross-examine those who submit Regional Center reports to the court. But those are the very issues that are essential to a proper training of attorneys on section 2351.5 powers.

After listening to the presentations of the Regional

Center attorney and the Regional Center Executive Director, the PVP attorneys had a general idea of what this one Regional Center does in evaluating the capacities of proposed conservatees. A very general and vague presentation was made on this process. But no detail was given on the exact criteria used on each power, on whether there is a manual used, or whether staff receives trainings on this.

The general impression I received from this presentation was that sometimes a core staff meeting is held, sometimes not. IPP and IEP reports and other client records are reviewed by someone, but the credentials of that someone were not disclosed. It was all very vague and nonspecific.

The presentation of Judge Cowan involved sidebar comments, throwing out questions to the other two presenters from time to time. He noted various inconsistencies in Regional Center recommendations, such as a recommendation to take away the right to contract but to allow the client to retain the right to marry. When questioned about the inconsistency, and that marriage is a contract, the Executive Director said the Regional Center thinks of marriage as a form of romance, a relationship type of thing, but not as a contract. The level of analysis was just too casual for a legal training program for lawyers.

Someone should have mentioned, but did not, that PVP attorneys can ask the court to appoint a psychologist or psychiatrist under Evidence Code Section 730 to evaluate the capacity of the client in any or all of the seven areas under scrutiny – decisions regarding residence, medical treatment, finances, education, marriage, social relationships, and sexual activities.

A professional training of legal advocates on how to evaluate the adequacy of capacity assessments and how and when to challenge them was what PVP attorneys needed – not a vague presentation on how one Regional Center generally operates.

It was emphasized that each Regional Center functions differently. Therefore, the training session should have provided information on how each of

the seven Regional Centers in Los Angeles County make evaluations and submit reports on which of the seven powers should be retained and which should be transferred to a conservator.

The Probate Court could have gathered such information and passed it along to the PVP attorneys. The Presiding Judge could have sent a letter to the seven Regional Centers, instructing them to submit a report to the court, in declaration form, on: (1) criteria used to determine capacity in each of the seven areas; (2) protocols for making such evaluations; (3) which staff person is responsible for such evaluations; (4) credentials of that person or persons; (5) training materials used to educate these evaluators on how to conduct the evaluations; (6) amount of time spent in evaluating the seven powers and writing the report, on average, in a limited conservatorship case; (7) guidelines or regulations of the Department of Developmental Services (DDS) for making such evaluations and preparing such reports by Regional Centers; and (8) specific language in their contracts with DDS on the subject of 2351.5 evaluations.

The court could have directed its investigations unit to compile the responses from the Regional Centers into a booklet to be distributed to PVP attorneys, along with a summary prepared by the investigations unit. That would have been educational and truly would have helped attorneys to fulfill the requirement that they understand the role of the Regional Center. (Local Rule 10.84)

The handout did not fill any gaps in the verbal presentations. No written information or resources of any substance on capacity assessments were provided, although many were readily available.

There are resources developed jointly by the American Bar Association and American Psychological Association for assessing capacity of older adults that are relevant to assessments of an adult of any age with a cognitive disability.

A [handbook for psychologists](#) titled “Assessment of Older Adults with Diminished Capacity” could have

been referenced in the program materials. There is also a [handbook for judges](#) titled “Judicial Determination of Capacity of Older Adults in Guardianship Cases.” In addition, there is a [handbook for lawyers](#) titled “Assessment of Older Adults with Diminished Capacity.”

This set of handbooks would have pointed PVP attorneys in the right direction in terms of the issues and considerations they should consider in evaluating the capacities of their own clients or challenging the opinions of petitioners or the recommendations of Regional Centers.

There are other resources, such as an article in the [American Family Physician](#) titled “Can the Patient Decide? Evaluating Patient Capacity in Practice.”

In 1995, the California Legislature enacted the “[Due Process in Competency Determination Act](#)” which is embodied in sections 810 to 814 of the Probate Code. This could have been referenced in the presentation on “The Role of the PVP Attorney” but was not mentioned there or anywhere else.

A discussion of the requirements of the Due Process Act is contained in an [article](#) written by Patrick Fitzsimmons, M.D. titled “Legal Mental Capacity – A Psychiatrist’s Perspective.”

According to an [article](#) written by Robert Allen, Ph.D. “Attorneys wishing to protect their clients by providing the most comprehensive scientific assessment, and conversely, avoid malpractice entanglements are obliged to consider the Due Process in Competency Determinations Act code changes and the following evaluation methods.”

Another excellent resource for attorneys is a publication by the California Advocates for Nursing Home Reform titled “Determining Capacity and Representing Clients with Diminished Capacity: An Advocates Guide.” It also has a [guide for advocates](#) titled “California Conservatorship Defense.” These materials would have been great resources for PVP attorneys to utilize in preparing themselves to be effective advocates for their clients.

Voting Rights

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.

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. The complaint alleged that state law, as administered by the Probate Court, violated federal voting rights protections. In particular, it was alleged that PVP attorneys had been advised that someone could not help their clients complete a voter registration form.

It was also alleged that the court was using an illegal “literacy test” in determining whether proposed conservatees should be disqualified from voting. Federal law prohibits states from making the right to vote depend on whether someone can “read, write, interpret, or understand any matter.” That is exactly what judges do when they disqualify someone from voting because he or she is unable to show an ability to complete an affidavit of voter registration.

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. The non-profit organization was mentioned in the DOJ complaint as being complicit in the violation of voting rights in that their self help clinics had routinely prompted parents to make allegations in the petition that were likely to result in the loss of voting rights for the proposed conservatee.

The presenters did a good job of clarifying, in no uncertain terms, that conservatees have the right to have someone assist them in completing a voter registration form and that they cannot be disqualified from voting because they had such assistance. But on the issue of the illegal literacy test, Judge Levanas aggravated the problem.

Neither he nor the other presenter mentioned the pending complaint with the DOJ. However, Judge Levanas did allude to the fact that there is a theory out there that California law violates federal prohibitions against literacy tests.

The problem is with what he said next. 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.

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.

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.

The United States Constitution declares: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." (Art. VI, cl. 2)

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)

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. The United States Department of Justice has been duly advised of his remarks. The court should notify the PVP attorneys who heard these remarks that they were made in error and that the court will rule on relevant federal objections.

Confidentiality

The advertised agenda listed confidentiality as an issue that would be covered in the training program. However, the printed program handed out at the event did not have a specific presentation on that topic.

Instead, the issue of confidentiality was mentioned directly, or implicated indirectly, in the comments of three speakers: an attorney in private practice, Judge David Cowan, and Judge Michael Levanas. There were no materials on confidentiality in the printed program booklet.

A proper training on this issue would have cited statutes, professional rules of conduct, and case law governing confidentiality. The confidentiality of attorney-client communications and attorney work-product would have been discussed. Opinions of the Ethics Committees of state and local bar associations would have been mentioned. Law review and journal articles would have been referenced.

None of that happened. Rather, some brief comments were made, mostly stated in passing.

In what appeared to me to be an indirect reference to criticisms that when attorneys file PVP reports with the court, they are breaching the rule of confidentiality, Judge Levanas stated there is no mandate for an attorney to file a PVP report. Forms exist, but you don't have to use them. A report is optional and up to each attorney, he emphasized.

The fact that filing such a report is not mandatory does not alter the conclusion that the discretionary filing of a report that includes information protected by the rule of confidentiality would be a violation of ethics. It just gets the court off the hook from an allegation that the court is mandating the violation.

Judicial statements have been made that underscore the breaches of confidentiality (and loyalty) inherent in filing a PVP report that contains attorney opinions gained from confidential communications or that are based on attorney work product.

Information that a client is unable to complete an affidavit of voter registration, even with help, is something that should be confidential, not disclosed in a PVP report. How would the attorney know this unless the attorney unsuccessfully tried, with appropriate accommodations, to have someone help the client complete such a registration form?

A statement in a PVP report that the attorney believes the client lacks capacity to make decisions in one or more areas is also something based on information gathered in the course of representation. A portion of that opinion would be based on the attorney's observations of the client and his or her personal and professional interpretations of those observations.

At the mandatory training in April 2014, a judge told the attorneys that the court preferred them to use the standard PVP report form that is found on the court's website. No one at the current training rescinded or contradicted or retracted that statement.

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.

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.

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.

One presenter tried to justify the filing of PVP reports as not being a violation of confidentiality by branding them as responsive pleadings. He said that in civil cases a responsive pleading is required so it cannot be a confidentiality violation for a PVP attorney to file a report. This is a non sequitur.

First, Judge Levanas stated that attorneys are not required to file a PVP report. Secondly, they are not a responsive pleading, but contain large amounts of personal and confidential information that are not general admissions or denials of allegations in the petition. Third, the inclusion of information based on confidential communications or work product is not transformed into non-privileged information simply because an attorney decides, without permission of the client, to disclose it.

For example, in a personal injury lawsuit a defense attorney would not be allowed to state his opinion in an answer that the client was liable – based on communications with the client and investigations by the attorney – without obtaining permission from the client first. This would violate the duties of confidentiality and loyalty. That fact that the violations occurred in a civil case in a responsive pleading would not transform them into an acceptable practice.

A question was raised about the federal health care confidentiality law known as HIPAA. Would not the inclusion of the client's medical diagnosis in a public document such as a PVP report be a violation of the confidentiality and privacy requirements of HIPAA? Without citing any authority and without any hesitation, one presenter stated that it was not a violation because the information was obtained by the attorney from a third party. Not so.

The diagnosis of the client is sensitive medical information. If it was found by the attorney in Regional Center records, it would be confidential information since such records are confidential and governed by HIPAA when they contain medical

information. So if the source of the third party information is protected by HIPAA, then the redisclosure of it by the attorney would logically be a violation of medical confidentiality.

The appropriate response would have been to say “I do not know the answer to that question. It is something that we need to look into further. It probably depends on whether the third party records from which the attorney got the information were governed by HIPAA. I will get back to you.”

The bottom line is that the issue of confidentiality was not covered as its own topic, no resource materials or references were provided, and the sporadic mention of confidentiality was very brief and surface. The training on this issue was not done professionally.

Conclusion

Dr. Baladerian and I started out with optimism. We hoped that the training would be professionally done. We wanted the attorneys to receive information to help them to be effective advocates for clients with developmental disabilities.

We left the training program with our hopes dashed. Some of the advertised agenda items were not covered at all. Others were handled in a very surface manner. Speakers contradicted each other on various issues. Incorrect information was given to the attorneys.

The written materials are of little use to PVP attorneys. Many valuable materials, resources, and references could have been included but were not.

This was a missed opportunity. If they were being graded for the quality of the training, the Probate Court and the Bar Association would receive a failing grade by any objective standards. ♦♦♦

Thomas F. Coleman is the Legal Director of the Disability and Abuse Project. He can be contacted at: tomcoleman@earthlink.net. The website of the Project is found at: www.disabilityandabuse.org.

Appendix

Letters Written to Public Officials
(with links to documents online)

Chief Justice of California

[May 15, 2014](#)

[June 15, 2014](#)

[June 23, 2014](#)

[September 23, 2014](#)

California Attorney General

[May 23, 2014](#)

Director

Department of Developmental Services

[June 1, 2014](#)

Board of Trustees

State Bar of California

[August 29, 2014](#)

Presiding Judge, Probate Division

Los Angeles County Superior Court

[May 15, 2014](#)

[August 28, 2014](#)

Public Defender

Los Angeles County

[June 2, 2014](#)

Attorney General

U. S. Department of Justice

[July 10, 2014](#)



Thomas F. Coleman

*People with Disabilities Have Been
Part of His Advocacy for Decades*

Thomas F. Coleman has been advocating for the rights of people with disabilities since he met Dr. Nora J. Baladerian in 1980. That was the year when Coleman became the Executive Director of the Governor's Commission on Personal Privacy.

Coleman wanted the Commission to focus on the privacy rights of a wide array of constituencies, one of which was people with disabilities. On his recommendation, Dr. Baladerian became a Commissioner and Chaired its Committee on Disability.

The Commission's Report, issued in 1982, contained recommendations to clarify and strengthen the rights of people with disabilities. One of its proposals was that "disability" be added to California's hate crime laws. That happened in 1984.

Coleman's next project involving disability issues was his work as a Commissioner on the Attorney General's Commission on Racial, Ethnic, Religious, and Minority Violence. In addition to focusing on violence motivated by racial prejudice and homophobia, the Commission's work – spanning several years from 1983 to 1989 – also included violence against people with disabilities.

The next phase of Coleman's work with disability issues involved family diversity. Coleman was the principal consultant to the Los Angeles City Task Force on Family Diversity. He directed this 38-member Task Force from 1986 to 1988. He wrote its final report, which included a major chapter on Families with Members Who Have Disabilities. Recommendations were made on how the city could improve the quality of life for all families, including people with disabilities.

A few years later, he and Dr. Baladerian created a Disability, Abuse, and Personal Rights Project, which was organized under the auspices of their nonprofit organization, Spectrum Institute.

Coleman's advocacy shifted to other issues for

several years, focusing on widely divergent subjects such as promoting the rights of single people, to fighting the abuse of troubled teenagers by boot camps and boarding schools.

Several years ago, Coleman began working again with Dr. Baladerian, devoting more of his time to the disability and abuse issues which she has championed for decades. As he learned more about these issues, he dedicated more of his time and talent to abuse of people with disabilities.

A few years ago, Coleman and Dr. Baladerian instituted a new Disability and Abuse Project, which recently conducted the largest national survey ever done on abuse and disability.

Although most of the work of the Project involves research and advocacy on policy, Coleman has become involved in several individual cases. One challenged a plea bargain as too lenient to serve justice for the sexual assault victims. Another sought to reduce the 100 year sentence of an 18 year old man with a developmental disability as disproportionately harsh. The other three involved adults whose rights were not being protected by the conservatorship system.

The most recent campaign is an ambitious Conservatorship Reform Project, which seeks to better protect the rights of adults with developmental disabilities who become conservatees.