

Duties of Appointed Counsel in Conservatorship Cases

Remarks of Honorable Maria Stratton
Presiding Judge of the Probate Division
of the Los Angeles County Superior Court

JUDGE STRATTON: I come from a public defender's background. Public defenders take what you're given and you roll with it. I kind of bring that background to you.

As I said in the beginning, we're really interested in robust representation for all the clients that you come to represent. I see that every day. I'm really amazed at how fast you all work and how you get those reports written in no time flat. It's really amazing . . . and the judgments that you all have, it's really wonderful.

My attitude is that you get appointed on a case, and you have what you have, and you roll with it. And you roll with it as an advocate.

I know there's kind of a tension between do I come in and tell the judge what I think is in my client's best interest, or do I come in and tell that judge this is what my client wants to do and this is the way we're going to proceed with the litigation. I'm an advocate and I know Rob [Wada] is too of the latter, that you come in and tell the judge this is what the client wants and this is how we are going to proceed with the litigation. While maybe in the background you are trying to persuade the client to do what you think is in their best interest – which is what you do in the criminal arena when your client is telling you “I want to you to trial.” And you're telling them “you're going to get 30 years if you go to trial and you're going to get two if you plead.” So in the background you're doing this but before the judge you're saying to the judge “we're going to trial” as much as it's killing you because you think the client should really take the deal.

It's a little bit similar here where you may have clients who are telling you “I want to do this, I want to do that” and in the back of your mind you're thinking “that is such a bad decision.” For many of them, the clients that you get, they are impaired – either intellectually impaired or they're impaired by the mental and medical and physical condition that has happened to them because they're elderly. So you do have a delicate balance because you're trying to talk them into taking your advice because as a lawyer you're their counselor, but as a lawyer you're also their advocate. So when they're telling you “I don't want this conservatorship, I'm fine, let's take it to trial,” that's what we as a judge need to know.

I'm here this morning to give you five tips, they are from me. I haven't discussed this with the other bench officers. They are things that I have to know from PVP counsel, and if I don't get them I may ask you for them in the course of your representation.

The first thing is, if you need more hours ask for them before you spend them. You don't need to know the paperwork behind all of this, but its just better to ask before instead of asking for forgiveness later. Ask before, and don't be shy. You don't have to use everything you get. Ask for 10, ask for 15, but ask before.

The second thing I'm going to tell you is the judge really needs to know what your client wants, as crazy as your client may want it. The judge needs to know it. So if your client is telling you "I'm opposed to this conservatorship, I'm fine, I don't need any help," then the judge needs to know that. It's not going to be forgotten, it's going to be put in the [judge's] brain just like everything else, all the other facts, but it is a critical fact that the judge needs to know.

When people come in and they say in their PVP reports – and I've seen some like this – "Well, I think my client should have a conservatorship." Well, you know what, I appreciate your opinion but I need to know what your client wants first, before I know what you want. And maybe I shouldn't even really hear what you think if it's contrary to what your client wants.

Your client says "I want a trial" or "I want a hearing" or "I don't want this particular person as my conservator," the judge needs to know that. And maybe you shouldn't be saying, "and by the way judge, even though my client says she doesn't want a conservatorship, she is so demented she doesn't really know what she wants and she really need one." No, you can't say that. That's being disloyal to your client. Your client wants to fight it, so you're in that mode, you're in fight mode.

Now, that goes against a lot of people's grain. I get that. You are dealing with really awful situations most of the time. You are either in the middle of fighting siblings or people claiming they are there for the person when they are really there for the money, and your clients are really not getting it, but you are. You are between a rock and a hard place many times. I get that, and its hard. It's particularly hard because all of you care about your clients otherwise you would not be volunteering to do this. But that's your role – as the advocate.

While ultimately the judge is going to take into account, perhaps, what the best interest of your client are, if the client's best interests aren't what the client wants, then you don't have any business telling me what your opinion about what the best interests are. I will get that from the court investigator's report, or I'll get that argument from the other side – the conservator or the conservator's counsel whose coming in to tell me why it's in the client's best interest to have a conservator and to have a particular conservator.

The court investigators are going out more on more cases and right now they are writing reports on every type of case except for public guardianship cases where the public guardian is the initial petitioner, and temporary conservatorship petitions. We're hoping at some point to expand that.

For the most part, you're going to have court investigator reports and that court investigator is writing it from the best interests point of view, not any other point of view. So as bench officers we need to hear your client's side of the story, because we're already getting the best interests side from the court investigators. You don't have to worry that we're not going to get it. That is the goal of the court investigator's report, to tell the judge what the court investigator recommends is in the best interest of the client.

I just urge you, when you're writing your PVP reports, the first thing you should put down is what your client wants – in no uncertain terms. Just put it out there. So that if your client read it, and could understand it, your client would say “yeah, that is exactly what I want, you did a good job as my lawyer, you represented me.” So that's kind of the second tip I have for you from the judge's perspective.

The third thing is – and this is part of my background from sitting in Department 95 for three years – the judge needs to be able to discern from your PVP report that you advised your client of all of your client's rights, including the right to be present. This is critical in conservatorship cases. And if you read conservatorship cases, whether they are general conservatorships or LPS conservatorships, the biggest issue that comes down the pike in most of these cases is presence – the right to be present – whether the lawyer can act without the client being present. The bench officer wants to know, did you advise your client of all your client's rights – the right to fight the conservatorship, the right to fight who should be the conservator, the right to fight what powers the conservator should have, the right to fight what disabilities are imposed on the conservatee. Your client needs to know all that and the judge needs to know you have told your client all of that – the most important right being the right to be present.

When I'm looking at a PVP report that's not one of those form ones that you check off – I hate those reports, generally, except that I love the little check off boxes because I can see that you have checked off the box that you have advised the client of all the rights. So I am feeling, oh good, that the client knows what's going on. If you're not using one of those forms, and you are using a template that you use, perhaps, put a little paragraph in for advisement of rights so that the judge knows that you've advised the client of all the rights. What would really be great is if you put in what rights you advised the client of. Maybe Jonathan can put together a paragraph that says what the rights are.

Not only that, but, did your client have a response to what you told them. You don't have to tell me what the response is if it would violate your attorney-client privilege, but I do need to know that the client seemed to understand, or said, thank you for that but I'm not interested in any of those rights, I'm fine with the conservatorship. Or, I don't want to be there, I hate going to court, I don't want to be with my family. Whatever it is, but, if you are able to say what your client's response was to the rights so that the court knows whether the client understood what was going on, that would be terrific. That's something that I look for, because if it's not clear that you've advised your client of the rights, then I have to ask you. Sometimes I have asked, particularly when they come in and say, “It's really not in my client's best interest to be here today.” So I have to ask, “Did you advise your client of his or her right to be present today?” Usually the answer is “yes.” So why wasn't that in your report? What did your client say in response to knowing that she had a right to be here today? Sometimes I hear “There was no response.” Well, that's an answer. Or “I hate my family.” OK, that's an answer. What ever the response is. In any event, I need to be able to discern that the client knew she had a right to be there and she decided to forego it, for whatever reason. The record has to be clear on that from the judge's point of view.

A lot of times when we get a PVP report that goes into great length about what would be in the client's best interest, oftentimes there is little discussion of what the client wants, or the client's statements or the client's reactions. It seems like it's more of a narrative of I've looked at all the

facts and this is what I think should happen. Some of the PVP reports don't even state whether they've visited the client or talked to the client. Maybe they will state these are the people I talked to and list them, but then I don't really know what the upshot of the discussion was. But that may well be because you feel its privileged information. That's fine. Just let me know it's privileged. Just let me know I have had discussions and I don't think it is appropriate to disclose them to the court what I heard or what was told to me. That's fine. I guess what I'm asking for is a little more detail, especially around the subject of rights, advisement of rights.

The last thing I'm going to say on these tips is when you look at the local rules, it says that PVP counsel has two goals. One, is to represent the interests of their client. The second says to assist the court in the resolution of the matter. To the extent that you can discuss with your client, well, I understand that you don't want a conservatorship, and you want to have a hearing on that. What about if we did this? To the extent that you can pose alternatives to a full blown conservatorship to your client that might be acceptable to your client that would be a good thing to know.

For example, I know that when I was in mental health court, there were actually four ways to resolve an LPS conservatorship. The lawyers would come in and say, the client agrees, go ahead and appoint, judge. I've advised them of their rights, powers, and disabilities, they're fine with it, go ahead, let's do it. That's the first way.

The second way is the client just submits on the paperwork. It's kind of like a no contest plea, right? So, the client's just submitting. That's the second way.

The third way is the client is doing a limited submission, which means the client is willing not to contest any of the facts you have before you in the paperwork, but the client wants to talk. And tell you why you shouldn't do what the paperwork is telling you to do. That's almost like guilty with an explanation. It's like, "I understand you may go ahead and do this judge, but I really want to tell you why you shouldn't. That's good. So then the client will talk and the client is able to give their side of the story.

The fourth way is a full blown hearing, with live witnesses and the whole thing.

I mention those because sometimes there is another option, which is, my client is okay with the conservatorship but the client really wants to make sure that she retains the right to vote. So she's okay with it if you don't do x, y, and z, or if you do do x, y, and z. So that's kind of turning the conservatorship into an even better least restrictive alternative, which is the other thing that you should be looking at for the second prong of your duties about trying to resolve the cases – is there a less restrictive alternative.

Would a power of attorney work? Or would supporting the conservatorship between two acceptable people work? Would extending the temporary conservatorship for six months work to give the client an opportunity to try it out? See if the client likes it or not, and then come back in six months and say "Whoa, I don't want this," or "Yeah, this wasn't as bad as I thought it would be."

So you ought to be very creative in coming up with ideas, but to the extent that you can propose different alternatives to your client, and see if that satisfied the one thing that's bothering your client

about this, that would be of great assistance to the court. I think that that's what the second prong of the two duties of PVP counsel is really talking about.

You're the only ones that really get to talk to your client directly in a confidential manner. I can talk to them from the bench, but that's not necessarily very helpful because who knows if they're going to tell me what they want because everyone else in their family is standing around. You get to talk to them privately. To the extent that you can use your time to go over possible alternatives that would be acceptable to your client, I think would be great for your client, great for your relationship with your client, because your client is going to see that you are trying to accommodate your client's interests. It is also great with respect to helping to resolve the conservatorship in the best way possible.

As I said, these are kind of my personal things that I would like to see in a PVP report. I think that if you did this for all the judges that they would be thrilled to have more information. Because the more information we have the better the decisions are all around.

QUESTION: (A question was posed about lawyer-client confidentiality and what if an attorney questions whether the client can give an informed waiver that would allow the attorney to include confidential information in the PVP report.)

JUDGE STRATTON: To me, if you don't feel you've got a knowing waiver from your client, the default position is that you don't reveal the conversation. That's my position. You go in with the attorney-client relationship – with the privilege that attaches – the minute you become their attorney. It attaches as a default position.

So if you have a conversation with a 75 year old client who is very impaired because of Alzheimers or dementia or just old age, and you start out with an attorney-client conversation with them, and then in the middle of the conversation you realize that they have no idea what I am talking about. I think you are able to impart your observation to the court that I advised them of all their rights and powers and disabilities and they seemed to not get it. But at that point, I would not go any further because you don't have a waiver. Right?

I mean, if you think about it, if you had a client who wasn't impaired, you wouldn't be talking about the interview you had with them unless they gave you a waiver. So, their disability really doesn't act as a default waiver. I would just be concerned because there would be ethical implications of assuming a waiver just because the client had no understanding of why you were there.



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