Conservatorship Training Riddled with Errors and Omissions

By Thomas F. Coleman
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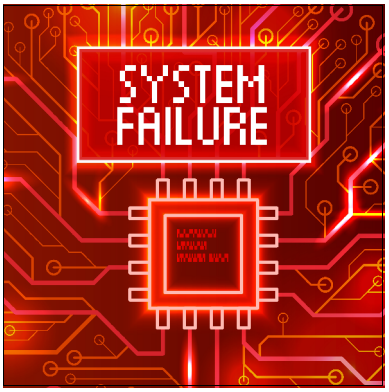
Conservatorship reform advocates were cautiously optimistic when the Judicial Council adopted new training requirements for attorneys in probate conservatorship proceedings. The mandates of Rule 7.1103 of the California Rules of Court became effective on January 1, 2020.

For years, some of us had pushed for better educational programs for court appointed counsel in these cases. We wanted crucial topics to be included in training curricula as well as performance standards to ensure that trainings would not misinform attorneys or inadvertently encourage malpractice.

We got half a loaf. The Judicial Council expanded the list of topics on which appointed attorneys must be educated annually. Performance standards were not adopted on the theory that setting such standards is not within the council's purview.



As it turns out, this is a situation where half a loaf may not be better than no loaf at all. The proof is found in a mandatory training on limited conservatorships conducted last week by the Los Angeles County Bar Association.

A colleague of mine – also a conservatorship reform advocate – attended the webinar and gave me reports in real time of what was being taught. I went online to review the content of the training materials.

When we compared notes at the end of the webinar, we both came to the same conclusion. Training programs that are not guided by formal performance standards are a recipe for disaster.

Without a checklist of what an effective advocate must do and not do, trainings can provide misinformation and still technically cover the required issue areas. New topics specified by Rule 7.1103 include: the requirements of the Americans with Disabilities Act; case law governing probate conservatorships; legal rights of conservatees and persons with disabilities; a lawyer's ethical duties; and supported decision-making.

Because there are no monitoring mechanisms to evaluate the trainings, local bar associations can award continuing education credits for seminars that leave attendees misinformed on some topics and uninformed on others. That is what happened last week at the limited conservatorship training.

Such an educational debacle would not likely occur at a training session for criminal defense attorneys or attorneys appointed for children and parents in dependency proceedings. In both types of proceedings, there are established performance standards that specify the advocacy activities required of lawyers.

In the field of criminal law, there is a body of appellate law clarifying what attorneys must do to provide effective assistance to their clients. These rulings guide the trainings of public defenders and court-appointed attorneys. It is therefore unlikely that presenters at criminal defense seminars would go rogue by encouraging malpractice.

Counsel appointed to represent minors or parents in dependency proceedings are explicitly guided by general performance standards established by statute and by specific advocacy standards adopted by the Judicial Council. Again, it is unlikely that training programs for these attorneys would deviate from these standards.

Training programs for court appointed counsel in conservatorship proceedings have no guardrails. Presenters are free to include or omit what they wish with only one proviso – that the content pleases the sponsoring organization and the probate court judges who mandate the trainings. As a result, trainings are ad hoc and based on local judicial preferences.

Local preferences were on full display at last week's

limited conservatorship training. Judges want the attorneys to act as de facto court investigators. That is why so much of the training program focused on local court rules rather than constitutional protections and disability nondiscrimination requirements.

Local preferences also influence attorneys to settle cases rather than demand evidentiary hearings. That preference is baked into local rule 4.125, which requires appointed counsel to help the court resolve cases. Such a "secondary duty" is manifest through a requirement that attorneys file a report with the court in which they share the results of work product developed during their investigation. These reports contain facts and opinions that may undermine the prospect of the client retaining his or her rights.

Appointed attorneys take these local rules and preferences seriously. They know that if they put in too many hours and run up fees which the county pays, they may be viewed with disfavor by the judges who operate the court appointed counsel program. Such disfavor may result in fewer appointments and therefore affect their income stream. Some attorneys can earn as much a $100,000 per year from these appointments.

Back to last week's training program. Here is a sample of what was included and what was omitted. Let's start with the latter.

Although each proposed conservatee has serious disabilities that can affect their ability to have meaningful participation in the case without appropriate accommodations, not one word was mentioned about the duties of attorneys and judges under the Americans with Disabilities Act.

Although conservatorship case law is supposed to be covered, two recent appellate rulings were not discussed. One was an order of the Supreme Court decertifying for publication a Court of Appeal opinion that downplayed the importance of searching for less restrictive alternatives. The other was a Court of Appeal opinion, certified for publication, emphasizing that trial courts lack the authority to order a conservatee to visit someone against their will.

There was also no mention of the due process right of clients to effective assistance of counsel. Also not mentioned was the duty of attorneys to preserve issues for a possible appeal. Perhaps that is because, unlike other areas of law, appointed attorneys for conservatees almost never file appeals.

There was no discussion of discovery or preparing for trial. Contested court trials are unusual. Although proposed conservatees theoretically have the right to a jury trial, out of 24,000 conservatorship cases processed in Los Angeles over a recent 12-year time span, there were only two jury trials.

Also missing from the curriculum was how to use social workers or regional center multi-disciplinary teams to develop supported decision-making arrangements as a substitute for conservatorship. Not a word was spoken about an attorney's duty to ensure that an appropriate continuing care plan is adopted if a conservatorship order is granted.

As to the former: what was included in the training was just as alarming as what was omitted. Reports by court appointed attorneys are mandatory. Attorneys were instructed to include their observations and recommendations. The client's limitations should be mentioned. Attorneys are supposed to identify which rights of the client should be retained or restricted.

Requiring attorneys to file such reports contributes to violations of ethics, professional standards, constitutional obligations, and disability nondiscrimination laws. By filing such a report, a lawyer is acting more like a social worker with a law degree than a zealous advocate. A diligent advocate would challenge the constitutionality of these local rules.

Last month a coalition of 10 organizations, including Spectrum Institute and the Long Beach Bar Association, filed an administrative request with the Supreme Court asking the justices to convene a Workgroup on Conservatorship Right to Counsel Standards. The list of issues suggested for investigation did not include deficient conservatorship trainings programs. If such a workgroup is eventually created, this issue should be placed at the top of the list, with last week's training session introduced as "Exhibit A." ♢ ♢ ♢

Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit organization advocating for conservatorship reform, disability rights, and access to mental health care. Email him at: tomcoleman@spectruminstitute.org