

Limited Conservatorships: Systematic Denial of Access to Justice

A Report Submitted to the
Senate Judiciary Committee

March 24, 2015



SENATE JUDICIARY COMMITTEE

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Hon. Hannah-Beth Jackson
Chair, Senate Judiciary Committee
State Capitol, Room 2187
Sacramento, California 95814

Re: Oversight Hearing on the Role of the Courts in Protecting Vulnerable Adults

Dear Senator Jackson:

When we became aware of the oversight hearing, we viewed it as an opportunity to share our concerns with the committee about the ongoing and systematic violations of the rights of limited conservatees.

The California Legislature had good intentions when it created the limited conservatorship system in 1980. Responsibility for operating this system was entrusted to the Judicial Branch. No agency in the Executive Branch was given a role in monitoring the system. The unfortunate and unforeseen result is a system that routinely violates the rights of thousands of adults with intellectual and developmental disabilities. It is also a system that fails to fulfill its obligations under Title 2 of the Americans with Disabilities Act – federal requirements for state and local courts adopted by Congress in 1990.

The limited conservatorship system has been operating on “auto pilot” for decades. Since appeals are virtually nonexistent, appellate courts never have opportunities to correct errors and abuses by judges and court-appointed attorneys in the superior courts. Each county court functions without oversight.

There are more than 40,000 adults with developmental disabilities who have open conservatorship cases in California, with 5,000 new limited conservatorships being added each year. Nearly 31 percent of these cases are under the jurisdiction of the Los Angeles County Superior Court.

After three conservatorship cases came to our attention about two years ago, each with its own set of egregious violations of constitutional and statutory rights, we decided to study the limited conservatorship system as a whole. We placed heavy emphasis on Los Angeles County since that is where we are located, but we also reviewed statewide policies that govern the system. For more than a year, we have gathered statistics, reviewed large numbers of court files, attended training programs, filed public records requests, conducted interviews, convened conferences, and solicited the opinions of various professionals.

Our first report – *Justice Denied: How California’s Limited Conservatorship System is Failing to Protect the Rights of People with Developmental Disabilities* – was sent in May 2014 to the Chief Justice and many other state and local elected officials. Since then, we have published many other reports and commentaries. When they are examined individually, they are alarming. When viewed together, they show a system in need of immediate review, ongoing monitoring, and major operational corrections.

We urge the California Legislature to create a Joint Select Task Force on Access to Justice in Limited Conservatorships. We believe that such a Task Force will confirm the disturbing findings of our own studies and reports, while it would broaden the review of the system to all 58 counties. We would like an opportunity to discuss the merits of convening such a Task Force with you when your time permits.

Respectfully,



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Key Findings

1. There is no agency or official in charge of the limited conservatorship system in California.
2. The Department of Developmental Services, Disability Rights California, and the State Council on Developmental Disabilities do not monitor this system or advocate for reform in general or intervene in individual cases where violations of rights are occurring.
3. There are never any appeals in limited conservatorship cases, so errors and abuses by judges and attorneys are not corrected by the normal appellate process.
4. Court-appointed attorneys are routinely violating their ethical obligations of loyalty and confidentiality to their clients, are surrendering rather than defending the rights of their clients, and are not providing effective assistance of counsel as required by due process of law.
5. Although the core function of a conservatorship proceeding is to assess whether an adult has capacity to make decisions in seven areas of functioning, and despite a legislative mandate for regional centers to make these assessments and report the findings to the court, regional center workers have no guidelines or training on how to make accurate capacity assessments.
6. Judges, attorneys, and court investigators are not trained on their duties under the Americans with Disabilities Act and it appears they are not providing equal access to justice to adults with intellectual and developmental disabilities in limited conservatorship proceedings.
7. The trainings of court-appointed attorneys and court investigators about their core functions are seriously inadequate. Whether judges who process limited conservatorship cases receive any training on issues critical to the administration of justice involving people with intellectual and developmental disabilities is not known.
8. Letters requesting intervention by the State Bar of California, the Attorney General of California, and the Department of Developmental Services have not been answered.
9. Despite having convened a statewide Task Force in 2006 in response to complaints of mistreatment of seniors in conservatorship proceedings, the Judicial Council has declined to convene a similar Task Force on Limited Conservatorships to investigate the manner in which cases involving people with intellectual and developmental disabilities are being processed.
10. Despite having constitutional authority to conduct surveys of the courts throughout the state, and despite having been asked to conduct a survey of the practices of courts in limited conservatorship proceedings in all 58 counties, the Judicial Council has no plans to do so.
11. The Legislature has authority, by joint resolution, to convene a Task Force on Access to Justice in Limited Conservatorships to assess the condition of the limited conservatorship system and to direct the Bureau of State Audits to assist the Task Force by conducting a survey of the county courts and by performing an audit of the practices of the Los Angeles Superior Court.

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A Report by Spectrum Institute to the Senate Judiciary Committee

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by Thomas F. Coleman, J.D.
and Nora J. Baladerian, Ph.D.

A legal system for limited conservatorships was created by the California Legislature in 1980. The new law merged the rights recognized by the Lanterman Act with the protective mechanisms of the conservatorship system. This resulted in new procedures for people with intellectual and developmental disabilities who needed some protection.

The Lanterman Act affirms that people with intellectual and developmental disabilities have the same constitutional and statutory rights as everyone else. It assumed that adults are capable of making their own decisions unless proven otherwise. It directs that people who would intervene to protect those who lack one or more decision-making capacities should seek a conservatorship as a last resort, not as a first choice. Even then, the conservatorship should only transfer authority to make decisions for the specific area where capacity is lacking, not for all decisions. Thus comes the name “limited conservatorships.”

Limited conservatorships, even when granted, were supposed to promote as much independence as possible for the limited conservatee. The wishes of the conservatee were supposed to be honored by the conservator, unless they would cause harm. Conservators were supposed to encourage self determination and to improve decision-making abilities.

The principles on which the new limited conservatorship system was based appear to be reasonable – in theory. However, as explained within, the practices of those who play a major role in the limited conservatorship system are not in compliance with the policies on which the system was constructed. Perhaps they have been out of compliance for decades.

Ten years after the limited conservatorship system was created, Congress added a new layer of protections for people with disabilities when it enacted the Americans with Disabilities Act. Title Two of the law imposed legal requirements on state and local courts in their interactions with people who come into contact with the judicial system. Title Three imposed obligations on private-sector businesses, including lawyers, that provide services to people with disabilities. These provisions apply to the limited conservatorship process.

As a result of these state and federal laws, people with intellectual and developmental disabilities – including those who are drawn into limited conservatorship proceedings – have legal protections under the federal and state constitutions, the Lanterman Act, the Probate Code, and the Americans with Disabilities Act. These protections apply to the practices of people in each assigned role in the limited conservatorship system – petitioners, court-appointed attorneys, court investigators, regional centers, judges, and conservators. Unfortunately, our review of practices in Los Angeles has revealed that people in each of these roles are engaging in ongoing and systematic violations of these legal protections.

Methodology of Our Research

Three specific limited conservatorship cases came to our attention during 2012 and 2013. One involved allegations of abuse. Another involved apparent violations of First Amendment rights, including freedom of association. The third raised multiple concerns, including violations of the ADA as well as voting rights infringements. These alleged violations stemmed from the conduct of court-appointed attorneys, conservators, and judges.

We reviewed each case thoroughly, examining court documents and interviewing or attempting to interview persons associated with each case. Over time we determined that the allegations were well founded. Although we are an educational organization, and do not represent individual clients, we shared our findings with the agencies and officials who had jurisdiction to intervene. We had mixed results. The abuse victim died, despite our best efforts to get him the protection he needed. The First Amendment violations in the second case have continued, despite our repeated attempts to have the judge and the court-appointed attorney honor the rights of the limited conservatee. The third case was resolved in a manner that allowed the young man to keep his voting rights and the ADA violations became moot.

Our review of these cases caused us to wonder if they were anomalies or were symptomatic of ingrained problems with the limited conservatorship system as a whole. We are sorry to report that, after a year of intense research and analysis, the problem is with the system – the system created by the Legislature in 1980 for which everyone had high hopes. To be more precise, the problem stems from the failure of those with assigned roles – judges, attorneys, investigators, regional centers, and conservators – to properly implement the system in a manner that complies with state and federal legal requirements. Shoddy practices have undermined laudable policies. Those with assigned roles in this system have not been fulfilling their legal obligations.

We have reached these conclusions after conducting exhaustive research. We read the California Probate Code and related statutes that govern limited conservatorships. We reviewed the provisions of the Americans with Disabilities Act that impose obligations on judges and attorneys to modify policies and practices to insure access to justice for people with intellectual and developmental disabilities. There is almost no case law regarding limited conservatorships (since there are virtually never any appeals in these cases) so there was little case law to review. Judicial Council forms and publications were also analyzed. Court rules relevant to limited conservatorships were reviewed as well.

With these statewide policies in mind, we examined how limited conservatorship cases have been handled in Los Angeles County. Thirty percent of conservatorship cases in California are processed in Los Angeles. We examined hundreds of court dockets and read documents (petitions, attorney reports, and court orders) in dozens of cases. Some mandatory trainings of court-appointed attorneys were reviewed after-the-fact, while others were attended in person. We obtained some documents through administrative records requests. We listened to and spoke with the employees of some regional centers. We convened two conferences, one on the limited conservatorship system in general and the other on voting rights violations. Based on this information, we published several reports and commentaries.

Findings

Demographic Information

1. Obtaining demographic information about the limited conservatorship system was difficult. Statistics were not readily available from reports published by the Judicial Branch or from other state and local sources. Public records requests eventually produced some results.
2. There are more than 40,000 adults with intellectual and developmental disabilities in California who are under an order of conservatorship. More than 12,000 of these cases (nearly 31%) are located in Los Angeles County.
3. About 5,000 new limited conservatorship cases are filed each year in California, with 1,200 of them in Los Angeles County.

The Statewide System

4. The limited conservatorship system operates throughout California. It is a statewide system created by the California Legislature in 1980.
5. The California Constitution requires that laws of a general nature must be uniform in operation. This constitutional provision was a precursor to the equal protection clause. Statutes governing limited conservatorships are laws of a general nature.
6. No agency or official is in charge of the limited conservatorship system in California.
7. Limited conservatorship cases are processed through the superior court of each county. There are 58 counties in California. Each superior court can decide how to process these cases. Some counties appoint the public defender's office to represent proposed limited conservatees, while others appoint private attorneys. Each county sets its own pay scale for these attorneys. Each superior court decides whether to use court investigators in all cases, some cases, or no cases. Each court decides the content of any trainings for appointed attorneys, if trainings occur at all. The Judicial Council of California has no control of the processing of cases at the local level, except for the use of some mandatory forms or the adoption of a few statewide rules.
8. The judges who process limited conservatorship cases at the local level have nearly unlimited power as to how cases are handled in their courtrooms. These cases are almost never appealed – and the judges know this. As a result, the Court of Appeal and the Supreme Court do not know the extent to which errors are committed or discretion is abused by the superior court judges. Likewise, the appellate bench is completely unaware of whether other participants in the system – court-appointed attorneys, court investigators, and regional center workers – are adhering to their obligations or violating their duties. The practices of these participants at the county level occurs, and has occurred for decades, without statewide judicial oversight. Since appellate oversight is lacking, errors and abuses go uncorrected.

9. There is no executive branch agency with jurisdiction or an obligation to monitor the limited conservatorship system or to intervene to correct either individual injustices or systemic problems. The Attorney General plays no role in limited conservatorships. Likewise, the Department of Developmental Services has no role in this system.

10. Because appellate review almost never occurs, and because there are no agencies in the executive branch with a duty to monitor the limited conservatorship system, and because the role of the Judicial Council is extremely limited, the superior courts in each county have been allowed to process these cases in whatever manner they see fit. For example, the Los Angeles Superior Court decided to stop using court investigators in these cases for several years as a money-saving technique. Because of its total control over limited conservatorship cases in Los Angeles, and because there was no executive branch agency to intervene, this was allowed to happen without any objection being raised.

11. The California Constitution authorizes the Judicial Council to conduct surveys of the courts throughout the state. The Judicial Council has never conducted a survey to determine the practices of the superior courts in the 58 counties with respect to the processing of limited conservatorship cases. Without such a survey, and without appellate review occurring, the Judicial Council does not know whether local practices are consistent with state and federal statutory requirements or whether the limited conservatorship system is uniform in operation as constitutionally required. The Judicial Council has no current plans to conduct such a survey.

12. State statutes require that a regional center report must be filed in each limited conservatorship case and must be considered by the court prior to granting a petition. Regional centers are required by law to assess the client's capacity to make decisions in each of seven areas – medical decisions, access to confidential records, education, residence, contracts, marriage, and social and sexual contacts.

13. There are 21 regional centers in California. Each one is a separate corporation. They operate independently from each other, although they have a voluntary trade association known as ARCA (Association of Regional Center Agencies). Each regional center receives its funding through contracts with the state Department of Developmental Services (DDS).

14. Contracts between DDS and regional centers say nothing about the duties of regional centers to conduct capacity assessments in limited conservatorship cases. There are no line items in regional center budgets regarding the performance of this statutory duty. DDS has not promulgated regulations on these capacity assessments. The department has no guidelines about capacity assessments, nor does it have any training materials or training programs on this subject. As a result, each regional center is left to its own devices as to how to comply with its statutory obligation to conduct capacity assessments for proposed limited conservatees.

15. One regional center acknowledged that it had no guidelines for capacity assessments and that its personnel had received no trainings on this topic. Management at that regional center indicated they would welcome such guidelines and trainings.

Los Angeles County

16. There are seven regional centers in Los Angeles County. The most recent data obtained from the Department of Developmental services shows that these seven regional centers have 12,688 adult clients under a conservatorship order issued by the Los Angeles Superior Court.

17. Data from a variety of sources, including Bet Tzedek, shows that about 1,200 new limited conservatorship petitions are filed with the Los Angeles Superior Court each year. Bet Tzedek is a nonprofit legal services corporation that operates conservatorship self-help clinics in Los Angeles County.

18. Since Los Angeles County has more than 30 percent of the open conservatorship cases involving adults with developmental disabilities in the state, the practices of the superior court in this county speak volumes about limited conservatorship cases in California. Whether the practices in Los Angeles County are the same as, better, or worse than those in other counties will not be known until there is a statewide survey and review of the practices in the other 57 counties.

The Pre-Petition Phase

19. Limited conservatorships are supposed to be a last resort. A petition should only be filed if, despite attempts to provide supported decision making to a regional center client, the client lacks the capacity to make decisions on his or her own (with or without support) in one or more of the seven areas.

20. Regional centers, as part of the person-centered IPP (individual program plan) process, should be evaluating capacities of each client just prior to the client becoming an adult. They should be developing plans, and finding support systems, to help clients make adult decisions. It is unknown whether the regional centers are fulfilling this IPP obligation.

The Petition Phase

21. Most petitions for limited conservatorships in Los Angeles County are filed by a parent or close relative of an adult with an intellectual or developmental disability. About 90 percent of such petitions are filed by persons who are not represented by an attorney. Most of these “pro per” petitioners go to a self-help clinic for assistance in completing the paperwork necessary to obtain an order of limited conservatorship.

22. Bet Tzedek operates self-help clinics located inside the courthouse of the Los Angeles Superior Court. They also conduct group seminars to help parents and others prepare petitions and other documents that are required by the Superior Court. Bet Tzedek does not provide legal advice to these petitioners. Rather, it gives form-filling advice, telling them which boxes to check in order to have a petition granted. If petitioners ask legal questions, Bet Tzedek says that it does not answer them.

23. Bet Tzedek does not offer educational programs for pro per petitioners. State law does not require them to attend such a program prior to filing a limited conservatorship petition.

24. Most petitioners ask the court to grant them all seven powers. The petition form asks the petitioner a question about the voting capacity of the proposed limited conservatee. The question is whether the adult is able or is not able to complete an affidavit of voter registration. The form does not explain what this means. Most petitioners put a check mark in the “is not able” box.

Court Investigators

25. The Los Angeles Superior Court currently employs 15 probate investigators. The number was 10 or less just a few years ago. These investigators are mandated by statute to investigate limited conservatorship cases after a petition is filed. They are supposed to interview the proposed conservatee and his or her immediate relatives as well as the proposed conservator and consider other persons who may better serve as a conservator. They should review evidence concerning the capacities of the proposed conservatee and whether lesser restrictive alternatives would eliminate the need for a conservatorship.

26. In addition to investigations in new filings, investigators are supposed to conduct an annual review and then biennial reviews thereafter. They are also called on to investigate cases when issues arise between biennial reviews.

27. Court investigators also have duties to investigate general conservatorships for seniors and other adults as well as guardianships for minors.

28. To save money, several years ago the Los Angeles Superior Court decided not to use court investigators in new filings for limited conservatorship cases. As a result, state-mandated investigations were not conducted by such investigators for an unknown number of years. The Superior Court would not provide information as to which judge entered the administrative order to stop such investigations or for how many years such investigations were omitted.

29. Attorneys appointed to represent limited conservatees did not object to the elimination of these investigations. No appeals or writs were filed. As a result, this practice was allowed to continue for a few years. It was only this year that such investigations were resumed.

30. Court investigators have not received any trainings about developmental disabilities in general, other than a rudimentary training once about autism. They have not received trainings on: (a) how to interview a person with an intellectual or developmental disability; (b) mandates of the Americans with Disabilities Act and how to comply with those mandates; and (c) voting rights laws and how to evaluate whether an adult has capacity to vote, whether the adult should be disqualified from voting, or whether the adult has regained the capacity to vote and should be reinstated.

31. Although the core function of the limited conservatorship process is to determine the capacity of an adult in seven areas of functioning, court investigators have not been trained on how to assess such capacities or how to question capacity assessments made by others, such as the regional centers.

Court Appointed Attorneys

32. The law requires that proposed limited conservatees be provided an attorney in all new cases and thereafter in proceedings that may restrict their rights if an attorney is requested. While the public defender's office represents limited conservatees in some counties, that is not the case in Los Angeles County. No one can recall how or why the Office of the Los Angeles County Public Defender became disassociated from these cases.

33. The Probate Division of the Los Angeles Superior Court has a Probate Volunteer Panel. This is a list of attorneys authorized by the court to represent conservatees and proposed conservatees in general conservatorship and limited conservatorship cases. There are 210 attorneys on the list.

34. Local superior court rules give general requirements for attorneys to be placed on the PVP list. Attorneys complete an application and request placement on the list. They self certify that they have met the requirements of the local court rule. They are automatically placed on the list. No audits are done to determine if the criteria have been met. There are no criteria for taking an attorney off the list.

35. The probate examiner's office is in charge of having attorneys appointed to specific cases. The names of the attorneys come up in rotation. A call is placed to three attorneys. The first to respond is appointed. Attorneys who have a phone system that makes them immediately accessible therefore get many more appointments than those who may not be able to respond to a phone call for several hours. Some attorneys get dozens of appointments while others may get one per year. Attorneys have been complaining about this system but it has not been changed. In response to our administrative records request, the court responded that there are no written instructions or guidelines on how the PVP appointment system is supposed to be operating. Individual judges are allowed to instruct the probate examiner's office not to appoint a specific attorney to any cases in his or her courtroom. Attorneys are not advised when they have been vetoed by a judge.

36. The Probate Division conducts mandatory PVP trainings once or twice each year. The trainings are conducted by the Los Angeles County Bar Association under the direction of the Supervising Judge of the Probate Division.

37. The training program agendas and training materials were reviewed for 2012 and 2013. Some training programs conducted in 2014 were attended in person. Reports about the quality of these training programs were published by our organization. Our evaluations ranked them as very poor quality. In some trainings, misinformation was given to attorneys. The main problem was that topics and methods that are crucial to effective representation of clients in limited conservatorships were completely omitted. There were no trainings on: (1) how to assess the capacities of clients on the seven powers; (2) how to challenge capacity assessments by doctors or regional centers; (3) how to interview clients with developmental disabilities; (4) the constitutional and statutory rights of such clients; (5) the requirement that less restrictive alternatives should be explored; and (6) how to conduct a contested hearing. Despite our negative evaluations, the trainings have not improved.

38. PVP attorneys are mostly surrendering the rights of their clients, not defending them. Statutes require them to represent the interests of their client, but a local court rule gives them a secondary duty to help the court resolve the case. This rule creates a conflict of interest for the attorneys. They have a duty to the client, with all of the ethical and professional requirements that entails, but they also have a duty to help the court settle the case.

39. A sampling of several dozen cases revealed that, on average, PVP attorneys were spending less than seven hours per case. When travel time and time spent in court are subtracted, it appears that such attorneys were spending only two hours or so to read documents, interview the client, investigate the proposed conservator, and review possible alternatives to conservatorship. We estimate that in order to provide the effective assistance of counsel to which a proposed conservatee is entitled, an attorney would spend more like 26 hours in an average uncontested case. Attorney fees are paid by the county, not the court.

40. PVP attorneys file reports with the court that are a matter of public record. Dozens of these reports were reviewed. We found that information that should be considered confidential and protected by the attorney-client privilege or governed by work product principles were routinely disclosed in these reports.

41. In these PVP reports, attorneys disclosed information adverse to the interests of their clients. These disclosures were considered by the judges as stipulations that the client lacked capacities in these areas. As a result of these disclosures, most clients lose their right to make decisions in these areas, as well as their right to vote.

42. PVP attorneys almost never requested a contested hearing on any issue. As a result, contested hearings are a rarity in limited conservatorship cases in Los Angeles. When they do occur on rare occasions, it is mostly in cases where the petitioner is represented by counsel and where the issue is who should be the conservator – not whether the proposed conservatee should retain his or her rights in one or more of the seven areas.

43. Since PVP attorneys do not request a contested hearing, there are no appeals filed by PVP attorneys on behalf of their clients. Since about 90 percent of petitioners are not represented by counsel and since these petitioners almost always have the requests in the petition granted, they do not file appeals either. As a result, there are almost no appeals in Los Angeles County. Two years ago, one parent filed an appeal to contest a court order that violated the First Amendment rights of her adult son. That was in one of the three cases reviewed by our organization. The Court of Appeal dismissed the appeal on the ground that the parent lacked standing to appeal. It was not her rights that were violated. The son was not represented on appeal because the court-appointed attorney who had surrendered the rights of his client was relieved as counsel as soon as the offending order was issued.

44. As a result of these practices, PVP attorneys are not properly trained, have conflicts of interest created by court rule, routinely violate ethical duties of loyalty and confidentiality, and surrender rather than defend the rights of their clients. None of this ever comes to the attention of the appellate courts or any other governmental agency. Clients have no recourse.

Regional Centers

45. There are seven regional centers that serve clients in Los Angeles County. These regional centers have statutory duties to conduct capacity assessments and file reports in limited conservatorship cases. As mentioned above, the regional centers have no guidance from DDS about how to properly evaluate capacity in these seven areas, nor do they have anything in their contracts with DDS on this topic.

46. In a considerable number of cases, regional center reports were not filed prior to the uncontested hearing on the petition. Rather than continue the case to a later date, the courts would grant the petition anyway and have the clerk instruct the regional center to file the report at a later date.

47. Some judges have stated publicly that they do not place much credence in the regional center reports or give them much value. One of the reasons is that judges find it contradictory for a regional center to state that the client lacks the capacity to enter into a contract and yet recommend that the client retain the right to marry. The judges point out that marriage is a contract.

Probate Court Judges

48. There are several judges in the Probate Division who hear limited conservatorship cases. There are no mandatory training requirements that these judges take any courses or attend any seminars about issues involving people with intellectual and developmental disabilities. It is unknown what type of training any of these judges have received to give them knowledge about issues that come up in limited conservatorship proceedings – rights under the Lanterman Act, constitutional rights of conservatees, lesser restrictive alternatives to conservatorships, forensic assessment of capacities in the seven areas, requirements of courts under the ADA and how to comply with those requirements, federal voting rights protections for people with intellectual and developmental disabilities, etc.

49. Having judges who hear cases decide which attorneys get appointed, how much they are paid, and whether they get reappointed or not, creates the appearance of a conflict of interest. Attorneys may fear offending the judge who has control over their livelihood. Rather than filing an objection in a case or demanding a contested hearing on an issue, attorneys may be tempted to stipulate to a settlement, justifying it as part of their secondary duty to help the court resolve the case.

50. The current presiding judge of the Probate Division told attorneys at a training that she has no control over the other judges. She warned attorneys that some of the judges may pressure them into revealing information adverse to their clients. She further warned that some judges want the attorneys to act like a guardian ad litem, telling the court what they think is in the client's best interests, rather than advocating for the client's rights.

51. The presiding judge was recently asked to repeal the local court rule giving PVP attorneys a secondary duty to help the court resolve the case. No response has been given.

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