# QUASI-JUDICIAL IMMUNITY IN CONSERVATORSHIPS: A GUIDE FOR COURT-APPOINTED COUNSEL FOR CONSERVATEES AND PROPOSED CONSERVATEES

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Probate Code sections 1470 and 1471 provide for the appointment of legal counsel for a conservatee or proposed conservatee in a conservatorship proceeding.[1] However, the Probate Code provides little guidance on counsel's *role* in the conservatorship proceeding. What guidance it does provide could easily create a conflict between the attorney's obligations under the Probate Code and the attorney's ethical obligations to his or her client, the person whose capacity is in question.[2] Unlike a guardian ad litem, who is tasked with advocating for his or her ward's best interests,[3] an attorney is generally a zealous advocate for his or her client—regardless of whether the client's position is what the attorney perceives to be in the client's best interests.[4] But what is the practitioner to do when asked by the court to provide an opinion as to the incapacitated or possibly incapacitated client's best interests? And what liability does the court-appointed attorney face if his or her opinion is contrary to the client's wishes?

In *McClintock v. West,*[5] the Fourth District Court of Appeal held that a guardian ad litem was immune from liability for professional negligence and breach of fiduciary duty under the doctrine of quasi-judicial immunity in a subsequent tort action initiated by her former ward. The court reasoned that quasi-judicial immunity was appropriate given that the guardian ad litem acted under the supervision of the trial court and in the best interests of her ward, fulfilling a role "intimately related to the judicial process."[6]

Although the Probate Code does not expressly state that independent counsel may be appointed to act in the "best interests" of the conservatee, counsel may be appointed to protect the "interests" of the conservatee or proposed conservatee.[7] In practice, some California courts expect court-appointed counsel to report to the court the attorney's view of his or her client's "best interests,"[8] as opposed to strictly following the client's wishes, even if contrary to the client's best interests. In such circumstances, should the attorney, like a guardian ad litem, be immune from subsequent tort liability under the theory of quasi-judicial immunity? In this article, the authors explore the ethical dilemmas independent counsel face when representing an incapacitated client and ask whether quasi-judicial immunity should protect court-appointed counsel from liability for actions the attorney takes in the client's "best interests."

## I. COURT-APPOINTED COUNSEL IN CONSERVATORSHIPS

### A. The Statutory Framework for Court-Appointed Counsel

In certain specified proceedings and "whether or not such person lacks capacity or appears to lack capacity," Probate Code section 1471 requires the court to appoint legal counsel for a "conservatee, proposed conservatee, or person alleged to lack legal capacity" where that person "is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter. . . ."[9] The proceedings covered under Probate Code section 1471 include proceedings (1) to establish, transfer or terminate a conservatorship, (2) for the appointment or removal of a conservator, (3) affecting the legal capacity of the conservatee, and (4) to change the place of residence for a temporary conservatee.[10] Even where the conservatee, proposed conservatee, or person alleged to lack legal capacity has not requested an attorney, the court must appoint an attorney in the aforementioned proceedings "if the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee."[11]

In addition to the mandatory appointment of counsel, the court has broad discretionary authority to appoint counsel for a conservatee or proposed conservatee in any conservatorship proceeding if the court determines the person is not otherwise represented and the appointment "would be helpful to the resolution of the matter or is necessary to protect the person's interests."[12]

The Probate Code is conspicuously silent as to whether court-appointed counsel owes his or her client a duty of zealous advocacy and it provides no guidance where the lawyer's duty of advocacy conflicts with what is in the potentially incapacitated person's best interests. The issue is further complicated by the unique nature of conservatorship proceedings, which are protective in nature but may result in substantial loss of the client's individual rights.[13] Court-appointed counsel is therefore placed in the difficult position of arguing against the establishment of a conservatorship, when in fact the client may need the conservatorship to protect

against suspected undue influence, elder abuse, or other harm resulting from the client's diminished capacity.

The attorney who is faced with the dilemma of following the incapacitated client's instructions or taking a conflicting position to protect the client's best interests has few tools to navigate what would appear to be an ethical minefield. Independent counsel may look for guidance in California case law, the Business and Professions Code, the Rules of Professional Conduct, or local rules of court, but these legal resources do not fully address the issues facing the attorney for a potentially incapacitated person.[14] Independent counsel also may turn to non-binding advisory ethics opinions issued by state and county bar associations for help.[15] Unfortunately, these sources vary widely when interpreting the role of independent counsel in the conservatorship proceeding and lead to conflicting results.

### B. California Case Law

Although its reach is limited, *Conservatorship of Drabick*[16] is one of the few California cases providing guidance to independent counsel for a conservatee. In *Drabick*, the conservator sought court authority to remove the feeding tube for the conservatee, who was comatose and in a persistent vegetative state from injuries sustained in a car accident.[17] The court appointed independent counsel for the conservatee under Probate Code section 1470, who determined that the conservatee would have refused life-sustaining treatment and, therefore, removing the feeding tube was in the conservatee's best interests.[18] On appeal, the conservatee's new counsel argued that the conservatee's former counsel had not adequately represented the conservatee's interests when counsel advocated for the removal of life sustaining treatment.[19] The Sixth District Court of Appeal disagreed and determined that independent counsel was not required to advocate for continued treatment if counsel did not believe it was in the conservatee's best interests. The court reasoned, "[w]hen the client is permanently unconscious. . . the attorney must be guided by his [or her] own understanding of the client's best interests. There is simply nothing else the attorney can do."[20]

However, and most importantly, the *Drabick* court expressly declined to extend its holding to circumstances where the conservatee could communicate with his or her counsel, noting that "[w]hen an incompetent conservatee is still able to communicate with his attorney it is unclear whether the attorney must advocate the client's stated preferences — however unreasonable —or independently determine and advocate the client's best interests."[21] Although *Drabick* provides some guidance to independent counsel, the role of court-appointed counsel is less clear in the vast majority of cases, where the client has diminished capacity but is still able to communicate his or her wishes.

### C. Court-Appointed Counsel's Ethical Requirements

California attorneys must comply with the Business and Professions Code and the Rules of Professional Conduct in their representation of clients.[22] Notably, California is the only state that has not adopted the ABA Model Rules of Professional Conduct,[23] which expressly authorize an attorney to take protective measures on behalf of a client with diminished capacity, including seeking appointment of a conservator, when the lawyer reasonably believes the client cannot adequately act in his or her own best interests.[24] Under California's current rules, an attorney may not reveal the client's confidences or assume a position adverse to the client without the client's informed consent.[25] There are no exceptions for an attorney representing an incapacitated client, which poses challenging ethical issues, particularly in the context of conservatorships.

#### *1. Duty of Confidentiality*

An attorney's duty of confidentiality is sacrosanct. In California, an attorney has a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[26] A client's "secrets" may include observations by the attorney during the course of the attorney-client relationship.[27]

The Rules of Professional Conduct provide that an attorney must not reveal his or her client's confidences or secrets "without the informed consent of the client[.]"[28] The one exception to this rule is when an attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm. In this limited circumstance, an attorney *may* make a limited disclosure.[29] Disclosure is not permitted to prevent financial harm to the client or to prevent physical harm that does not result from a criminal act.[30]

In the absence of the "informed consent of the client," there is no authority in either the Business and Professions Code or the Rules of Professional Conduct for independent counsel to disclose the secrets or confidences of a client whose incapacity is in question to anyone —not even the court. Given that independent counsel is appointed where a person allegedly lacks capacity, it is questionable whether there could

be a knowing waiver by the possibly incapacitated client prior to the establishment of the conservatorship.[31]

However, under Evidence Code section 953, after the conservatorship has been established, it is the conservator, not the conservatee client, who is the holder of the conservatee's attorney-client privilege.[32] Thus, although there is no authority for the attorney to reveal his or her client's secrets, the attorney *could* disclose confidential communications[33] to the court with a waiver by the incapacitated client's conservator, provided such disclosure does not breach the attorney's duty of loyalty. However, this creates an inherent conflict in disputes arising between the conservatee and the conservator. For example, a conservatee is entitled to representation in an action to remove his or her conservator.[34] In such a case, to disclose the conservatee's confidential communications with counsel regarding the removal proceedings would appear to be "a violation of the attorney's [ethical] duties and a violation of the right of the conservatee. . . to effective and meaningful representation and assistance from the attorney."[35] The Conference of California Bar Associations recently proposed a resolution to amend Evidence Code section 953 to clarify that "[i]n any case or controversy between a conservator and a conservatee, or a guardian and a ward, the conservatee or ward is the 'holder of the privilege.'"[36]

*2. Duty of Loyalty*

An attorney has a duty to represent the client with undivided loyalty and to represent the client zealously within the bounds of the law.[37] The duty of loyalty precludes an attorney from assuming any position adverse or antagonistic to the client without his or her informed consent.[38] The authority to make decisions affecting the merits of the case or substantially prejudicing the rights of a client is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.[39] Therefore, if the potentially incapacitated client instructs court-appointed counsel that he or she opposes the conservatorship, it seems that counsel is ethically bound to advocate the client's position at the hearing, even if it is contrary to what the attorney perceives as the client's best interests.[40]

If the attorney does not believe that he or she can ethically carry out the client's instructions,[41] the attorney's only option is withdrawal under Rules of Professional Conduct rule 3-700(C).[42] Where appointment of counsel for the conservatee is mandatory, the court who permits one attorney's withdrawal must appoint another in his or her place, leaving the next attorney to wrestle with the same ethical issues.

It is even murkier where counsel is appointed to represent a conservatee who lacks capacity. Can counsel for an incapacitated client advocate a position contrary to his or her client's expressed wishes where the attorney believes the client's position is unreasonable? How does independent counsel "protect the person's interests," as required by Probate Code sections 1470 and 1471, if the attorney cannot advocate a position contrary to that taken by the incapacitated client? Although designed to protect the attorney-client relationship, the rules governing the practice of lawyers in California may have the unintended effect of protecting the client's decisions and confidences to the detriment of the client's best interests.

**D. Non-Binding Ethics Opinions**

Independent counsel with questions regarding his or her role in the representation of a conservatee or potential conservatee may seek guidance from ethics opinions issued by the various California bar associations.[43] Unfortunately for the practitioner, the pertinent ethics opinions interpret the statutory framework differently, provide contradictory opinions on the role of the attorney for an incapacitated client, and are non-binding and merely advisory. Nonetheless, the opinions represent one additional tool for independent counsel faced with questions regarding his or her ethical obligations to the incapacitated client.

*1. Orange County*

In 1995, the Orange County Bar Association Professionalism and Ethics Committee addressed the issue of whether court-appointed counsel could express his or her opinion regarding the advisability of a conservatorship to the court where the attorney's opinion was contrary to the wishes of the client.[44] In Formal Opinion No. 95-002, the Orange County committee took the position that the purpose of counsel's appointment, and the client's expressed wishes, are critical factors in determining counsel's role at the conservatorship hearing.[45] Here, the proposed conservatee objected to the conservatorship and counsel was appointed under Probate Code section 1471(a) "to represent the interest" of the proposed conservatee. The Orange County committee concluded that court-appointed counsel must maintain the duty of loyalty and protect client confidences, despite the fact that the attorney believed the conservatorship was in the best interest of the client and the expense of a trial would exhaust the conservatee's limited estate.[46] The Orange County committee concluded that independent counsel is prohibited from providing any information to the court that could be contrary to the interests expressed by the proposed conservatee without the client's consent.[47] Further, if the court

insists that the independent counsel provide information to the court which would force counsel to violate his or her duty of loyalty or confidentiality to the proposed conservatee, the Orange County committee determined that counsel must withdraw from employment with permission from the court under Rules of Professional Conduct, rule 3-700.[48]

In contrast, if counsel is appointed under Probate Code section 1470(a) or 1471(b), and the conservatee has not contested the hearing nor requested counsel, the Orange County committee observed that there is no "opposing" viewpoint that needs to be represented.[49] In such circumstances, the attorney may inform the court as to counsel's own opinions regarding the best interests of the client.[50]

*2. San Francisco*

In 1999, the Ethics Committee of the Bar Association of San Francisco addressed the question of what action, if any, an attorney may take if the attorney believes that a client is so mentally impaired that the client is not capable of making rational choices regarding the subject of representation.[51] In Formal Opinion No. 1999-2, the San Francisco committee concluded that an attorney *may* make limited disclosures of confidential information where necessary to achieve the best interests of the client if the attorney reasonably believes the client is substantially unable to manage his or her own financial resources or resist fraud or undue influence.[52] Such action may include recommending appointment of a trustee, conservator, or guardian ad litem.[53]

The San Francisco committee observed that the statutory scheme in conservatorships is protective of conservatees and that "[t]he client's best interests are paramount, not the attorney's role."[54] Further, the committee observed that withdrawal leaves a vulnerable client more exposed, and opposing a conservatorship for a client who is substantially unable to manage his or her financial resources or resist undue influence puts the attorney in the role of acting contrary to the client's best interests.[55]

**E. Survey of Local Rules Impacting Independent Counsel Throughout California**

California courts have created their own local rules governing the role of independent counsel in an attempt to aid the practitioner on fulfilling his or her duties to the court and to the incapacitated client. Without a legislative mandate, the rules vary considerably from county to county, and the attorney's adherence to the rules could conflict with the attorney's ethical duties under the Business and Professions Code and the Rules of Professional Conduct. The local rules are valid and have the force and effect of law, provided that they are not inconsistent with higher authority, such as statutes, state rules of court, and case law.[56]

*1. San Francisco County and Marin County*

San Francisco and Marin Counties have similar rules governing independent counsel for the conservatee. Independent counsel in San Francisco County is "expected to inform the Court of the wishes, desires, concerns, and objections, of the (proposed) conservatee."[57] If asked by the court, the attorney "may give his or her opinion as to the best interests of the (proposed) conservatee and whether [the attorney believes] a conservatorship is necessary."[58] No written report is required or necessary unless requested by the court.[59] Similarly, Marin Local Rule 5.72 provides that court-appointed attorneys are expected to inform the court of the wishes, desires, and concerns of the proposed conservatee, "as well as provide the Court with an independent assessment of the situation."[60]

*2. Santa Barbara County*

Santa Barbara County formulated comprehensive local rules to guide court-appointed counsel in conservatorship proceedings. Under Local Rule 1714(g), the attorney's role and ethical obligations to the client depend on the client's ability to communicate and whether the client is opposed to the request before the court.[61] The attorney's responsibility differs depending on three scenarios.

If the client is non-communicative, "clearly delusional" or not opposed to the request before the court, the attorney must evaluate the request before the court and must report to the court his or her observations and recommendations as to what would be in the client's best interests, orally or in a written report.[62] Where a conflict arises between the attorney and the client concerning the best interests of the client, the court may appoint a successor attorney.[63]

If the client is communicative and alert, and is opposed to the request before the court, the attorney "must use all reasonable and appropriate means to obtain the result sought by the client"[64] if the attorney has a good faith belief that sufficient grounds exist to support the position taken by the client.[65]

If the client appears to have impaired judgment and is opposed to the request before the court, the attorney must report to the court the attorney's observations and recommendations as to what would be in the client's best interests, as well as the fact that the client is opposed to the request and the apparent

reasons for the opposition.[66] The attorney must ensure that the client is given the opportunity to directly address the court, if reasonably possible.[67]

Although Santa Barbara's local rule provides significant guidance to practitioners, it does not solve the ethical dilemmas the attorney faces with regard to the duties of loyalty and confidentiality. Moreover, it places counsel in the awkward position of determining whether his or her incapacitated client's judgment is "impaired," which arguably replaces the attorney as judge and jury in the conservatorship proceeding.

*3. Los Angeles County*

In Los Angeles County, under Local Rule 4.125, independent counsel's "primary duty is to represent the interests of his or her client in accordance with applicable laws and ethical standards."[68] Independent counsel's "secondary duty is to assist the court in the resolution of the matter to be decided."[69] Independent counsel "must, if practical, ensure that the client is afforded an opportunity to address the court directly."[70] Independent counsel must also file a written report with the court.[71] Among other things, the statement must contain "a brief explanation of the representation."[72]

Los Angeles County's rule makes it clear that independent counsel's primary duty is, first and foremost, to represent the client whose capacity is at issue in accordance with the attorney's ethical standards. Secondarily, the attorney should assist the court in the resolution of the matter. Thus, if the attorney cannot fulfill his or her ethical duties to the arguably incapacitated client while assisting the court in resolving the matter, the attorney must not take any action that would be contrary to the attorney's ethical standards.

### F. Reconciliation of Competing and Ambiguous Authorities

The legislative void regarding the role of independent counsel is evident upon review of the various ethics opinions and local rules regarding independent counsel's role in the conservatorship proceeding. There is little case law on the subject and the statutes are ambiguous as to counsel's role when counsel is appointed to protect the conservatee's interests or because such appointment would be helpful. However, the ambiguity seems to be resolved in favor of zealous advocacy when applying tools of statutory interpretation. First, the fundamental task of statutory construction is to ascertain legislative intent so as to effectuate the purpose of the law.[73] Under Probate Code section 1800, it is the intent of the legislature to "determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible"[74] and to "[p]rotect the rights of persons who are placed under conservatorship."[75] Second, if two potentially conflicting statutes are contained in different legislative acts, the courts will strive to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect.[76] Here, the Probate Code is harmonized with the Rules of Professional Conduct and the Business and Professions Code by interpreting independent counsel's role as an advocate.

Until California courts render an opinion on this issue, or until there is legislative reform to clarify the role of court-appointed counsel, the attorney must be guided by *Drabick* and the attorney's binding ethical requirements under the Business and Professions Code and the Rules of Professional Conduct. Such legal authorities mandate that court-appointed counsel represent the client in accordance with his or her ethical obligations, including the duties of loyalty and confidentiality. Additionally, the attorney must act as an advocate for the expressed wishes of the client. If the client is unable to communicate his or her wishes, counsel *may* be permitted to act in the client's best interests.

## II. SHOULD QUASI-JUDICIAL IMMUNITY BE EXTENDED TO COURT APPOINTED COUNSEL

Some California courts expect court-appointed counsel to report to the court the attorney's view of his or her client's "best interests."[77] If that is the court's expectation, court-appointed counsel, like the guardian ad litem, is acting under the supervision of the trial court and in the best interests of the conservatee. In this circumstance, court appointed counsel is not serving as an attorney, but rather as a de facto guardian ad litem for the incapacitated client. In such a case, should the attorney, like a guardian ad litem, be immune from subsequent tort liability under the theory of quasi-judicial immunity?

In *McClintock v West*, the Fourth District Court of Appeal extended the protection of quasi-judicial immunity to a guardian ad litem who acted under the supervision of the trial court and in the best interests of her ward. In doing so, the guardian ad litem fulfilled a role "intimately related to the judicial process."[78] California has not yet addressed whether the protection of quasi-judicial immunity should be extended to court-appointed counsel for a conservatee or proposed conservatee acting in the best interests of his or her client.

### A. Connecticut: *Gross v. Rell*

In 2012, the Supreme Court of Connecticut concluded court-appointed counsel was not entitled to quasi-judicial immunity related to the representation of a proposed conservatee in the establishment of a conservatorship.[79]

In *Gross v Rell*, an involuntary conservatorship proceeding was initiated against Gross, a resident of New York, while he was visiting his daughter in Connecticut.[80] Pursuant to Connecticut law, the court appointed independent counsel for Gross to represent him in the conservatorship action.[81] The attorney interviewed Gross who was "alert and intelligent."[82] Gross informed his counsel that he opposed the conservatorship and that he wanted to manage his own affairs.[83] Despite Gross's statements to his counsel and his opposition to the conservatorship, Gross's attorney concluded that he had no basis upon which to oppose the conservatorship.[84] The court granted the conservatorship and Gross was placed in a secured-perimeter facility, where Gross was assaulted by his roommate.[85] Gross then filed a petition for a writ of habeas corpus, and the conservatorship was ultimately found to have been void ab initio.[86] Thereafter, Gross filed a complaint against his independent counsel. The district court dismissed the action against Gross's attorney on the basis that the attorney was entitled to quasi-judicial immunity because, as court-appointed counsel, he was "serving the judicial process."[87] Gross appealed, and the Second District Court of Appeal submitted the question of whether independent counsel was protected by quasi-judicial immunity to the Connecticut Supreme Court for certification.[88]

Gross argued that his attorney was not entitled to quasi-judicial immunity because the primary function of court-appointed counsel was to advocate for their client's expressed wishes—not to determine the client's best interests.[89] Gross's court-appointed counsel, however, argued that attorneys for conservatees are entitled to quasi-judicial immunity "because their primary function is to assist the Probate Court to ascertain and to serve the best interests of their clients."[90] Similarly to Probate Code sections 1470 and 1471, Connecticut's statute is silent as to the role of independent counsel.[91]

The court concluded that the "primary function" of counsel appointed by the court to represent the proposed conservatee in the establishment of the conservatorship proceeding "is to advocate for the client's express wishes."[92] Otherwise, as the court noted, the attorney "usurps the function of the judge or jury by deciding her client's fate."[93] Moreover, if court-appointed counsel is not a pure advocate for the proposed conservatee, then "no one in the courtroom will be expressing respondent's strongly held view."[94] However, the court determined that the role of independent counsel is more nuanced after the conservatorship is established. If the conservatee has expressed a preference to his or her counsel for a specific course of action, and the conservator believes that course of action is unreasonable, independent counsel has two options under Connecticut law. If independent counsel believes the conservatee's preference is unreasonable, independent counsel should defer to the conservator's decision.[95] Otherwise, if the attorney believes the conservatee's preference is reasonable, independent counsel for the conservatee may advocate for his or her client's position.[96]

As the court noted in *Gross*, except in the rarest of cases, independent counsel in Connecticut is not ethically required, or even permitted, "to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests. . . ."[97] The purpose of independent counsel "is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests."[98] Their function generally is no different from that of a privately retained attorney, and "attorneys for respondents and conservatees are no more likely to act as litigation lightning rods than other privately retained attorneys in contested adversarial proceedings involving conflicting rights and interests."[99] As a result, Connecticut law does not provide court-appointed counsel in conservatorship proceedings with quasi-judicial immunity from claims arising from his or her representation.[100]

### B. California: *McClintock v. West* and *Drabick*

The test for quasi-judicial immunity in California, with regard to a guardian ad litem, is whether court-appointed counsel fulfills a function that is "intimately related to the judicial process."[101] In *McClintock v. West*, the court determined that "a court-appointed officer, who, under the appointment of and supervision of the trial court, must act in her ward's best interests" is entitled to quasi-judicial immunity because such a role "is indeed a function intimately related [to the judicial process] and indeed, one which the trial court found in this case was indispensable to bringing the case to a conclusion."[102] The courts will look at "the nature of the duty performed [to determine] whether it is a judicial act—not the name or classification of the officer who performs it. . . ."[103] The court also will analyze policy considerations in support of quasi-judicial immunity. First, the court considers whether immunity is necessary to promote uninhibited and independent decision-making.[104] Second, the court analyzes whether there are sufficient safeguards in place to ensure accountability of the protected person.[105]

Under the reasoning of *McClintock*, court-appointed counsel with a client like that in *Drabick* should be protected by quasi-judicial immunity when acting in the client's best interests. In such an instance, the attorney is acting under the supervision of the probate court and in the best interests of the conservatee, thus fulfilling the requirements for quasi-judicial immunity as expressed in *McClintock*. The policy considerations raised in *McClintock* also support immunity. First, liability may deter attorneys from accepting court appointment and the risk of liability could impact how the attorney carries out his or her role. Second, there are safeguards in place to ensure the accountability of court-appointed counsel. Immunity is limited to acts within the scope of the attorney's authority, the attorney is appointed by (and subject to the supervision of) the probate court, the probate court can remove the attorney if he or she is not performing responsibly, and the probate court's decisions are subject to review by writ or appeal. Additionally, the attorney is subject to stringent ethical obligations.

If the attorney has a communicative client and is ordered by the court to act in the client's best interests, then counsel *may* be entitled to quasi-judicial immunity. Although the court cannot relieve the attorney of his or her ethical duties, the court's order places the attorney in the role of de facto guardian ad litem. As explained in *McClintock*, a guardian ad litem is entitled to quasi-judicial immunity for acts within the scope of representation.

However, without an express order from the court instructing the attorney with a communicative client to act in his or her client's best interests, quasi-judicial immunity should not apply to an attorney representing a communicative client. In such a case, court-appointed counsel must act as an advocate for his or her client in accordance with the Rules of Professional Conduct and the Business and Professions Code. Moreover, the Rules of Court require court-appointed counsel for conservatees or proposed conservatees to be covered by professional liability insurance, evidencing legislative intent that counsel be subject to liability.[106]

In the limited circumstances in which quasi-judicial immunity should apply, the attorney would only be shielded against liability for acts "within the scope of representation."[107] The attorney would still be subject to liability for acts beyond the scope of representation (such as fraud or theft). But, most importantly, even with the protection of quasi-judicial immunity, the attorney could still be subject to State Bar disciplinary proceedings if, by acting in his or her client's best interests, the attorney breached ethical obligations to the client.[108]

## III. RECOMMENDATIONS FOR COURT-APPOINTED COUNSEL IN CONSERVATORSHIPS

### A. Pre-Appointment: Representation of Proposed Conservatee

There is a rebuttable presumption that all adults have capacity to make decisions and be responsible for their own actions.[109] If counsel is appointed to represent a proposed conservatee, and the proposed conservatee is capable of communicating, California's ethical rules mandate that the attorney advocate the client's position at the hearing, even if it is contrary to what the attorney perceives as the client's best interests.[110] The attorney may use his or her persuasive abilities to counsel the client to accept the conservatorship, citing the high cost of trial and the likelihood of success, if the attorney believes a conservatorship is warranted. However, ultimately the decision lies with the client, and the client's decision is binding on the attorney.

If the client cannot communicate, the attorney "must be guided by his [or her] own understanding of the client's best interests"[111] in light of the client's previously expressed wishes and values. In addition, regardless of whether or not the attorney believes a conservatorship is warranted, it is court-appointed counsel's role to ensure that, before the client's fundamental rights are taken away, the client's wishes are made known to the court, appropriate evidence is presented, and the client's freedom and dignity are protected to the fullest extent possible.

If court-appointed counsel is required to file a written report to the court, counsel must prepare the written report in accordance with his or her ethical duties to the client. Absent informed consent, the report must not reveal the client's confidences or secrets and must not take any position adverse to the client's expressed wishes.[112] The attorney's written report may simply provide that the client objects or accepts the conservatorship. The attorney is permitted to file written objections on behalf of the conservatee; however, the Probate Code does not require the conservatee to file any pleadings to perfect his or her opposition.[113] The proposed conservatee could simply appear at the hearing and oppose the petition.[114] If, at the hearing, the court asks the attorney for his or her opinion as to whether the conservatorship is in the client's best interests, the attorney could decline to opine on the client's best interests and respond that the attorney's role is to advocate the client's wishes.

Although the attorney may feel that it is his or her duty to protect the client's best interests, there are safeguards in

place to ensure that the client's interests are adequately protected at the hearing. For example, a court investigator may be appointed by the court to interview the proposed conservatee to determine, among other things, whether the proposed conservatee will attend the hearing, contest the establishment of a conservatorship, and oppose the proposed conservator.[115] The court investigator often will interview other persons involved, including family members, friends, neighbors and medical professionals, to form an independent assessment of whether a conservatorship is in the proposed conservatee's best interests. The investigator must then provide this information, including the court investigator's recommendations, to the court in a written report at least five days prior to the hearing.[116] In addition, the party petitioning for the conservatorship will presumably provide the court with all relevant facts and evidence showing why a conservatorship is necessary, including filing a capacity declaration prepared by a licensed medical professional.

If court-appointed counsel practices in a jurisdiction where the local rules of court conflict with the attorney's ethical duties, the attorney should act at his or her own risk. Rather than place court-appointed counsel in the uncomfortable position of reporting on the client's "best interests," which may require the attorney to breach his or her duties of loyalty and confidentiality, the court should place greater emphasis on the report of the court investigator, whose role is to provide a neutral and objective report to the court, and who is unquestionably protected by quasi-judicial immunity. If the court is unable to rely on the court investigator, due to budget constraints or any other reasons, the court may consider appointing an expert to report on the proposed conservatee's "best interests." Under Evidence Code section 730, the court may, on its own motion or on the motion of any party, appoint an expert to investigate, render a report, and testify as an expert on a "fact or matter as to which the expert evidence is or may be required."[117] Although a guardian ad litem can be a useful tool in litigation, and an important safeguard to protect an incapacitated person's best interests, it is not appropriate prior to the establishment of a conservatorship. A guardian ad litem is only appropriate where a party "lacks legal capacity to make decisions."[118] Prior to the establishment of the conservatorship, the proposed conservatee has the right to a trial on the very issue of legal capacity.[119]

If the attorney does not advocate the client's wishes, there may be no one at the hearing to advocate on the proposed conservatee's behalf. By advocating for the client's best interests, the attorney usurps the role of the judge or jury as the trier of fact. The court's role is to appoint a conservator if it is shown by *clear and convincing evidence* that the proposed conservatee "is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter" or is "substantially unable to manage his or her own financial resources or resist fraud or undue influence" or both.[120] In making that determination, the judge has many tools at his or her disposal without having to rely on independent counsel's assessment of a client's best interests; the judge will have absolute immunity regardless of whether or not the conservatorship is established.[121]

### B. Post-Appointment: Representation of Conservatee

If a conservatorship is established, the conservatee maintains the right to court-appointed counsel to protect his or her interests for the duration of the conservatorship.[122] The Probate Code makes no distinction in the role of court-appointed counsel before or after a conservatorship is established.[123]

The Connecticut Supreme Court takes the position that "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[124] There is no authority for that position in California. In fact, in *Michelle K. v. Superior Court*, the court determined that court-appointed counsel must independently determine and advocate for the conservatee's interests on the conservatee's behalf regardless of whether those interests coincide with the conservator's course of action.[125] The court reasoned that the need for independent counsel exists when a conservator or other representative proposes acts that would significantly affect a conservatee's fundamental rights. Although *Michelle K.* involved an LPS conservatorship,[126] the rationale applies equally to a probate conservatorship.

A conservator has a duty to act in the best interests of the conservatee. The conservator will be represented by his or her own counsel, who will advocate the conservator's position in court. The conservatee's interests will be represented by the conservator and by the conservatee's attorney. Additionally, if the court has concerns that the conservatee's interests are not being adequately protected, the court may, on its own motion, appoint a guardian ad litem for the conservatee to report to the court on the conservatee's best interests. For these reasons, the independent counsel's role would be superfluous if appointed solely to act in the conservatee's best interests and at the instruction of the conservator.

If court-appointed counsel is ordered by the court to act in the best interests of the conservatee or to report to the

court on the conservatee's "best interests," the attorney acts at his or her own risk. As discussed above, the attorney *may* be protected by quasi-judicial immunity in a subsequent civil action under the rule and reasoning of *McClintock*; however, quasi-judicial immunity will not protect the attorney in a State Bar disciplinary proceeding for breaches of the attorney's ethical obligations.[127]

### C. Legislative Reform

Legislative reform is needed to clarify the role of court-appointed counsel in conservatorships. In 2009, the Executive Committee of the Trusts and Estates Section of the State Bar proposed a new Rule of Court as a guideline for court-appointed counsel:

> **Rule 7.1102. Guidelines for Counsel Appointed by the Court under Probate Code Sections 1470 and 1471**
>
> Counsel's primary duty shall be to represent the interest of his or her client in accordance with the laws and ethical standards which apply to the representation of clients in general.[128]

The proposed rule would clarify that an attorney appointed under Probate Code sections 1470 and 1471 must serve as an advocate for his or her client, subject to the lawyer's duties of confidentiality and loyalty. Although the proposed rule was not adopted and is not currently pending, it serves as a useful guideline for future legislation.

Additionally, members of the State Bar have proposed legislation that would bring the Rules of Professional Responsibility in accord with the prevailing view as set forth in the ABA Model Rules. The legislative proposals include a limited confidentiality exception for mentally impaired clients under the Business and Professions Code[129] and the Rules of Professional Conduct.[130] Until there is legislative reform to clarify the role of court-appointed counsel, the attorney must be guided by *Drabick* and the attorney's binding ethical requirements under the Business and Professions Code and the Rules of Professional Conduct.

## IV. CONCLUSION

Court-appointed counsel has a duty to represent the interests of his or her client in accordance with applicable laws and ethical standards.[131] As discussed throughout this article, there are no exceptions under the Business and Professions Code or the Rules of Professional Conduct for an attorney representing an incapacitated or allegedly incapacitated client. Although quasi-judicial immunity may protect independent counsel who is ordered by the court to act in the conservatee's best interests, that immunity will not shield the lawyer from discipline.[132] The attorney is ethically bound to advocate for the client's rights, preferences and desires. Without such advocacy, the client will have no voice in the conservatorship proceeding.

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1 This article does not encompass conservatorships established under the Lanterman-Petris Short Act (Welf. & Inst. Code, section 5000), which involves different legal standards for court-appointed counsel.

2 See Prob. Code, sections 1470, 1471; *see* also Rules Prof. Conduct, rule 3-100; Bus. & Prof. Code, section 6068, subd. (e)(1).

3 *McClintock v. West* (2013) 219 Cal.App.4th 540, 551.

4 *People v. McKenzie* (1983) 34 Cal.3d 616, 631; San Diego County Bar Assn., ethics opn. 1978-1; see also ABA Model Code Prof. Responsibility, DR 7-101(a).

5 *McClintock v. West, supra,* 219 Cal.App.4th 540.

6 *Id.* at p. 551.

7 Prob. Code, sections 1470 and 1471.

8 See Super. Ct. S.F. County, Local Rules, rule 14.77, subd. Q(5); Super. Ct. Marin County, Local Rules, rule 5.72, subd. (4); Super. Ct. Santa Barbara County, Local Rules, rule 1714, subd. (g)(2).

9 Prob. Code, section 1471, subd. (a).

10 *Ibid.*

11 Prob. Code, section 1471, subd. (b).

12 Prob. Code, section 1470, subd. (a).

13 Prob. Code, section 1800.

14 See, e.g., *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185; Rules Prof. Conduct, rule 3-100; Bus. & Prof. Code, section 6068, subd. (e)(1); Super. Ct. S.F. County, Local Rules, rule 14.77, subd. Q(5); Super. Ct. Marin County, Local Rules, rule 5.72, subd. (4); Super. Ct. L.A. County, Local Rules, rule 4.125.

15 Rules Prof. Conduct, rule 1-100, subd. (A); see, e.g., State Bar, formal opn. 1989-112 (1989); Orange County Bar Assn., formal opn. No. 95-002 (1995); Bar Assn. of S.F., opn. No. 1999-2 (1999).

16 *Conservatorship of Drabick, supra,* 200 Cal.App.3d 185.

17 *Id.* at p. 191.

18 *Id.* at p. 212.

19 *Ibid.*

20 *Ibid.*

21 *Conservatorship of Drabick*, *supra*, 200 Cal.App.3d at p. 212. Despite *Drabick's* seemingly limited application, one California court has applied the principles of *Drabick* to a conscious but non-verbal conservatee with an IQ of 23 who could not communicate her

wishes to independent counsel. See *Michelle K. v. Superior Court* (2013) 221 Cal.App.4th 409.

22 Rules Prof. Conduct, rule 1-100, subd. (A); Bus. & Prof. Code, sections 6076 and 6077.

23 The ABA Model Rules may only be considered by California courts if there is no direct authority in California and there is no conflict with state public policy. *San Gabriel Basin Water Quality Authority v. Aerojet-General Corporation* (C.D. Cal. 2000) 105 F.Supp. 2d 1095, 1105; see also Rules Prof. Conduct, rule 1-100, subd. (A); State Bar, formal opn. No 1983-71.

24 ABA Model Rules Prof. Conduct, rule 1.14.

25 See Bus. & Prof. Code, section 6068, subd. (e)(1); Rules Prof. Conduct, rule 3-100.

26 Bus. & Prof. Code, section 6068, subd. (e)(1).

27 State Bar, formal opn. No. 1989-112 (1989).

28 Rules Prof. Conduct, rule 3-100, subd. (A).

29 Rules Prof. Conduct, rule 3-100, subd. (B); see also Evid. Code, sections 952 and 954.

30 Rules Prof. Conduct, rule 3-100, subd. (B).

31 See L.A. County Bar Assn., formal opn. No. 471 (1992) p. 6. The concept of informed consent assumes that a client is in a position to understand and assess the significance of the facts presented and the adverse consequences. When the client lacks the capacity to do so, informed consent is not possible.

32 Evid. Code, section 953, subd. (b).

33 Evid. Code, section 952.

34 Prob. Code, section 1471, subd. (a)(3).

35 Conference of California Bar Associations, Resolution 0610-2016, Statement of Reasons, *available at <http://calconference.org/html/wp-content/uploads/2015/04/Series-6-Probate.pdf>* (retrieved July 22, 2016).

36 Conference of California Bar Associations, Resolution 0610-2016, Text of Resolution, *available at <http://calconference.org/html/wp-content/uploads/2015/04/Series-6-Probate.pdf>* (retrieved July 22, 2016).

37 See note 4, *ante*.

38 *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1298-1300.

39 *Linsk v. Linsk* (1969) 70 Cal.2d 272, 278.

40 See note 4, *ante*.

41 An attorney may not present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law. Cal. Rules of Court, rule 3-200, subd. (B); see Bus. & Prof. Code, section 6068, subd. (c). There is an exception for "the defense of a person charged with a public offense." (Bus. & Prof. Code, section 6068, subd. (c).) The policy rationale would seem to apply equally to court-appointed counsel in conservatorships, which involve the representation of clients who risk the substantial loss of individual rights.

42 Rules Prof. Conduct, rule 3-700, subd. (C).

43 Rules Prof. Conduct, rule 1-100, subd. (A).

44 Orange County Bar Assn., formal opn. No. 95-002 (1995).

45 *Ibid*.

46 *Ibid*.

47 *Ibid*.

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

51 Bar Assn. of S.F., opn. No. 1999-2 (1999).

52 *Ibid*.

53 *Ibid*.

54 *Ibid*.

55 *Ibid*.

56 Gov. Code, section 68070; *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1084-1085.

57 Super. Ct. S.F. County, Local Rules, rule 14.77, subd. Q(5).

58 *Ibid*.

59 *Ibid*.

60 Super. Ct. Marin County, Local Rules, rule 5.72, subd. (4).

61 Super. Ct. Santa Barbara County, Local Rules, rule 1714, subd. (g)(2).

62 Super. Ct. Santa Barbara County, Local Rules, rule 1714, subd. (g)(2)(a).

63 *Ibid*.

64 Super. Ct. Santa Barbara County, Local Rules, rule 1714, subd. (g)(2)(b).

65 *Ibid*.

66 Super. Ct. Santa Barbara County, Local Rules, rule 1714, subd. (g)(2)(c).

67 *Ibid*.

68 Super. Ct. L.A. County, Local Rules, rule 4.125.

69 *Ibid*.

70 *Ibid*.

71 Super. Ct. L.A. County, Local Rules, rule 4.127, subd. (a).

72 *Ibid*.

73 Code Civ. Proc., section 1859; *People v. Cruz* (1996) 13 Cal.4th 764, 774-775.

74 Prob. Code, section 1800, subd. (b).

75 Prob. Code, section 1800, subd. (a).

76 *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986.

77 See, e.g., Super. Ct. S.F. County, Local Rules, rule 14.77, subd. Q(5); Super. Ct. Marin County, Local Rules, rule 5.72, subd. (4); Super. Ct. Santa Barbara County, Local Rules, rule 1714, subd. (g)(2).

78 *McClintock v. West, supra,* 219 Cal.App.4th at p. 551.

79 *Gross v. Rell* (2012) 304 Conn. 234.

80 *Gross v. Rell*, *supra,* 304 Conn. at pp. 235-236.

81 *Id*. at p. 240.

82 *Ibid*.

83 *Ibid*.

84 *Ibid*.

85 *Id*. at p. 241.

86 *Id*. at pp. 242-243.

87 *Id*. at pp. 243-244.

88 *Id*. at p. 244.

89 *Gross v. Rell, supra,* 304 Conn. at p. 259.

90 *Ibid*.

91 Conn. Gen. Stat., section 45a-649, subd. (d).

92 *Gross v. Rell, supra,* 304 Conn. at p. 263.

93 *Id*. at p. 260, citing Tremblay, *"On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client"* (1987) 1987 Utah L.Rev. 515, 548-549.

94 *Gross v. Rell, supra,* 304 Conn. at p. 261, citing Office of the Probate Ct. Admin., "*Performance Standards Governing Representation of Clients in Conservatorship Proceeding*" (1998) p. 1.

95 *Gross v. Rell, supra,* 304 Conn. at p. 263.

96 *Id*. at pp. 263-264.

97 *Id*. at p. 264.

98 *Id*. at p. 265.

99 *Ibid*.

100 *Id*. at p. 266.

101 *McClintock v. West, supra,* 219 Cal.App.4th at p. 551.

102 *Ibid*.

103 *Person v. Reed* (1935) 6 Cal.App.2d 277, 286-287.

104 *McClintock v. West, supra,* 219 Cal.App.4th at pp. 550-552.

105 *Id*. at pp. 551-552.

106 Cal. Rules of Ct., rule 7.1101, subd. (b)(3).

107 *McClintock v. West, supra,* 219 Cal.App.4th at p. 552.

108 See *Budwin v. American Psychological Assn.* (1994) 24 Cal.App.4th 875, 884-885. Quasi-judicial immunity did not preclude a private, voluntary, professional association from disciplining its psychologist member for making false representations in a judicial proceeding.

109 Prob. Code, section 810, subd. (a).

110 For an additional perspective on this issue, *see* Chicotel, *California Conservatorship Defense: A Guide for Advocates* (CANHR 2010).

111 *Conservatorship of Drabick, supra,* 200 Cal.App.3d at p. 212.

112 Rules Prof. Conduct, rule 3-100; Bus. & Prof. Code, section 6068, subd. (e)(1).

113 Prob. Code, section 1829.

114 *Ibid*.

115 Prob. Code, section 1826.

116 *Ibid*.

117 Evid. Code, section 730.

118 Code Civ. Proc., section 372, subd. (a)(1).

119 Prob. Code, section 1827.

120 Prob. Code, section 1801.

121 *Stump v. Sparkman* (1978) 435 U.S. 349, 355-356.

122 Prob. Code, sections 1470 and 1471.

123 *Ibid*.

124 *Gross v. Rell, supra,* 304 Conn. at p. 263.

125 *Michelle K. v. Superior Court, supra,* 221 Cal.App.4th at p. 449.

126 *Id*. at p. 421.

127 See note 107, *ante*.

128 Executive Committee of the Trusts and Estates Section, Appointment of Counsel for a Proposed Conservatee Who May Lack the Capacity to Hire Counsel (Legislative Proposal (T&E 2010-06)), July 31, 2009.

129 In 2005, the Executive Committee of the Trusts and Estates Section of the State Bar of California submitted a proposal to the State Bar Office of Governmental Affairs. The section proposed adding section 6068.5 to the Business and Professions Code, as follows:

a. 6068.5. Notwithstanding subdivision (e) of Section 6068:

b. If a client's capacity to make adequately considered decisions in connection with a representation is significantly impaired, the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

c. If the attorney reasonably believes that the client has significantly impaired capacity and as a result thereof 1) is at risk of substantial physical, financial, or other harm unless action is taken, and 2) cannot adequately act in the client's own interest, the attorney may, but is not required to, notify those individuals or entities that have the ability to take action to protect the client.

d. If an attorney takes action pursuant to paragraph (b), above, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

e. Nothing in this section permits an attorney to file, or represent a person filing, a conservatorship petition or similar action concerning the attorney's client, where the attorney would not otherwise be permitted to do so, nor to take a position adverse to the client beyond the notification permitted in paragraph (b) above.

f. "Significantly impaired capacity" as used in this section shall mean that the client suffers from an impairment that would be sufficient to support a determination of incapacity under Probate Code Sections 811(a) and (b).

g. An attorney shall not be held liable for taking or forbearing to take the action authorized by this section.

Unfortunately, the proposal was not adopted and is not currently pending.

130 See proposed rule 1.14 adopted on January 22-23, 2016 by State Bar Com. for the Rev. of the Rules of Prof. Conduct. Under the proposed rule 1.14, a lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client or seek appointment of a guardian ad litem, when the attorney reasonably believes there is a significant risk the client will suffer substantial physical, psychological or financial harm unless protective action is taken, the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and the client cannot adequately act in his or her own interest. However, the rule does not apply if the lawyer represents a person who is the subject of a conservatorship proceeding. The proposed rule has not yet been approved by the State Bar Board of Trustees or submitted for public comment.

131 Super. Ct. L.A. County, Local Rules, rule 4.125.

132 See note 107, *ante*.



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