AMERICAN BANKRUPTCY INSTITUTE

2021 Consumer Practice Extravaganza

Ethics: Hold or Fold Them?

Anerio V. Altman
Lake Forest Bankruptcy; Laguna Hills, Calif.

Hon. Laurel M. Isicoff
U.S. Bankruptcy Court (S.D. Fla.); Miami

Kelly K. Roberts
Roberts Law, PLLC; Sarasota, Fla.

Hon. Deborah L. Thorne
U.S. Bankruptcy Court (N.D. Ill.); Chicago

2021

”HOLD ‘EM OR FOLD ‘EM!”

Avoiding and terminating attorney-client relationships
in a consumer bankruptcy matter

Scenario 1: *The Emergency Filing*

- ***Scenario 1: The Emergency Filing***
- **You receive a call on Sunday afternoon from a PNC. For the purpose of his hypothetical, you take the call, and speak to the individual. No one else is available to assist this client in your legal community.**
- **PNC is an individual over 65 years of age who owns real property. The real property has significant equity, but as best as you can tell, it has no more equity than they could exempt under your state's applicable homestead exemption.**
- **There is a foreclosure sale Monday morning at 9:00 AM. If this case is not filed, the PNC will lose their home. You only have time to file a “Skeletal Petition”.**
- **While the individual is in your office wailing about the slings and arrows of the inequity of the world as you prepare the petition, something concerns you about the potential filing, although you can't identify what the issue is. You don’t want to file the case, but you can’t figure out why.**
- **Can you refuse to file the case?**

The Formation of the Attorney-Client Relationship Are you their attorney?

- California Law: California courts have held that an attorney-client relationship can only be **created by contract**. Koo v. Rubio's Restaurants, Inc. (2003) 109 Cal.App.4th 719. However, the formation of an attorney-client relationship does not require an express contract; such a relationship can be formed implicitly, as evidenced by the intent and conduct of the parties.
- Lister v. State Bar (1990) 51 C3d 1117 ("No formal contract or arrangement or attorney fee is necessary to create the relationship of attorney and client." Hecht v. Superior Court (Ferguson) (1987) 192 Cal.App3d 560 ("It is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship.").
- Restatement, Third, The Law Governing Lawyers, §14(1) ("A relationship of client and lawyer arises when […] a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services").

First Out-Fully Executed Contract

- You are a Debt Relief Agency 11 USC Sec. 528
- **(a)**A debt relief agency shall—**(1)**not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—
  - **(A)**the services such agency will provide to such assisted person; and
  - **(B)**the fees or charges for such services, and the terms of payment;
- **(2)**provide the assisted person with a copy of the fully executed and completed contract;

Second Out-There is no such thing as a ”Skeletal Filing”

- Either you can file a complete petition, or you don’t file. There is no such thing as a ”Skeletal Filing”.
- **FRBP 9011(b) is your watchword**
  - **(b)Representations to the court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—**(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
  - **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
  - **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
  - **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
  - **In re Kearns, 616 B.R. 458 Footnote 11**

Scenario 2-Last Minute Breach

- **You have been preparing to file an individual Chapter 11 on behalf of a well heeled, or formally well heeled, client. You have been able to perform all due diligence that you would have liked to have performed, and there is every indication that this case will, at least initially, proceed as planned.**
- **As part of your representation, the client was to deposit a retainer prior to filing of $5000 plus the filing fee for a total of $6,717.**
- **In the week prior to filing, the client rescheduled the final pre-filing appointment. All the reasons proffered by the client were sensible so the rescheduling did not alarm you. Ultimately, the signing appointment was moved to Sunday afternoon by mutual agreement, the day before a foreclosure sale on the debtor's primary residence, in which they had significant non exempt equity.**
- **On Sunday afternoon, client comes in, reviews all the paperwork, and participates in this process. When the time comes to give you the retainer check, the client states he can only give you half, and gives you a cashier's check for half, from which the filing fees still needs to be paid. Client has unquestionably breached your written and executed agreement the day before the foreclosure sale on their primary residence.**
- **Can you refuse to file the case?**

ABA Model Rule 1.16

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (1) the representation will result in violation of the rules of professional conduct or other law;
  - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
  - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
  - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - (7) other good cause for withdrawal exists.

ABA Model Rule 1.16 (Cont.)

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Scenario 3-Bouncing Checks

- **You file the case as a Chapter 7 matter. Prior to filing the case as a Chapter 7 matter the debtor provided you a check for the fees. You file the case first and then file.**
- **You happily walk over to the bank and deposit the check.**
- **Almost immediately after the case is filed, you received notification that the debtor's check bounced.**

Questions

- **Can you, as appropriate for your state, request post-petition that the debtor make payment on this bounced check?**
  - **Gordon v. Hines (In re Hines), 147 F.3d 1185 (1998 9th Circuit) Post-dated checks**
  - **In re Davis, 2014 Bankr. LEXIS 2985 (2014 11th Circuit) More on Post-dated checks**
  - **11 U.S.C. Sec. 362(b)(11)-Negotiable Instrument exception**
- **Can you move to withdraw as counsel due to the debtor's breach?**
- ***Must* you withdraw as counsel due to the debtor's breach?**

Scenario 4-*Beyond the Scope*

- **You file the case as a Chapter 7 matter. You are paid on a flat fee with a Limited Scope of Representation filed with the court. Pre-341a When preparing for the 341 a hearing, you determine that the debtor, whether negligently or recklessly, was incorrect as to a material fact underpinning their case. For the purpose of this scenario, presume that there is no way to prove whether or not the debtor intentionally misled you.**
- **As a result of the omission of this information, the amount of time that you will need to spend has greatly increased. The debtor has no ability to pay you for this increase in time.**
- **If you get wrapped up in this extra time, you will be unable to work on your other cases. In essence this case may destroy your firm.**
- **Can you withdraw from representation?**

Limited Scope of Representation

- **Tedocco v. DeLuca(In re Seare), 515 B.R. 599 (2014 9th Circuit) ("Specificity in Drafting")**
- **In re Prophet, 628 B.R. 788 (2021 4th Circuit) ("Ride or Die")**
- **In re Edsall, 89 B.R. 772 (1998 7th Circuit) ("Financial Burden on Counsel")**
- **Mekhsavanh v. Senouthai (In re Senouthai), 2016 Bankr. LEXIS 2513 (3rd Circuit) ("Recalcitrant and uncooperative clients")**
- **Burrage v. Homecomings Fin. Network, Inc. (In re Burrage), 2010 Bankr. LEXIS 2745 (6th Circuit) ("Complete breakdown")**

Scenario 5: *Trustee's Little Buddy*

- **Your file the case as a Chapter 7 matter. You're paid on a flat fee. Although you performed due diligence and acquired the documents necessary in order for you to work with a Chapter 7 trustee, through luck of the draw, the trustee assigned to your case is the one that asks for A LOT of documentation. Nevertheless, you acquire all of the documentation prior to the 341 a hearing for the trustee's request.**
- **At the 341 a hearing, the debtor reveals other issues which greatly increase the amount of work that you're going to need to do on this case because you will need to acquire excessive documentation.**
- **The declaration re limited scope of appearance on file with the court states that you are only required to appear at 1 341A hearing. By all accounts you appeared and performed as required.**
- **Both the debtor and the trustee expect you to appear and produce documents at continued 341 hearings that you know will be held over the next year.**
- **Questions:**
  - **Is the declaration re limited scopes sufficient for you to decline to participate in the case any further?**
  - **Separate from the Debtor, do you have a duty to assist the Trustee in the acquisition of these documents after the first 341 a hearing whether or not the declaration re limited scope states that you were only appearing at one 341a hearing?**
  - **Do you need to file a motion to withdraw if both the debtor and the trustee expect you to continue to participate past the first 341 a hearing?**

Scenario 6: *Competency*

- **You file a Chapter 7 case on a flat fee. The Debtor is a little weird, but seems competent.**
- **For various reasons not relevant to this scenario, the trustee initiates litigation against the debtor for turnover of their home for liquidation.**
- **During this litigation you learn that the debtor suffered a traumatic brain injury three years ago. As a result of that injury, the Debtor isn't just a little weird, the Debtor may not be mentally competent. The problem apparently arises with the debtor's decision making powers rather than their ability to perceive and communicate.**
- **The debtor is 61 years old, has significant respiratory and other health issues, has no savings, and no ability to earn income because as part of their delusions, they believe they already have some sort of job.**
- **The Debtor is *EXTREMELY* verbally abusive, so much so that you can't have anyone else at your office speak to her without creating a hostile work environment.**
- **Trustee is seeking to sell their home and evict them prior to sale which will reduce them to homelessness, and because of their health issues, may actually kill them if they have to live in their car.**

Questions

- **Do you need to petition the BK court, or another court, to appoint a conservator or Guardian?**
  - **ABA Model Rule 1.14**
    - (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
    - (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
    - (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
  - LOOK AT YOUR STATE!

Questions

- **Can you even let a court know that the debtor is having these problems if the knowledge you acquired from the debtor would be construed as a client secret or confidence?**
  - **ABA Model Rule 1.6 and 1.14**
- **When can you withdraw from representation if you feel you must withdraw from representation?**
  - **ABA Opinion 96-404**

Questions

Attorney Conduct: The Impaired Client

This article was edited and reviewed by FindLaw Attorney Writers (https://www.findlaw.com/company/our-team.html) | Last updated March 26, 2008

Although California disagrees with the ABA rule, there is authority that would permit an attorney to seek guardianship

ABA Model Rule 1.14 (b) permits an attorney to seek a guardianship of the attorney's own client if the attorney reasonably believes that the client cannot protect his or her own interests. California has no such rule. Current California ethics opinions disagree with the ABA Model Rule, making it risky for a California attorney to take any concrete steps on behalf of the impaired client. However, there is authority that would permit a California attorney to do so. From a policy viewpoint, we should support the ABA approach here in this state.

Sullivan v. Dunne (1926) 198 Cal 183, holds that the client must have capacity to contract in order to give the attorney authority to represent the client in a civil proceeding. In dicta, it states that if the client had contract capacity when hiring the attorney, then lost it, the contract would necessarily end, as the authority of an agent ends when the principal becomes incompetent. Sullivan was cited with approval in Caldwell v. State Bar (1975) 13 Cal. 3rd 488, criticizing an attorney who spent client funds under a power of attorney after the client was adjudicated incompetent.

Meanwhile, there was Conservatorship of Chilton (1970) 8 Cal. App. 3rd 34, where the attorney was introduced to the client by the client's boyfriend, and proceeded to act for the client. The appellate court upheld the trial court's finding that the boyfriend was a designing person seeking to take advantage of the client and denied the attorney's petition for fees. One of the facts used against the attorney was his

opposition to the conservatorship, when the existence of the conservatorship was clearly needed to protect the client. Another finding was that he advocated positions taken by a clearly incompetent client. Another was that the client lacked the capacity to enter into an attorney-client relationship.

Notwithstanding these decisions, various ethics opinions of California state and local bars have uniformly opposed any action by an attorney to cooperate in conservatorship proceedings against the attorney's own client. San Diego Opinion 1978-1 concluded that an attorney could not seek a conservatorship for his own client because the attorney would necessarily reveal client secrets. The opinion did not cite Sullivan, Caldwell or Chilton.

The ABA Model Rules of Professional Responsibility were promulgated in 1983. Model Rule 1.14 (b) permits an attorney to seek a guardianship of the attorney's own client if the attorney reasonably believes that the client cannot protect his or her own interests. COPRAC, when commenting in 1986 on proposed changes to the California Rules of Professional Conduct, recommended against a California rule similar to ABA Model Rule 1.14, on the basis that such a move is adverse to the client and also constitutes the revelation of client confidences in violation of Bus & Prof 6068(e). There was no mention of Sullivan, Caldwell or Chilton. All California ethics opinions since this time have followed COPRAC--Los Angeles opinion #450 (1988); COPRAC 1989-112; San Diego opinion 1990-3; Orange County Bar Association Committee on Professionalism and Ethics, Opinion 95-002. Again, none of these opinions mentioned Sullivan, Caldwell, or Chilton.

In 1997, the Estate Planning, Trust and Probate Law Section of the State Bar of California published its guide to assist practitioners in dealing with ethics issues. The guide criticizes the California ethics opinions and calls on the courts to adopt the ABA rules and guidelines. The attorneys who deal with the problem on a daily basis realize that something has to be done, but the various ethics opinions make them pause. I became interested in this issue after receiving calls from several of my clients who did not know what to do when it became obvious their own client was impaired.

At the time this article was written, the American Law Institute was circulating what it expected to be its final draft of the restatement, "The Law Governing Lawyers" (1998). In the section under "The Client-Lawyer Relationship," the draft restatement states that "adjustments" are required to the attorney-client relationship when the client is impaired, and that the lawyer must exercise informed judgment in choosing among "imperfect alternatives." Those alternatives include discussions of the issue with the client's medical providers or relatives, bringing the issue to the attention of the court, and the discretion to seek a guardianship.

The current California ethics opinions leave the attorney with no way to protect the client. After concluding that an attorney would have a conflict of interest, reveal client secrets, or both, about all they can recommend is that the attorney withdraw from representation. That course of action simply leaves a vulnerable client more exposed than before. This stance unfortunately puts the attorney in the role of acting contrary to the client's best interests.

ABA Model Rule 1.14 recognizes that there is a problem and that the problem should be addressed. There are a variety of options that an attorney can consider that help the client while avoiding violation of the rules. The client's interest requires that something be done. The attorney may be the only one who both sees the problems and has the power to do something.

The problem is real. There are incapacitated clients. The ABA overtly grants the attorney discretion to act, and existing California ethics opinions state that to act is wrong. ACTEC and the guide believe that an attorney should be able to act. So does the draft restatement. I agree.

Fortunately, there are at least three California cases on the subject that can be cited in support of attorney action. And the contrary ethics opinions can be distinguished away for the failure to consider those still valid court decisions, as well as for not offering any solution to the problem.

The past California ethics opinions uphold form over substance. The opinions suffer from the implied assumption that there is an all or nothing approach--either you bring the conservatorship action yourself, you represent somebody else doing it or you do nothing. There are other choices. Sometimes it means using a relative, therapist or other intermediary to facilitate communication between attorney and client. As the draft restatement points out, the attorney should act only on reasonable belief, based on appropriate investigation. As discussed in the ABA/BNA Manual on Professional Conduct, the protective action will depend upon the attorney's perception of the client's condition and the client's interests. The attorney may be the only person with the knowledge and power to forestall conduct adverse to the client.

An attorney's course of conduct can be colored by the attorney's personal beliefs and values. Thus, the actions should be limited and least intrusive. Disclosures of client secrets may be limited. They may be made in camera. It may be appropriate for the attorney to suggest the commencement of such proceedings without representing the proposed conservator, or without becoming the conservator. Courts will have to be vigilant, as in Chilton, so that the attorney is not used to take advantage of the impaired person. Courts will have to be

careful that any restrictions imposed on conservatees are narrow in order to deal with the specific problem, and not be in a hurry to limit a person's life choices any more than strictly necessary. Attorneys will have to separate their personal philosophical choices from the decisions necessary for the client.

There is also the practical risk recognized in Estate of Moore (1968) 258 Cal. App. 2nd 458, that the client will then seek to terminate the person seeking to establish the conservatorship. If the price of recommending a conservatorship is getting fired, so be it. Hopefully the conservator will be able to protect the client.

As a general rule, an attorney recommends actions to clients and the clients decide what course to take. An impaired client presents challenges that are not easily resolved under customary rules, because the rules assume a rational, sober client. An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence should be able to take protective action with respect to the client's person and property.

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 96-404 **August 2, 1996**
Client Under a Disability

A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of the client, including petitioning for the appointment of a guardian. Withdrawal is appropriate only if it can be accomplished without prejudice to the client. The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available. With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to handle the legal matters of the guardianship estate. However, a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.

The Committee has been asked to address ethical issues that arise when a lawyer believes that his client is no longer mentally capable of handling his legal affairs. May the lawyer consult with family members or others? May the lawyer petition the court to appoint a guardian for the client? Is he obligated to do so? May the lawyer represent a third party petitioning for the guardianship? May the lawyer support the appointment of a guardian who the lawyer expects will retain him in connection with handling the client's affairs? If so, must the lawyer disclose to the court the fact that the person appointed will likely retain the lawyer to handle all legal matters concerning the client's estate?

The Effect of Incompetency on the Client-Lawyer Relationship

Representation of a client who becomes incompetent to handle his own

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

affairs presents special challenges for the lawyer. This is recognized in the Model Rules of Professional Conduct (1983, as amended) in Rule 1.14(a)'s directive that the lawyer in that situation maintain insofar as possible a "normal" relationship with an incompetent client:

> Rule 1.14 Client Under a Disability
>
> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

A normal client-lawyer relationship presumes that there can be effective communication between client and lawyer[1], and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives.[2] When the client's ability to communicate, to comprehend and assess information, and to make reasoned decisions is partially or completely diminished, maintaining the ordinary relationship in all respects may be difficult or impossible.

Rule 1.14 recognizes that there may be situations in which a normal client-lawyer relationship is impaired, or, perhaps, impossible because of client disability. Rule 1.14(a) requires a lawyer, "as far as reasonably possible", to "maintain a normal lawyer client relationship" with a client whose "ability to make adequately considered decisions in connection with the representation is impaired." This obligation implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions.[3]

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1. Rule 1.4(a): "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

2. Rule 1.2(a): "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued . . . ."

3. Comment 1 to Rule 1.14 reminds us that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence." To the same effect was EC 7-12 of the predecessor Model Code of Professional Responsibility: "If a client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid."

If the client is, in fact, incompetent, simply staying in touch with the client may not be sufficient to empower the lawyer to act in behalf of the client or to protect the client's interests. Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent,[4] and the client's disability may prevent the lawyer from fulfilling the lawyer's obligations to the client unless a guardian is appointed or some other protective action is taken to aid the lawyer in the effective representation of the client. For example, Comment 3 to Rule 1.14 notes the situation where the disabled client has property that should be sold for the client's benefit, but completion of the transaction requires the appointment of a legal representative who can act on the client's behalf. Many other situations can be envisioned where the client's immediate legal needs cannot be accomplished without the intervention of a legal representative, or where the client's personal needs cannot be met without the aid of some protective action.

Anticipating this kind of dilemma, Rule 1.14(b) permits the client-lawyer relationship to continue even in the face of the client's incapacity, authorizing the lawyer to initiate protective action appropriate to the circumstances, including seeking the appointment of a legal representative having some degree of power over the client's affairs:

> A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The scope of authority granted a lawyer under Rule 1.14(b) appears on the face of the rule to be quite broad. For example, the language of Rule 1.14(b) appears to permit a lawyer to take protective action whether or not immediately necessary to the lawyer's effective representation of the client, if, in the matter at hand, the client cannot adequately act in the client's own interest. Thus, a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies.

On the other hand, there are limits as to when a lawyer may take protective action under Rule 1.14(b), and as to what action may be taken.

4. In re Houts, 7 Wash. App. 476, 499 P.2d 1276 (1972) (client's incapacity subsequent to retaining lawyer terminates lawyer's authority to act); Restatement (Second) of Agency § 122 (1958) (incompetent principal has no authority to empower his agent). Some courts have stated that the client's incapacity terminates the client-lawyer relationship. *See, e.g.,* Donnelly v. Parker, 486 F.2d 402, 407 note 20 (D.C. Cir. 1973).

Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client "cannot adequately act in the client's *own* interest."[5] (Emphasis added) A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment. Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions. Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal" relationship.

Equally important, Rule 1.14(b) cannot be construed to grant broad license for even the most well-intentioned lawyer to take control over every aspect of a disabled client's life, or to arrange to have such control vested in someone other than the client. Rather, the authority granted under Rule 1.14(b) to seek protective action should be exercised with caution in a limited manner consistent with the nature of the particular lawyer/client relationship and the client's needs, as discussed more fully below.

Assessing the Client's Capacity and Seeking Guidance from Others

If a lawyer is unable to assess his client's ability to act or if the lawyer has doubts about the client's ability, Comment 5 to Rule 1.14 suggests it is appropriate for the lawyer to seek guidance from an appropriate diagnostician, particularly when a disclosure of the client's condition to the court or opposing parties could have adverse consequences for the client. Such discussion of a client's condition with a diagnostician does not violate Rule 1.6 (Confidentiality of Information), insofar as it is necessary to carry out the representation. *See* Informal Opinion 89-1530. For instance, if the client is in the midst of litigation, the lawyer should be able to disclose such information as is necessary to obtain an assessment of the client's capacity in order to determine whether the representation can continue in its present fashion.

There may also be circumstances where the lawyer will wish to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the

5. "In other words, the client's capacity must be judged against the standard set by that person's own habitual or considered standards of behavior and values, rather than against conventional standards held by others." M. Silberfield and A. Fish, When the Mind Fails; A Guide to Dealing with Incompetency (University of Toronto Press, 1994).

decision of how to proceed. Limited disclosure of the lawyer's observations and conclusion about the client's behavior seems clearly to fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. The lawyer must be careful, however, to limit the disclosure to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation.

Withdrawal from Representation of the Disabled Client

In the absence of Rule 1.14, a lawyer whose client becomes incompetent would have no choice but to withdraw, not only because a lawyer who continues the representation would be acting without authority, but also because the lawyer would be unable to carry out his responsibilities to the client under the Rules.[6] *See* Rule 1.16(a)(1) (withdrawal required where "the representation will result in violation of the rules of professional conduct"). While Rule 1.14 permits a lawyer to take protective action in such situations, it does not compel the lawyer to do so, and many lawyers are uncomfortable with the prospect of having to so act. The committee considers that withdrawal is ethically permissible as long as it can be accomplished "without material adverse effect on the interests of the client." Rule 1.16(b).[7]

On the other hand, while withdrawal in these circumstances solves the lawyer's dilemma, it may leave the impaired client without help at a time when the client needs it most.[8] The particular circumstances may also be such that the lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not be able to represent the client effectively due to the inability to discuss the matter with the client. Thus, without concluding that a lawyer with an incompetent client may never withdraw, the Committee believes the better course of action, and the one

6. See discussion above regarding the duties of competence and diligence, and the obligation to inform the client and act in accordance with the client's desires.

7. While Rule 1.16(b)(5) also permits withdrawal "if the representation has been rendered unreasonably difficult by the client," a disability over which the client has no control is likely not the sort of "difficulty" the drafters had in mind in crafting this provision. Similarly, we do not believe that the final "catch-all" provision in Rule 1.16(b)(6) ("other good cause for withdrawal") automatically authorizes withdrawal where the client becomes disabled.

8. As pointed out in C.W. WOLFRAM, MODERN LEGAL ETHICS 162 (1986), even if withdrawal is technically permissible, it "only solves the lawyer's problem and may belittle the client's interest."

most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client.

Identifying and Taking the Least Restrictive Measures Under the Circumstances

Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances.[9] The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available. Neither Rule 1.14(b) nor its comments offer a definition of "other protective action," but it has been interpreted to include the involvement of other family members who are concerned about the client's well-being, use of a durable power of attorney or a revocable trust where a client of impaired capacity has the capacity to execute such a document, and referral to support groups or social services that could enhance the client's capacities or ameliorate the feared harm.[10] Any of these types of protective action could be less restrictive than the appointment of a guardian. The lawyer should, if time permits, explore the availability of such less restrictive actions before resorting to a guardianship petition.

The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation.

9. *Cf.* Oregon Code of Professional Responsibility Rule 7-101, which permits a lawyer to "seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client . . . ." *See also* Oregon Formal Opinion No. 1991-41, which directs a lawyer to take the least restrictive action sufficient to address the situation when a client is in need of protective action.

10. *See Working Group on Client Capacity*, 62 FORDHAM L.REV. 1003 (1994).

While there may be circumstances in which the appointment of a general guardian to assume control over every aspect of the client's life is the only reasonable course, in some, if not many, circumstances it may be sufficient for the client's protection to arrange for a guardian to manage the client's financial affairs, allowing the client to continue managing his personal affairs.

The Lawyer May Seek a Guardian but May Not Represent Another in Doing So

When, after consideration of less drastic means, a lawyer has concluded that a guardian should be appointed for his client, the lawyer may file the petition for guardianship. By its terms, Rule 1.14(b) clearly authorizes a lawyer himself to file a petition for guardianship when the lawyer has made the requisite finding concerning the client's inability "to adequately act in the client's own interest." Conscious of his general duty of loyalty, and his specific obligation under Rule 1.14(a) to maintain as normal as possible a relationship with an incompetent client, a lawyer may feel discomfort at being the petitioner. The lawyer may also be discomfited by being in the position of taking action, regardless of how necessary and appropriate, that will take away the client's fundamental right of independence. Nevertheless, in the extraordinary circumstances in which it applies, Rule 1.14(b) clearly permits the lawyer to do so.

A lawyer who finds himself in this awkward position may prefer that someone else file the petition. In practice, too, it is not uncommon for the lawyer to be approached by a family member or other third party with a request that the lawyer represent that third party in pursuing the petition. As discussed above, Rule 1.14(b) clearly permits the lawyer himself to file a petition for guardianship upon concluding that it is necessary to protect the client and there are no less restrictive alternatives available. However, nothing in the rule suggests that the lawyer may represent a third party in taking such action, and after considerable analysis, the Committee concludes that a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.

Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However, Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to his client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and pro-

hibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client's best interests, unless and until the court makes the necessary determination of incompetence. Even if the court's eventual determination of incompetence would moot the argument that the representation was prohibited by Rule 1.7(a), the lawyer cannot proceed on the assumption that the court will make such a determination. In short, if the lawyer decides to file a guardianship petition, it must be on his own authority under Rule 1.14 and not on behalf of a third party, however well-intentioned.

We emphasize, however, that this does not mean the lawyer cannot consider requests of family and other interested persons and be responsive to them, provided the lawyer has made the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third person with whom he is dealing is also acting in the best interests of the client. In such circumstance, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation.

Seeking the appointment of a guardian for a client is to be distinguished from seeking to be the guardian, and the Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay. Even in the latter situations, a lawyer may have to act before the appointment has been actually made by the court. A lawyer whose incapacitated client is about to be evicted, for instance, should be permitted to take action on behalf of the client to forestall or prevent the eviction, for example, by filing an answer to the eviction complaint. In such a case the lawyer should take appropriate steps for the appointment of a formal guardian, other than himself, as soon as possible.[11]

Recommending a Guardian and Making Necessary Disclosures

A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment.

11. Comment 2 to Rule 1.14 recognizes that there are circumstances in which the lawyer must act as de facto guardian.

Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward.

Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. *See* Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian. The substantive law of the forum may require such disclosure.[12]

Conclusion

When a client is unable to act adequately in his own interest, a lawyer may take appropriate protective action including seeking the appointment of a guardian. The lawyer may consult with diagnosticians and others, including family members, in assessing the client's capacity and for guidance about the appropriate protective action. The action taken should be the least restrictive of the client's autonomy that will yet adequately protect the client in connection with the representation. Withdrawal from representation of a client who becomes incompetent is disfavored, even if ethically permissible under the circumstances.

The lawyer may recommend or support the appointment of a particular person or other entity as guardian, even if the person or entity will likely hire the lawyer to represent it in the guardianship, provided the lawyer has made reasonable inquiry as to the suggested guardian's fitness, discloses the self-interest in the matter and obtains the court's permission to proceed. In all aspects of the proceeding, the lawyer's duty of candor to the court requires disclosure of pertinent facts, including the client's view of the proceedings.

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12. *See, e.g., Illinois Probate Act of 1975, Article XI.A*, Guardians for Disabled Adults, 755 ILCS 5/11a-8:

> Section 11a-8. Petition. The petition for adjudication of disability and for the appointment of a guardian of the estate or the person or both of an alleged disabled person must state, if known: (a) the relationship and interest of the petitioner . . . .

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CALIFORNIA TRUSTS AND ESTATES QUARTERLY

A LAWYER IS A LAWYER IS A LAWYER

By Anne M. Rudolph, Esq. and Ralph E. Hughes, Esq.**

I. SYNOPSIS

Attorneys appointed to represent conservatees and proposed conservatees in California's courts are knee-deep in important personal and constitutional issues. Every day across the state, private citizens use the courts to deprive other private citizens of control of property and other freedoms. Although a conservatorship proceeding is classified as a "protective proceeding,"[1] a conservatorship case is fundamentally adversarial, and a court's imposition of a conservatorship of the person or estate on an individual has been described as, "in one short sentence, the most punitive civil penalty that can be levied against an American citizen . . . ."[2]

Although attorneys have a general obligation to be zealous advocates for their clients,[3] attorneys appointed to represent proposed conservatees in probate courts are routinely encouraged, and even required, to provide the courts with reports regarding their clients.[4] The contents of those reports often violate the attorneys' duty to be a zealous advocate. The practice of requiring the appointed attorney to report to the court exists, in part, because a conservatorship proceeding can be seen as grounded in the state's historical "most beneficent function" to act as *parens patriae* of its disabled citizens.[5] With this background of protection and assistance, the adversarial nature of the protective proceeding has been minimized or ignored even though the proceeding is designed to deprive a citizen of liberty and property.

These authors believe that the practice of requiring or encouraging appointed attorneys to report to the court about what the attorney believes is in the best interests of the proposed conservatee should be ended, and California should instead follow state-wide, uniform procedures that encourage appointed attorneys to fulfill their duty to act solely and only as zealous advocates for their clients.

The conclusion that a California attorney appointed to represent a proposed conservatee must act as a zealous advocate for the client and not as a reporter to the court lies at the intersection of the two most basic ethical rules governing California attorneys. The first of these rules, Business and Professions Code section 6068, subdivision (e)(1), requires the attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The second of these rules is the attorney's duty of absolute loyalty to the client. In *Flatt v. Superior Court*,[6] the California Supreme Court instructed attorneys that,

> *It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.* By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. *Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.*[7]

The attorney who files a report with the court regarding his or her interactions with a client, describing his or her conclusions about the case which might differ from the client's, or describing communications with the client, violates both the duty of confidentiality and the duty of loyalty.

The duties of confidentiality and loyalty are particularly strict in California. Every other state has adopted a form of American Bar Association Model Rule 1.14, which allows attorneys to take limited actions to protect their clients with diminished capacity. Those actions can range from seeking the appointment of a guardian ad litem to seeking the appointment of a conservator.[8] A California attorney dealing with a client with diminished capacity cannot take the same actions because the California Supreme Court declined to adopt a version of Model Rule 1.14 in May 2018.[9] After a multi-year effort to update the California Rules of Professional conduct, the State Bar Board of Trustees submitted 70 proposed new or amended rules to the Supreme Court,[10] including a version of Model Rule 1.14.[11] The Supreme Court approved 69 of the proposed rules, with some amendments.[12] The only rule that the Supreme Court did not adopt was the proposed version of Model Rule 1.14.[13]

These changes to the California Rules of Professional Conduct leave no doubt that confidentiality and loyalty are

central to an attorney's practice in California, regardless of whether the client may have diminished capacity. The Legislature and the Supreme Court have spoken, and probate practitioners should take them at their word. The currently effective statutory and ethical rules contain no exceptions for practice in the probate courts. Attorneys must be loyal only to their clients. Attorneys cannot reveal the confidences of their clients under any circumstance whatsoever. Attorneys must be zealous advocates and are not permitted to resolve their client's interests contrary to the client's wishes. The authors believe that the Supreme Court left no room to maneuver in the changes to the Rules of Professional Conduct that became effective in November 2018.

II. TWO CASES ILLUSTRATE THE PROBLEMS INHERENT IN REQUIRING AN APPOINTED ATTORNEY TO REPORT TO THE COURT

Two cases, *Conservatorship of Schaeffer*[14] and *Conservatorship of Cornelius,*[15] illustrate the dangers of a system that requires attorneys to stray from their roles as loyal, confidential, and zealous advocates and to instead function as reporters to the court. In both *Schaeffer* and *Cornelius,* appointed attorneys openly acknowledged that they were pursuing courses of action that directly contradicted the stated desires of their clients. In both cases, the attorneys reported on conversations with their clients, and conceded major issues including the need to impose a conservatorship. In both cases the filed reports ran afoul of the dictates of Business and Professions Code section 6068, subdivision (e)(1), and *Flatt v. Superior Court,* but the trial and appellate courts treated the reports as business-as-usual.

This article does not criticize the attorney who filed the report in either case but, instead, questions the system that required the reports. The authors propose that the system should be changed so that appointed attorneys can function as attorneys for their clients, as required by law. That the appellate courts in *Schaeffer* and *Cornelius* quoted so extensively from the reports and expressed no shock or surprise at their content illustrates how far the appointed attorney's role in conservatorship practice has deviated from fundamental California law.

A. Conservatorship of Schaeffer

Conservatorship of Schaeffer reveals the dangers of a system requiring an appointed attorney to report to the court, not only because of the problematic content of the attorney's report itself, but also because the failure to present the case as an adversary proceeding blinded the parties and the courts to the due process rights of the proposed conservatee.[16] In *Schaeffer,* a woman petitioned for appointment as her husband's conservator. The court appointed an attorney to represent the proposed conservatee. The appointed attorney filed a report that was placed in the file and was available to all parties, but he did not serve the report on the parties' attorneys. In the report, the attorney gave his opinions about the state of the marriage, and "reported that Mr. Schaeffer needed a conservator, but that he had said that he did not want Mrs. Schaeffer or any member of his family to be appointed."[17] The court appointed a professional conservator.

Shortly thereafter, Mrs. Schaeffer petitioned to remove the professional conservator and for her own appointment as conservator. The appointed attorney again reported to the court. This time, he reported that he believed that Mrs. Schaeffer had improperly closed her husband's IRA. He also reported his conclusion that Mr. Schaeffer had told his associate that, "he [Mr. Schaeffer] wanted Mrs. Schaeffer to be the conservator, but only because she had pressured him."[18] The attorney then—contrary to his client's stated desire—recommended that Mrs. Schaeffer not be appointed as successor conservator, due to the appointed attorney's conclusion that she had acted inappropriately with respect to his finances.

The appointed attorney asked the court to review his second report *in camera,* and not to disclose it to the parties' attorneys. The court reviewed the report privately and, over the opposing attorney's objections, sealed it, ruling that the report, "is to be reviewed by the court only. That's what we usually do, and it will not be available."[19]

The appellate court reversed, holding that the trial court's decision to withhold the report from the other parties violated Mrs. Schaeffer's rights to due process. The report contained the attorney's conclusions about Mrs. Schaeffer's financial dealings with her husband's IRA and included hearsay allegations about her relationship with her husband. Since Mrs. Schaeffer could not contest this unfavorable evidence, the court concluded that her due process rights had been violated and reversed the trial court's judgment.

The appointed attorney's reports violated the requirements of Business and Professions Code section 6068, subdivision (e)(1), and *Flatt.* The reports: (i) conceded the main issue that a conservatorship was required; (ii) revealed confidential communications between the client and the attorney's associate; and (iii) took a position regarding the identity of the proper conservator that directly contradicted his client's wishes. Both the trial court and the appellate court relied on the

reports and treated them as evidence. Neither court, though, considered the propriety of the attorney's reports themselves, and their impact on the proposed conservatee's rights. The case was decided on the basis that the trial court's "private investigation"[20] using the attorney's sealed report violated the due process rights of the petitioner – *Mrs. Schaeffer.* The appellate court gave no consideration whatsoever to the due process rights of *Mr. Schaeffer*, the proposed conservatee, although his freedom and his right to control his property were the central issues, and his due process rights too had been violated.

B. Conservatorship of Cornelius

Conservatorship of Cornelius,[21] published in 2011, again illustrates how an attorney who is called upon to report to the court concerning his or her client's status can run afoul of the dictates of both Business and Professions Code section 6068, subdivision (e)(1), and *Flatt.*

In *Cornelius,*[22] a trial court in Sonoma County ordered a temporary conservatorship of the person of Bobby Jack Cornelius at his daughter's request. At the first hearing on the permanent conservatorship, the court appointed an attorney for the proposed conservatee and continued the trial. The court expressly directed the court-appointed attorney to file a detailed report and, a few weeks before trial, the attorney "filed an extensive report with the court."[23] The appellate court noted that, "[a]s the court directed, the report included background facts, factual and legal analysis and recommendations 'to assist the court in making a determination as to the course of action that would best serve the interests of the proposed conservatee.'"[24]

The appointed attorney's report reflected numerous interviews the attorney had conducted. It "confirmed that Cornelius associated with people who lived in his house rent-free, 'obtained money and credit cards from him,' and operated a marijuana farm."[25] The attorney "dismissed [her client's] claim that the events giving rise to the conservatorship were isolated and that a conservatorship was no longer necessary."[26] The report admitted Mr. Cornelius's deficits and pointed out that his situation had improved during the six months of the temporary conservatorship. Quoting from the report itself, the Court of Appeal observed that the appointed attorney had reported:

> *[T]hat [her client] was "unable to manage his own financial resources or resist fraud or undue influence, and a conservatorship of the estate would be appropriate and necessary," and recommended appointment of a professional fiduciary as conservator of his person and estate. The attorney noted: "Many of my recommendations are contrary to many of Mr. Cornelius's stated wishes to me, but the majority of Mr. Cornelius's objections and the course of action he suggests are inappropriate."*[27]

Mr. Cornelius did not agree with the appointed attorney. His position was that the people seeking and implementing the conservatorship had been an "assemblage of busy-bodies."[28] After several hearings and proceedings, the daughter dismissed her petition. The court then ordered that the conservatorship estate was to pay "the temporary conservator, attorneys, and providers."[29] Mr. Cornelius appealed.

The appellate court, determined that, "[t]he deciding factor in awarding reimbursement in a conservatorship proceeding is not whether a permanent conservatorship is established but whether expenses were incurred in good faith and in the best interests of the proposed conservatee."[30] The court referred extensively to the factual details and admissions contained in the appointed attorney's report as evidence showing that the petition had been filed, and the expenses had been incurred, in good faith.

The *Cornelius* court cited the appointed attorney's report as evidence to support its ruling that the temporary conservatorship estate had to pay the fees. However, it did not analyze whether the trial court properly required the report in the first place and did not consider the ethical questions raised by the content of the report. As in *Schaeffer,* the attorney's report was a clear breach of her duty of loyalty to her client under Business and Professions Code section 6068, subdivision (e)(1), and *Flatt.* She openly dismissed his asserted positions in favor of her own conclusions. The report revealed confidential communications that she was forbidden to reveal. She concluded that her client should be subject to a conservatorship, citing his actions in letting other people live with him rent-free and use his credit cards that are not against the law and that a free and competent adult can undertake if he or she wishes. Those facts could have and should have been presented by the petitioner seeking to impose the conservatorship, not by the attorney who was supposed to advocate on behalf of the proposed conservatee. To add insult to injury, the appointed attorney's report in the end served as important evidence supporting the court's conclusion that the petition for conservatorship was filed in good faith—evidence that cost her client money.

III. THE PROBLEMS CONSIDERED IN THIS ARTICLE

The authors write this article because different counties in California, and even different judges within the same county, have different approaches regarding the role of an attorney appointed to represent a proposed conservatee in a Probate Code conservatorship case. The different practices place attorneys at risk regarding their duties and obligations to their clients under Business and Professions Code section 6068, subdivision (e)(1), and *Flatt.* These practices also raise constitutional concerns of due process and equal-protection.

The current CEB Practice Guide, *California Conservatorship Practice* (the "Guide"), takes note of the varied practices around the state, observing that attorneys and judges have differing views on the attorney's duties when the "client wishes to take a position that the attorney believes is antithetical to the client's own interests."[31] According to the Guide, "[o]ne school of thought considers the attorney – even one appointed by the court – to be a zealous advocate for the client's wishes."[32] The other school of thought, "gives the court-appointed attorney the professional discretion to conclude that the course of action selected by the partially impaired client is not appropriate [and to] make recommendations contrary to the client's stated wishes."[33] The Guide concludes, "[u]nless a reported decision or new legislation offers further guidance in this area, ultimately local custom and the preferences of each court will point toward the approach to be taken by counsel."[34]

This article argues that the "further guidance" has already been provided. An attorney who maintains the client's confidences and who is completely loyal to the client as required by existing California law cannot act as a reporter to the court. The attorney cannot tell the court what the client has said without that client's consent, cannot ignore the client's stated desires and goals, and cannot advocate something that the client does not want. Only the court can determine the capacity of a proposed conservatee, and the attorney cannot ignore instructions from a client who is presumed to have capacity. Even after the establishment of a conservatorship, "[a] person . . . may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions."[35] Whether the individual has these capacities is to be determined by the court, not by his or her attorney, appointed or not.

The California attorney is required to be a loyal, confidential, and zealous advocate for the client regardless of the client's mental condition. Local customs and judicial preferences have no place in the analysis of the appointed attorney's fundamental role.

IV. THE SCOPE OF THIS ARTICLE

This article will begin by exploring the important historical role of the *parens patriae* doctrine in the development of rules of practice in conservatorship cases. It will then examine the relatively recent history of efforts to focus courts and attorneys more specifically on the rights of the proposed conservatee.

After this historical discussion, the article will examine the two ways an attorney can be appointed to assist the court in a conservatorship case. First, the court can appoint an attorney to represent the proposed conservatee.[36] Second, the court can appoint an attorney to act as guardian ad litem.[37] The article will compare the roles and powers of appointed attorneys with the roles and powers of guardians ad litem. It will also discuss the restrictive wording of Probate Code section 1003,[38] and the limits that statute places on probate courts when appointing guardians ad litem for proposed conservatees.

The article will also examine the current state of California's law governing the role to be played by an appointed attorney. The authors will discuss the ways different states have approached the role of the proposed conservatee's attorney. The various sources of law governing the attorney's role, ranging from the common law, to statutory law, to constitutional law will be examined. The article will consider the appointed attorney's appropriate role in a conservatorship proceeding, and the various interests at play in determining the appointed attorney's role. A comparison of the appointed attorney's role to that of a guardian ad litem will be discussed. The article surveys various recommended uniform practices and will conclude by recommending that California's probate courts uniformly acknowledge that California law requires the appointed attorney to act as a zealous and confidential advocate for his or her client's interests as expressed and obtained from the client—the proposed conservatee—with no duty to act as a reporter or an advisor to the court.

Since this article focuses on the role of the attorney, it will not discuss the role of the court investigator. However, given the article's emphasis on the role of the guardian ad litem and its conclusion that the appointed attorney should be an advocate rather than a reporter to the court, the authors believe it would be helpful if investigators were sensitized to the need to report to the court not just regarding the potential appointment of an attorney,[39] but also regarding the potential need to appoint a guardian ad litem.

CALIFORNIA TRUSTS AND ESTATES QUARTERLY

V. A HISTORICAL PERSPECTIVE

As inheritors of English common law, we find the basis of our conservatorship law in the doctrine of *parens patriae*, the doctrine that made the King of England his country's parent, with the duty to protect his disabled citizens.[40]

Although states in post-Revolutionary America were reluctant to retain the traditional powers of the King, state legislatures accepted the doctrine of *parens patriae* and used it to justify the jurisdiction they assumed to care for their incapacitated citizens.[41] "Although courts did not want American democracy to retain the traditional powers of the King, *parens patriae* authority was seen as benevolent and consistent with the duty of the state to protect those who could not protect themselves."[42] California's courts affirmed the doctrine of "*parens patriae*," as early as 1876.[43] The state's authority and power under the doctrine of *parens patriae* are extensive. The United States Supreme Court has explained that the powers of both King and Parliament passed to the people of the United States, and "here, the legislature is the *parens patriae* and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England."[44]

In the nineteenth and early twentieth centuries, different states implemented protective proceedings for incapacitated adults without uniformity. In 1987, the Associated Press undertook a nationwide study of protective proceedings for adults and published a series of articles criticizing the treatment of disabled adults.[45] The United States House Select Committee on Aging studied protective proceedings in response to the articles.

The AP articles and the congressional inquiry "precipitated a rush to reform state guardianship laws," with various improvements, emphasizing "enhanced due process in the appointment of a [conservator], including provisions for a hearing, notice, presence of the respondent, and representation by counsel . . . ."[46] The development of the right to counsel has been inconsistent, and not all states have implemented a right to counsel.[47] The development of the role that an appointed attorney is to play in conservatorship proceedings has also been inconsistent, and there is debate over the role properly to be played by an attorney appointed to represent a proposed conservatee.[48] Most states, though, have more flexibility in defining the appointed attorney's role than does California, because most states have adopted a version of ABA Model Rule 1.14.

VI. THE DISTINCTIONS BETWEEN THE ROLE OF THE APPOINTED ATTORNEY AND THE GUARDIAN AD LITEM

Since the court can appoint either an attorney or a guardian ad litem, or both, it makes sense to ensure that the powers and duties of both the attorney and the guardian ad litem are understood. A focus on just one of the court's resources risks an over-emphasis on that particular resource as a solution. If a carpenter has just a hammer, every problem looks like a nail. Understanding the role of the guardian ad litem is a fundamental preliminary to understanding the role of the appointed attorney.

A. The Guardian ad Litem Derives His or Her Authority From the Court; The Appointed Attorney Derives His or Her Authority From His or Her Client

A key to understanding the difference between the roles of the appointed attorney and the guardian ad litem is their different sources of authority.

The guardian ad litem is a special agent of the court directly responsible to the court and the source of the guardian ad litem's authority is the court's authority under *parens patriae*. "The court is, in effect, the guardian – the person named as guardian ad litem being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign State as *parens patriae*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person."[49] Stated in a slightly different manner: "[t]he guardian ad litem, therefore, when representing an adult deemed incapable of representing himself or herself, is in a similar role to a conservator, who derives his or her authority from the power of the state to protect incompetent persons."[50] The guardian ad litem investigates the situation, determines the proposed conservatee's interests in the guardian's opinion, and reports the guardian's determination of those interests (or advocates those interests through an attorney) to the court.

An appointed attorney is an officer of the court, but is not its direct agent.[51] Attorneys are agents of the client, and the attorney's authority flows from the client under the laws of agency.[52] The appointed attorney's duty of loyalty is only to the client.[53] The appointed attorney's role is to investigate the status of the proposed conservatee and client, to determine the client's interests as the client can articulate them and to represent those interests in court.[54]

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B. The Guardian ad Litem is More Than an Attorney and Less Than a Party

Courts have said that the "guardian ad litem's role is more than an attorney's but less than a party's."[55] Thus, for example, "[t]hough an attorney must zealously advocate for her client, she cannot unilaterally appeal ... or bring a motion to dismiss.... A motion to dismiss requires the authorization of the [client] or, if the [client] is incapable of giving authorization, the authorization of a guardian ad litem acting on the [client's] behalf and in the [client's] best interests."[56] The attorney can only act if the attorney is acting as the agent of an authorized decision-maker; either the client or a guardian ad litem.[57] The attorney is not a decision-maker.

C. A Guardian ad Litem is Not an Advocate

While an attorney is an advocate for a client's wishes, a guardian ad litem determines the best interests of the proposed conservatee and represents those interests but is not an advocate.[58] If the guardian ad litem is to advocate for the proposed conservatee's interests, he or she properly retains an attorney.[59]

D. The Attorney is Not a Witness; The Guardian ad Litem Reports to the Court and May be a Witness

Although, a guardian ad litem is "less than a party," because the court can overrule decisions made by a guardian ad litem, a guardian ad litem is a party for discovery purposes and is not exempt from the rules of discovery. [60] As a party required to follow the rules of civil discovery a guardian ad litem is presumably subject to deposition.[61]

In both *Schaeffer* and *Cornelius,* the appointed attorney's report to the court was considered as evidence by both the trial court and the appellate court. [62] An attorney who acts as a reporter or advisor to the court and who, for example, submits a sworn report, is a witness who could be deposed or cross-examined, and runs a significant risk that he or she will violate the duty of confidentiality and the attorney-client privilege in the process.

An attorney who limits his or her role to that of a zealous advocate for the client, on the other hand, presents evidence, but his or her statements are not evidence.

E. A Guardian ad Litem is Entitled to Quasi-Judicial Immunity for Actions Within the Scope of His or Her Authority

A guardian ad litem is constantly subject to review and removal by the court that appointed him or her. The guardian ad litem is, therefore, within the judicial process and is entitled to quasi-judicial immunity.[63] Judicial immunity is meant to protect the decision-making of a guardian ad litem who may otherwise be at risk of suit in determining the best interests of an incapacitated person. "[T]he guardian ad litem does not advocate for her ward in the way an attorney does—her job is acting in the ward's best interests, and the ward might not always agree with the guardian ad litem's decisions. Her ability to act would be compromised if the threat of future liability encouraged a guardian ad litem to put a ward's *wishes* above his *interests*."[64] A guardian ad litem must be free to determine the ward's interests differently than the ward determines those interests, a freedom not possessed by the attorney.

F. No Quasi-Judicial Immunity for an Attorney

While no California case has yet addressed the issue, the Connecticut Supreme Court has determined that an appointed attorney is not entitled to quasi-judicial immunity.[65] That court reasoned that because the attorney is required to be loyal to the client and is not free to make an independent determination of the client's interests, the attorney does not need quasi-judicial immunity to protect the attorney's decision-making process.[66]

G. The Appointed Attorney is Responsible to Protect the Attorney-Client Privilege

The appointed attorney has an ethical duty of confidentiality and must preserve the attorney-client privilege on behalf of his or her client. No such ethical duty applies to a guardian ad litem who is not acting as an advocate for a client, who may not be an attorney, and who has no client. [67]

H. An Appointed Attorney in California Cannot Seek the Appointment of a Guardian ad Litem

ABA Model Rule 1.14 instructs an attorney representing a client with diminished capacity to "as far as reasonably possible, maintain a normal client-attorney relationship."[68] The rule goes on to provide that,

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take

> reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[69]

As discussed above, Model Rule 1.14 has not been adopted into the California Rules of Professional Conduct. The California Supreme Court's considered decision not to adopt a version of Model Rule 1.14 emphasizes that an appointed attorney cannot take even limited protective action on behalf of a client. An attorney cannot advise a court of his or her opinion regarding what is "best" for his or her client, cannot report to the court that a conservatorship is necessary for his or her client, and cannot seek the appointment of a guardian ad litem.

VII. KEY CALIFORNIA STATUTES AND RULES REGARDING THE APPOINTMENT OF ATTORNEYS AND OF GUARDIANS AD LITEM DO NOT AUTHORIZE ATTORNEYS TO ACT AS REPORTERS TO THE COURT

Appointment of legal counsel in "Guardianships, Conservatorships and Other Protective Proceedings" is found in Probate Code sections 1470 to 1474.[70] These sections do not specify the roles to be played by an appointed attorney or by a guardian ad litem. For example, in a case involving a comatose individual, the court noted, "Probate Code 1470 authorized appointment of counsel in this case but does not specify counsel's role."[71]

A. Probate Code Section 1470

Section 1470 is discretionary. Under it, a court "may appoint private legal counsel" for a ward or conservatee when there is no attorney and, "appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests."

B. Probate Code Section 1471

Section 1471, subdivisions (a) and (b), are mandatory and apply in conservatorship proceedings.

Section 1471, subdivision (a), mandates appointment of an attorney in several listed sorts of cases on request of the proposed conservatee and provides that the attorney is "to represent the interest of that person" in the listed cases.

Section 1471, subdivision (b), requires the court to appoint an attorney for a proposed conservatee when the proposed conservatee "does not plan to retain legal counsel and has not requested the court to appoint legal counsel" when 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."

C. Probate Code Section 1003

Section 1003, subdivision (a)(2), authorizes the court to "appoint a guardian ad litem at any stage of a proceeding under this code to represent the interest of . . . [an incapacitated person] if the court determines that the representation of that interest otherwise would be inadequate. . .."

Since the Probate Code authorizes appointment of a guardian ad litem for "an incapacitated person," there is some question whether the probate court has the power to appoint a guardian ad litem for an adult who has not yet been conserved or has not yet been determined to have an incapacity. Such appointment is particularly problematic in a proceeding to establish a conservatorship in which the need for a guardian ad litem may be obvious, but the court has not yet determined that the proposed conservatee requires a conservator.

The common law regarding guardians ad litem appointed under the Code of Civil Procedure is that a court can appoint a guardian ad litem even for a person who has not been conserved, although the procedure for making that determination is unclear.[72] "Incompetency may exist independently of any judicial determination thereof."[73] While it appears that this common law certainly should apply in conservatorship cases, and a judge in such a case has the authority to appoint a guardian ad litem before granting a conservatorship petition, the Law Revision Commission Comment to Section 1003 may limit the application of that common law in conservatorship cases. The Comment provides, "[t]he general provisions for appointment of a guardian ad litem in Code of Civil Procedure Sections 372-373.5 do not apply to the appointment of a guardian ad litem under this code."

Whether the court can appoint a guardian ad litem for a proposed conservatee does not affect this article's analysis of the role of the appointed attorney. Certainly, it is best if the court can employ two different resources—appointed attorney and guardian ad litem—to assist it in making its determinations. However, even if the current state of the Probate Code prevents the appointment of a guardian ad litem before the determination of incapacity, the role of the appointed attorney remains the same: the appointed attorney must be a zealous advocate for his or her client. In no event should procedural difficulties regarding the appointment of a

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guardian ad litem cause the attorney to be pushed out of his or her role as a zealous advocate and into the role akin to a guardian ad litem, reporting what he or she believes is in the best interests of the proposed conservatee.

If section 1003 needs to be clarified or expanded regarding the probate court's power to appoint a guardian ad litem for a proposed conservatee, it should be amended.

D. California Rule of Court 7.1101

Rule of Court 7.1101 specifies the experience and education requirements for appointed attorneys and specifies certain continuing education for appointed attorneys. That Rule does not provide guidance on the role to be taken by an appointed attorney.

E. Potential Confusion Caused by the Wording of Sections 1470 and 1471

1. A Duty to be "Helpful" to the Court?

Section 1470 and section 1471, subdivisions (a) and (b), call for the appointed attorney to represent the "interest(s)" of the proposed conservatee. However only section 1470 and section 1471, subdivision (b), the sections giving the court discretion to appoint an attorney, call for appointment of an attorney when it would be "helpful to the resolution of the matter." This difference in wording supports an argument that an attorney appointed under the discretionary authority of section 1470 or section 1471, subdivision (b), has a duty to be "helpful" to the court that the attorney appointed under the mandatory appointment required by section 1470, subdivision (a), does not.

The Guide follows this approach, explaining that "the attorney appointed in the court's discretion under [Section 1470(a)] has a dual role: not only to 'protect the interests' of the subject person but also to assist the court in 'the resolution of the matter.'"[74] Similarly, the Guide states, "[a]s with Probate Code section 1470(a) discretionary appointments, counsel appointed under Probate Code section 1471(b) has the additional role of being 'helpful to the resolution of the matter.'"[75] On the other hand, according to the Guide, the distinction in the wording of the sections "suggests that [counsel appointed under Section 1471(a)] has the single role of advocating the client's interests without regard to assisting the court in resolving the dispute."[76]

These authors have a different view of the wording of the sections and instead conclude that the language in section 1470 and in section 1471, subdivision (b), authorizing the court to appoint an attorney if, "the appointment would be helpful to the resolution of the matter. . . " actually identifies a factor the court must consider when appointing a guardian ad litem. However, the language cannot be read as an instruction directing the appointed attorney to assist the court in the resolution of the matter by acting as a reporter to the court.

The "helpful" language is directed to the court, not the attorney. The attorney's duties to be a confidential, loyal, and zealous advocate are fundamental. A statute designed to override those fundamental ethical duties would need to be specific.[77] The statutory references to "helpful" are not specific enough to support a conclusion that the legislature intended to change the appointed attorney's professional obligations as an attorney.

2. Does the Appointed Attorney Represent "Interests" or a Client?

The statutes authorizing the probate court to appoint an attorney or a guardian ad litem all refer in one way or another to representation of an "interest." Section 1003 regarding guardians ad litem refers to "representation of an interest." Section 1470 refers to representation "necessary to represent the person's interests." Section 1471, subdivision (a), refers to appointing counsel "to represent the interest of that person." Section 1471, subdivision (b), refers to appointment that "is necessary to protect the interests of the conservatee or proposed conservatee."

The Guide concludes that this language, "makes it clear that the court-appointed attorney is to represent 'the interests' of the client rather than merely the client."[78] These authors have a different interpretation: an attorney must represent a client, who identifies the interests that the client wants the attorney to represent. In other words, the client is paramount. "Interests" are not a client but instead are determined by the client. If the attorney determines those "interests," the attorney is not acting as a loyal advocate for his or her client.

The notion that an attorney represents "interests" and not a client leads to the next step, that the attorney can independently determine the client's interests even if the attorney's determination conflicts with the client's. The Guide states that the line of thought suggesting that the attorney "has the professional discretion" to make recommendations contrary to the wishes of the client derives from the "statutory mandate to represent the client's 'interests' rather than merely the client."[79] According to the Guide, the notion that the attorney can make recommendations contrary to the instructions of his client derives from the "longstanding rule . . . that a client must at least possess the capacity to contract or the attorney-

client relationship is terminated."[80] However, it does not follow that if a client lacks capacity, his attorney can decide for him. When the appointed attorney is faced with a client who has no capacity, that relationship is terminated and the attorney should resign.[81] The court should then appoint a guardian ad litem. No attorney has the professional training to exercise "professional discretion" to advocate courses of action contrary to the client's decisions or instructions. Appointment of a guardian ad litem expressly authorized to exercise the court's *parens patriae* authority over an incapacitated person is a better course of action than causing the attorney to overstep the bounds of his or her duties.

VIII. LOCAL RULES TAKE VARIOUS POSITIONS ON THE DUTIES OF THE APPOINTED ATTORNEY

A review of the local rules of the courts in California shows that the courts have taken different positions regarding the appointed attorney's role. Local rules that make an incapacitated person's rights different in one county than another may run afoul of equal protection requirements. Regardless of equal protection requirements, an appointed attorney having a different role in Los Angeles than in San Francisco, or in San Diego, makes no sense.

A. Los Angeles County

Local Rule 4.125 of the Los Angeles Local Rules, effective July 1, 2011 (Ethical Guidelines for Probate Volunteer Panel "PVP" counsel), emphasizes that the appointed attorney is to "represent the interests of his or her client in accordance with applicable laws and ethical standards." But "[t]he PVP attorney's secondary duty is to assist the court in the resolution of the matter to be decided."[82]

B. San Diego County

San Diego Local Rule 4.18.10 states simply that, "[t]he court will appoint counsel for the person who is the subject of a conservatorship petition as required by law or for good cause."[83] Anecdotal information from practitioners in San Diego suggests that it is not uncommon for the appointed attorney to file a report with the court, giving his or her views on the substance of the case, including whether a conservatorship should be established.

San Diego Local Rule 4.18.5, subdivision F, provides that an attorney will always be appointed for a proposed conservatee "in any case where dementia authority is requested." In these cases, "a written report from that attorney must be filed five court days in advance of the hearing before the court acts on the dementia request."[84] The rule makes no specification of the items to be included in the appointed attorney's report.

C. San Francisco County

San Francisco's Local Rules contain extensive provisions regarding the role of appointed attorneys. Appointed attorneys are expected to "remain in close communication with the Court Investigator,"[85] are "expected to personally visit the person they have been appointed to represent,"[86] and are not permitted to undertake representation outside the specific case without a court order.[87]

San Francisco's Local Rules go on to specify the "Role of the Court-Appointed Attorney."[88] Under the rules, "Court appointed attorneys are expected to inform the Court of the wishes, desires, concerns, and objections of the proposed conservatee."[89] In addition, "[i]f asked by the Court, the attorney may give his or her opinion as to the best interests of the proposed conservatee and whether a conservatorship is necessary."[90]

Finally, San Francisco's Rules provide that, "[n]o written report is required or necessary unless requested by the Court."[91]

IX. REASONS UNDERLYING THE TRADITIONAL VIEW OF THE APPOINTED ATTORNEY AS A REPORTER TO THE COURT

Ancient doctrines and modern budget cuts underlie the courts' willingness to treat appointed attorneys in conservatorship cases as reporters rather than as advocates.

A. Assisting the Court

Utilizing appointed attorneys as reporters assists the court in making determinations as to what is best for the proposed conservatee. Under the doctrine of *parens patriae,* the court's actions in protecting an individual from harm due to his or her incapacity can be viewed as beneficial to the individual because the court proceeds with "the altruistic purpose of insulating the adult from choices that may endanger him and to ensure his 'best interest' is protected."[92]

That a court could lean on a report setting forth observations and conclusions from an attorney who is a known and responsible officer of the court is understandable. However, if the court needs someone to act as its agent in asserting the state's power of *parens patriae,* the court should appoint a guardian ad litem.

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B. Lack of Resources

An observer of the probate courts in action can see that the courts are crowded and that many conservatorships are established without trial. If the number of conservatorship trials were to increase substantially, the courts' resources would be stretched beyond what they are now. This lack of resources is likely a reason that courts have treated the appointed attorney as a reporter and advisor for the court rather than as advocate for the client.[93] If the cases seem simple, if resources are limited, and if the court is acting to protect the proposed conservatee, the steps of zealous and confidential advocacy can seem unnecessary.[94]

Although not as publicly apparent, the appointed attorney is also affected by the lack of resources. To the authors' knowledge, the courts in California do not uniformly approve compensation for appointed attorneys in conservatorship cases. The appointed attorney faced with a complicated case might be required to advance his or her own money to finance the proceedings, since payment is delayed and dependent on a hearing "upon conclusion of the matter."[95] The attorney risks objections to his or her fees, expenses, and costs and a judge's decision that he or she charged too much or incurred unnecessary expenses or costs. "[I]n the end, the attorney often winds up with compensation at a reduced rate or even no compensation at all."[96] While not necessarily always the motivating factor, the appointed attorney can minimize personal financial risk by reporting to the court his or her own opinions and conclusions and facilitating a quick resolution of the petition.

While a lack of resources is not a reason for the courts and appointed attorneys to shift the attorney's role from zealous advocate to reporter, it is a basis for understanding why that shift may have happened.

X. CALIFORNIA CASES IN WHICH THE APPOINTED ATTORNEY WAS AUTHORIZED TO ADVOCATE FOR HIS OR HER INDEPENDENT JUDGMENT WHEN REPRESENTING PERMANENTLY UNCONSCIOUS CONSERVATEES

The courts in *Schaeffer* and *Cornelius* both noted that attorneys had filed reports. Neither considered the propriety of the contents of the filings themselves, and neither wrestled with the question whether the appointed attorney could properly advocate positions contrary to the client's wishes. However, in cases involving permanently unconscious conservatees, who cannot communicate, California courts have issued holdings authorizing appointed attorneys to advocate the attorney's own conclusions. The logic of these decisions is not compelling, and if the decisions are not changed, they should be limited to their context.

A. Conservatorship of Drabick

In the first of these cases, *Conservatorship of Drabick,*[97] the court dealt with the issue of withdrawing life support from a permanently unconscious conservatee. An attorney was appointed to represent the conservatee. Since the attorney could not communicate with the client, the attorney investigated the case and, after that investigation, "came to agree with the conservator that [the conservatee] would have refused life sustaining treatment."[98]

Appellate counsel argued that the appointed attorney had a duty to advocate for the conservatee's life. The court disagreed. Citing the 1983 CEB publication Cal. Conservatorships 2d, it noted, "[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 interest."[99] It then concluded, "[w]hen the client is permanently unconscious, however, the attorney must be guided by his own understanding of the client's best interests. There is simply nothing else the attorney can do."[100]

B. *Conservatorship of Wendland*

In a second case, *Conservatorship of Wendland,*[101] another case involving a permanently unconscious conservatee and issues of withdrawal of life support, the Supreme Court approved the approach used in *Drabick*. In *Wendland,* the court noted that the appointed attorney for Mr. Wendland had supported withdrawing life support, "exercising his independent judgment."[102] The *Wendland* court did not analyze the propriety of this exercise of the appointed attorney's independent judgment; it simply cited *Drabick.*

XI. REASONS TO QUESTION *DRABICK* AND *WENDLEND*

A. The Flawed *Drabick* Analysis

The authors believe that the court in *Drabick* incorrectly analyzed the role of the appointed attorney in a conservatorship proceeding, and a decade later the court in *Wendland* mistakenly relied on *Drabick* without further analysis.

In *Drabick*, the court drew an improper analogy between the role of an appointed attorney in a child custody dispute and the role of an appointed attorney in a conservatorship

proceeding. The analogy stems from an over-extension of the Law Revision Commission Comment to Section 1470 regarding "appointment" of counsel, to that of the "role" of counsel. The court in *Drabick* acknowledged that section 1470 "does not specify counsel's role" in a conservatorship proceeding.[103] The court then noted that the Law Revision Commission's Comment to section 1470 provided that, "the court's discretionary *authority to appoint counsel* in conservatorship proceedings 'is comparable to the court's *authority to appoint private counsel* to represent the minor's interests in connection with a child custody issue arising in a proceeding under the Family Law Act.'"[104] While that analogy may be correct with regard to appointment, the court in *Drabick* went further, analogizing *the role of an attorney* in a child custody dispute to *the role of an attorney* in a conservatorship case. This logic does not hold.

The *Drabick* court could ground its decision on this analogy because it focused only on section 1470, and it failed to consider the body of California law that frames the attorney's role in conservatorship proceedings, especially *Flatt* and Business and Professions Code section 6068, subdivision (e)(1). Without this context, the Law Revision Commission's analogy of the court's *power to appoint* an attorney in the two types of cases put the *Drabick* court on a slippery slope which led the court to mistakenly analogize the *roles* of the appointed attorneys in the two different types of cases.

The second problem with the *Drabick* analysis is that it imported the attorney-client conflict rules from child custody and dependency cases into the adult world of conservatorship law. Historically, the courts and the legislature have treated child custody cases as unique and have authorized and required attorneys to assume conflicts of interest that attorneys cannot assume in other civil and criminal cases.[105] The propriety of the rules that allow attorneys to assume conflicts in custody and dependency cases is a matter of debate even in family law circles, and certainly not a proper subject in a probate form. Because even if the rules governing attorney-client conflicts make sense in a custody/dependency setting—and they may not—the rules never should have been imported into the conservatorship setting involving adults.

The final problem with the *Drabick* decision is that the court also rested its conclusion on the notion that an appointed attorney with a non-communicative client could do nothing other than rely on his or her own conclusions, stating: "[t]here is simply nothing else the attorney can do."[106] An attorney who relies on his or her own conclusions is an attorney without a client, which is a dangerous and lonely place to be. Besides, there is something else that the attorney can do—the attorney can ask the court to rescind his or her appointment.

The appointed attorney who cannot communicate with the client cannot ask the court to appoint a guardian ad litem because, as discussed above, California does not have any rule similar to Model Rule 1.14 permitting the appointed attorney that leeway. However, the appointed attorney can still resign. When the attorney takes this action, he or she is not revealing a client confidence. The analogy is to an attorney who seeks removal from a civil case under California Rules of Professional Conduct Rule 1.16 (former Rule 3-700), and whose declaration cannot reveal client confidences. If the appointed attorney's resignation is accepted, the court can then appoint a guardian ad litem or other properly authorized officer of the court to determine the interests of the non-communicative proposed conservatee and who could, if necessary, retain an attorney to advocate those interests.

The court in *Wendland* did not review the *Drabick* analysis; it simply adopted it. *Wendland* only perpetuates the weaknesses of the *Drabick* opinion.

XII. SOURCES OF LAW SUGGESTING THAT THE APPOINTED ATTORNEY SHOULD SERVE AS ADVOCATE FOR THE PROPOSED CONSERVATEE

A. Generally

Both the common law and sister state statutes support the notion that the proper role for an appointed attorney is to act as advocate for the client, not as reporter to the court.

B. The Common Law

1. California

In *Conservatorship of John L.*,[107] an LPS proceeding, the Supreme Court made the sweeping statement that, "*[l]ike all lawyers*, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf."[108] In addition, the appointed attorney has a duty to "perform in an effective and professional manner."[109] This ruling makes clear that in LPS conservatorship matters the attorney's role is as an advocate.

2. New Jersey

In 1994, not long after the publication of the AP articles noted above, the New Jersey Supreme Court decided *In re M.R.*[110] In *M.R.*, the divorced parents of a developmentally-

disabled adult woman litigated whether she should live with her father or with her mother.

The trial court appointed an attorney to represent the woman. At the time, New Jersey law required the appointed attorney, "to file, in lieu of filing an Answer, a written report of findings and recommendations to the court at least three days prior to the hearing."[111] M.R.'s appointed attorney had reported that M.R. had expressed a preference to live with her father, but he ultimately took the position that either household could be approved. Given the appointed attorney's change of position and noting "substantial confusion over the role of attorneys appointed on behalf of children" in analogous cases,[112] the court determined that it needed to analyze the appointed attorney's proper role in a contested proceeding.

The court focused on the difference between an appointed attorney and a guardian ad litem. The key distinction between the roles, it noted, is that an attorney's services are to the client, and a guardian ad litem's services are to the court. The attorney, "takes an active part in the hearing. . . ."[113] On the other hand, the guardian ad litem acts as an "independent fact finder and evaluator," who "submits a written report and is available to testify."[114]

The *M.R.* court pointed out several reasons underlying its decision distinguishing appointed attorneys from guardians ad litem. First, the two appointees could take different positions, with the attorney advocating the client's stated desires and the guardian ad litem urging his or her analysis of the client's best interests.[115] Second, the appointed attorney would be required to work through the attorneys for other parties in the case, while the guardian ad litem could interview parties directly.[116] "Finally, a guardian may merely file a report with the court, but the attorney should zealously advocate the client's cause."[117]

Urging that an attorney should be first and always an advocate, the *M.R.* court concluded:

> Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system. An attorney proceeds without well-defined standards if he or she forsakes a client's instructions for the attorney's perception of the client's best interests. [Internal citation omitted.] Further, "if counsel has already concluded that his client needs 'help,' he is more likely to provide only procedural formality, rather than vigorous representation. [Internal citation omitted, stating "[i]f the attorney is directed to consider the client's ability to make a considered judgment on his or her own behalf, the attorney essentially abdicates his or her advocate's role and leaves the client unprotected from the petitioner's allegations."] Finally, the attorney who undertakes to act according to a best-interest standard may be forced to make decisions concerning the client's mental capacity that the attorney is unqualified to make. [Internal citation omitted.][118]

Although the *M.R.* court was dealing with a case involving a developmentally-disabled individual, it did not limit its analysis to just that sort of case, and it concluded with general guidelines "to assist the attorney for an incompetent."[119]

3. Connecticut

In *Gross v. Rell,*[120] a case dealing with an attorney's assertion of quasi-judicial immunity, the court dealt carefully with the appointed attorney's functions in a conservatorship case.

The court began its analysis with the proposition that, in a conservatorship case, the appointed attorney should maintain a normal client-lawyer relationship as far as possible. This reflects the common law rule and ABA Model Rule 1.14, that:

> When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as [the client would define them].[121]

The court then noted that others had observed that:

> Even though this choice [between advocating for the client's wishes and protecting the client's best interests] may be difficult to make personally, its resolution among courts and writers has been rather uniform. Most favor advocacy. The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate.[122]

Although the law in Connecticut is not the same as the law in California, the fundamental thinking of the *Gross v. Rell* court is solid. That reasoning could and should be imported into California.

4. Restatement Third of the Law Governing Lawyers

The Restatement Third of the Law Governing Lawyers requires an attorney representing a client with diminished capacity to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client . . . . "[123] It then defines the attorney's pursuit of "the best interests of the client," as pursuing, "the lawyer's reasonable view of the client's objectives or interests as the client would define them. . . . ."[124] The attorney is to represent the client's objectives, as the client would define them, not as the attorney or someone else would define them.

In the commentary, the Restatement emphasizes that a client's disagreement with his or her attorney is not evidence of incapacity, and that clients with diminished capacity should be permitted to make their own decisions as much as possible.[125]

C. Statutes in Other States

Several states have adopted statutes clarifying the role of the appointed attorney.

1. Alaska

Alaska's statutes require the appointed attorney to be an advocate and not a reporter, and also make a clear delineation between the duties of the attorney and the duties of the guardian ad litem.

Defining the duties of the appointed attorney as an advocate, the Alaska code provides, "[t]he principal duty of an attorney representing a ward or respondent is to represent the ward or respondent zealously."[126] The statute then defines "zealous representation" to include "at least" "personal interviews with the ward or respondent," explaining the nature of the case, "if possible to the ward or respondent in terms that the ward or respondent can understand," and "securing and presenting evidence and testimony and offering arguments that would tend to protect the ward's or respondent's rights. . . ."[127]

The Alaska law specifies that the proposed conservatee is responsible for determining his or her interests.[128] The attorney in Alaska has no authority to determine the client's interests. If the ward or respondent is incapable of effectively determining and communicating his or her interests, then the court is to appoint a guardian ad litem for the ward or respondent.[129] The guardian ad litem can then determine the ward or respondent's interests, after considering the circumstances that the ward or respondent would consider and after encouraging the ward or respondent to participate in the decision as much as possible.[130] Again separating the role of the attorney from the role of the guardian ad litem, the statute authorizes the court to appoint the attorney as guardian ad litem but, if it does, the person's authority as attorney terminates.[131]

2. Washington

Washington, too, specifies that the attorney for a proposed conservatee is to act as an advocate for the client's interests, without authority to determine those interests.[132] The statute provides, "[c]ounsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests."[133]

Like Alaska, Washington draws a clear distinction between the role of the attorney and the role of a guardian ad litem. "Counsel's role shall be distinct from that of the guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences." [134]

3. Vermont

Turning to the East Coast, Vermont's code requires the appointment of an attorney for a proposed protected person "when an initial petition for guardianship is filed." The decision to appoint an attorney is not in the court's discretion.[135] The attorney is required to explain the case to the proposed ward "to the maximum extent possible."[136]

As in Alaska and in Washington, Vermont's code then requires the appointed attorney to act as an advocate, and distinguishes the attorney's role from the role of a guardian ad litem:[137]

> Counsel for the respondent shall act as an advocate for the respondent and shall not substitute counsel's own judgment for that of the respondent on the subject of what may be in the best interest of the respondent. Counsel's role shall be distinct from that of a guardian ad litem if one is appointed.

XIII. CONCLUSION

California law and Rules of Professional Conduct require appointed attorneys to be confidential, loyal, and zealous advocates for their clients. There is no exception to these ethical duties in the probate court.

Given the strictness of the attorney's duties of confidentiality and loyalty in California, court rules encouraging or requiring appointed attorneys to file reports with the court or otherwise to assist in the resolution of conservatorship proceedings are contrary to those duties. Given those professional duties, many if not most of the reports that are filed around the state could subject their authors to discipline, possibly to malpractice liability, or to risk of a suit for depriving a client of constitutional rights.

Like Alaska, Vermont, and Washington, California must recognize that appointed attorneys have a duty to act as zealous advocates for their clients and for the wishes that their clients communicate to them. Attorneys should not be required or permitted to put their determination of a client's interests ahead of the client's own expression of his or her interests. To the extent that attorneys cannot effectively represent the interests of a client who is unable to make or communicate informed decisions, those interests should be determined and reported to the court by a guardian ad litem. Court rules requiring or authorizing an appointed attorney to report to the court should be eliminated.

Hughes & Pizzuto, APC, San Diego, California

1 Division 4 of the Probate Code is titled, "Guardianship, Conservatorship, and Other Protective Proceedings."

2 Gottlich, *Maryland Code Revisions,* (2000) 7 Md. J. Contemp. L. Issues, 191, 198.

3 *In re Josiah Z.* (2005) 36 Cal.4th 664, 680; *Cal State Auto Ass'n Inter-Ins. Bureau v. Bales* (1990) 221 Cal.App.3rd 227, 231.

4 This article will refer to conservatees and proposed conservatees, together, as proposed conservatees.

5 *Late Corp. of Church of Jesus Christ v. United States* (1889) 136 U.S. 1, 56-58. (Some courts refer to *patres patriae* and other to *parens patriae.* The authors make no distinction, except to generally understand that one is plural and the other is singular).

6 *Flatt v. Superior Court* (1994) 9 Cal.4th 275.

7 *Id.* at 289 (quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116 (citations omitted, emphasis added)).

8 American Bar Association Model Rule 1.14 provides:

Rule 1.14: Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ABA Model Rules Prof. Conduct, rule 1.14, ([as of November 6, 2018]).

9 Administrative Order 2018-05-09 filed in the Supreme Court on May 10, 2018.

10 *Id.*; Bloomberg BNA, *Fate of California Rule Overhaul Now in Court's Hands* (April 5, 2017).

11 Administrative Order 2018-05-09 filed in the Supreme Court on May 10, 2018.

12 *Ibid.*

13 *Ibid.*

14 *Conservatorship of Schaeffer* (2002) 98 Cal.App.4th 159.

15 *Conservatorship of Cornelius* (2011) 200 Cal.App.4th 1198.

16 *Conservatorship of Schaeffer, supra,* 98 Cal.App.4th 159.

17 *Id.* at p. 161.

18 *Id.* at p. 162.

19 *Ibid.*

20 *Conservatorship of Schaeffer, supra,* 98 Cal.App.4th at p. 164.

21 *Conservatorship of Cornelius, supra,* 200 Cal.App.4th 1198.

22 *Conservatorship of Cornelius, supra,* 200 Cal. App. 4th 1198.

23 *Id.* at p. 1202.

24 *Ibid.*

25 *Conservatorship of Cornelius, supra,* 200 Cal. App. 4th at p. 1202.

26 *Ibid.*

27 *Conservatorship of Cornelius, supra,* 200 Cal.App.4th at p. 1203.

28 *Conservatorship of Cornelius, supra,* 200 Cal.App.4th at p. 1207.

29 *Id.* at 1203.

30 *Conservatorship of Cornelius, supra,* 200 Cal.App.4th at p. 1205.

31 1, Ingham, *California Conservatorship Practice* (Cont. Ed. Bar 2018), section 7.27.

32 *Ibid.*

33 *Ibid.*

34 *Id.* at section 7.28.

35 Prob. Code, section 810, subd. (b).

36 Prob. Code, sections 1470, 1471.

37 Prob. Code, section 1003.

38 All references to "section" are references to the California Probate Code.

39 Prob. Code, section 1826, subd. (a)(11)(A).

40 O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person,* (2002) 31 Stetson L. Rev. 686, 689.

41 O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person, supra,* 31 Stetson L. Rev. at p. 691.

42 *Id.,* citing *Bliss v. Bliss,* (Md. 1918) 104 A. 467, 471.

43 *Ex parte Ah Peen* (1876) 51 Cal. 280.

44 *Late Corp. of Church of Jesus Christ v. United States* (1889) 136 U.S. 1, 56-57. Some courts use *"patres patriae."* Others use *"parens patriae."* The authors have no preference and have chosen to use parens patriae for convenience, except in quotes.

45 O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person, supra*, 31 Stetson L. Rev. at p. 694.

46 Teaster, Wood, Lawrence & Winsor C. Schmidt, *Wards of the State: A National Study of Public Guardianship,* (2007) 37 Stetson L. Rev. 193, at p. 197; O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person, supra,* 31 Stetson L. Rev. at p. 694. Many states use the terms "guardian" and "guardianship" to describe the protective proceeding that we, in California, call "conservator" or "conservatorship." The article uses all of the terms to refer to protective proceedings for incapacitated and allegedly-incapacitated adults.

47 Hensley, *Due Process Is Not Optional: Mississippi Conservatorship Proceedings Fall Short On Basic Due Process Protections For Elderly And Disabled Adults* (2017) 86 Miss. L.J. 715, 748 et seq.

48 1, Ingham, *California Conservatorship Practice*, *supra,* sections 7.26, 7.27. (This article refers to a proposed conservatee because a California court can appoint an attorney for a proposed conservatee and also for an adult who has already been conserved. Prob. Code, sections 1470 & 1471).

49 *Cole v. Superior Court of San Francisco,* (1883) 63 Cal. 86, 89; see also *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 535.

50 *McClintock v. West* (2013) 219 Cal.App.4th 540, 549-550.

51 *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.

52 *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 446.

53 *Flatt v. Superior Court*, *supra*, 9 Cal.4th 275.

54 *Conservatorship of Sides* (1989) 211 Cal.App.3d 1086, 1093.

55 *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454; see *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 644.

56 *In re Josiah Z.* (2005) 36 Cal.4th 664, 681 (citations omitted).

57 *McClintock v. West* (2013) 219 Cal.App.4th 540, 549.

58 *Id.* at p. 549.

59 Prob. Code, section 2451.5.

60 *Regency Health Servs. v. Superior Court* (1998) 64 Cal.App.4th 1496, 1503-1504.

61 *Ibid.*

62 *Conservatorship of Schaeffer, supra*, 98 Cal. App. 4th 160, *Conservatorship of Cornelius, supra,* 200 Cal. App. 4th 1198.

63 *McClintock v. West, supra*, 219 Cal.App.4th at p. 551, see also *Bergeron v. Boyd* (2014) 223 Cal.App.4th 877 (child custody evaluator entitled to quasi-judicial immunity).

64 *McClintock v. West, supra*, 219 Cal.App.4th at pp. 551-552 (original emphasis; citations omitted).

65 *Gross v. Rell* (2012) 304 Conn. 234, 259-273 [40 A.3d 240, 257-265].

66 The authors have not located a published California case that deals with the issue whether an appointed attorney is entitled to quasi-judicial immunity. However, using an analysis similar to that in *Gross v. Rell, supra,* the court in *Webb v. Louw* (2003) Cal.App.Unpub Lexis 8175 determined that an appointed attorney was not entitled to quasi-judicial immunity.

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

68 ABA Model Rules Prof. Conduct, rule 1.14 (a).

69 Rule 1.14, Client with Diminished Capacity. (2018). In American Bar Association, Center for Professional Responsibility. Model Rules of Professional Conduct <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity.html > (as of November 6, 2018).

70 Prob. Code, sections 1470-1474.

71 *Conservatorship of Drabick* (1988) 200 Cal.App.3rd 185, 213 (disapproved on other grounds in *Conservatorship of Wendland* (2001) 26 Cal.4th 519).

72 *In re Sara D.* (2001) 87 Cal.App.4th 661, 667 ["We know of no case law addressing the procedure for appointment of a guardian ad litem for an allegedly incompetent adult."].

73 *Sarracino v. Superior Court* (1974) 13 Cal.3rd 1, 11-13; see also *In re Sara D.* (2001) 87 Cal. App. 4th 661, 667.

74 *California Conservatorship Practice*, *supra*, at section 7.2.

75 *Id.* at section 7.4.

76 *Id.* at section 7.3.

77 Bus. & Prof. Code, section 6068, subd. (e)(1); A statute designed to override those fundamental duties would need to be specific. (*In re Greg F.* (2012) 55 Cal.4th 393, 407 [the Legislature is presumed to be aware of all laws in existence when it passes or amends a statute and the failure of the Legislature to change the law when the subject is before it is indicative of an intent to leave the law as it stands]).

78 *California Conservatorship Practice*, *supra,* at section 7.25.

79 *California Conservatorship Practice, supra,* at section 7.27.

80 *Ibid* (citing *Sullivan v. Dunne* (1926) 198 Cal. 183).

81 Cal. Civ. Code, sections 38 & 1556; Rule of Prof. Conduct, rule 3-700 (C)(1)(d).

82 Super. Ct. L.A. County, Local Rules, Ethical Guideline 4.125. The notion that the appointed attorney must not act only as an attorney, but as an agent to "assist in the resolution of the matter to be decided," suggests that the appointed attorney is not just an attorney with a client, but also has a separate duty to the court, a duty that extends

beyond representing the client. However, Bus. & Prof. Code, section 6068(l) and *Flatt* provide that an attorney has duties solely to the client.

83 Super. Ct. San Diego County, Local Rules, rule 4.18.10

84 Super. Ct. San Diego County, Local Rules, rule 4.18.5

85 Super. Ct. San Francisco County, Local Rules, rule 14, subd. Q 2.

86 *Id.* at rule 14, subd. Q 3.

87 *Id.* at rule 4, subd. Q 4.

88 Super. Ct. San Francisco County, *supra,* at rule 14, subdivision Q 5. The rules require the attorney to report on matters that are subject to the attorney-client privilege, and suggest that the attorney might give an opinion regarding the necessity of conservatorship that would differ from the client's opinion.

89 *Ibid.*

90 *Ibid.*

91 Super. Ct. San Francisco County, *supra,* at rule 14, subd. Q 5.

92 Hensley, *Due Process Is Not Optional: Mississippi Conservatorship Proceedings Fall Short On Basic Due Process Protections For Elderly And Disabled Adults* (2017) 86 Miss. L.J. 715, 727.

93 "Opponents of the advocacy role for the defendant's attorney cite examples of unnecessary and protracted litigation that increases costs for all parties and that results in the imposition of a guardianship." Gottlich, *The Role Of The Attorney For The Defendant In Adult Guardianship Cases: An Advocate's Perspective* (1995/1996) 7 Md. J. Contemp. L. Issues 191, 215. Gottlich's article inspired many of the thoughts and much of the organization of this article, and credit is given to her for a thoughtful and informative piece of writing.

94 The courts' ongoing lack of resources to properly supervise conservatorships was noted in this Journal in 2007. Corey, Lodise, & Stern, *Crisis in Conservatorships* (2007) California Trusts and Estates Quarterly, vol. 12, Issue 4, p. 44.

95 Prob. Code, section 1472, subd. (a)(1).

96 *California Conservatorship Practice, supra,* at section 7.10.

97 *Conservatorship of Drabick* (1988) 200 Cal.App.3rd 185 (criticized on other grounds in *Conservatorship of Wendland* (2001) 26 Cal. 4th 519).

98 *Id.* at p. 212.

99 *Conservatorship of Drabick, supra,* 200 Cal.App.3rd at p. 212.

100 *Ibid.*

101 *Conservatorship of Wendland, supra,* 26 Cal.4th 519.

102 *Id.* at p. 526.

103 *Conservatorship of Drabick, supra,* 200 Cal.App.3rd at p. 213.

104 *Conservatorship of Drabick, supra,* 200 Cal.App.3rd at p. 213 (italics added) (criticized on other grounds in *Conservatorship of Wendland* (2001) 26 Cal. 4th 519).

105 Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases* (1996) 64 Fordham L. Rev. 1857, 1860-1862.

106 *Conservatorship of Drabick, supra,* 200 Cal.App.3rd at p. 212.

107 *Conservatorship of John L.* (2010) 48 Cal.4th 131.

108 *Id.* at 151 (emphasis added).

109 *Id.* at 152 (quoting *Conservatorship of Benvenuto* (1986) 180 Cal. App. 3rd 1030, 1037 fn. 6).

110 *In re M.R.* (1994) 135 N.J. 155.

111 *In re M.R., supra,* 135 N.J. at pp. 172-173.

112 *Id.* at p 174.

113 *In re M.R., supra,* 135 N.J. at p. 173.

114 *Ibid.*

115 *In re M.R., supra,* 135 N.J. at p. 175.

116 *Ibid.*

117 *Ibid.*

118 *In re M.R., supra,* 135 N.J. at p. 176 (internal citations omitted).

119 *In re M.R., supra,* 135 N.J. at p. 177.

120 *Gross v. Rell* (2012) 304 Conn. 234, 259-273.

121 Rest. 3rd The Law Governing Lawyers, sections 24A (1) and (2).

122 *Gross v. Rell, supra,* 304 Conn. 234 at p. 260 (quoting P. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client,* (1987) Utah L. Rev. 515, 548-49).

123 Rest. 3rd The Law Governing Lawyers section 24A(1).

124 Rest. 3rd The Law Governing Lawyers, *supra,* at section 24A(2).

125 Rest. 3rd The Law Governing Lawyers, *supra,* at comment c "Maintaining a normal client-lawyer relationship so far as possible."

126 13 AK ST Ch. 26, section 13.26.246(a).

127 *Ibid.*

128 13 AK ST Ch. 25, section 13.25.246(b).

129 *Ibid*; see also 13 AK ST Ch. 26, section 13.26.041(a).

130 *Id.* at section 13.26.041(b).

131 *Id.* at section 13.26.041(c).

132 11 WA ST Ch. 11.88, section 11.88.045.

133 *Id.* at section 11.88.045(b).

134 11 WA ST, *supra,* at section 11.88.045(b).

135 14 V.S.A. section 3065(a)(1)(A).

136 14 V.S.A. section 3065(b).

137 *Ibid.*

Straight & Narrow ETHICS

Noisy Withdrawals: Urban Bankruptcy Legend or Invaluable Ethical Tool?

Contributing Editor:
C.R. "Chip" Bowles Jr.
Greenebaum Doll & McDonald PLLC
Louisville, Ky.[1]
cdr@gdm.com

One of the greatest professional nightmares a chapter 11 debtor's attorney can face is discovering, during a bankruptcy case, that the people running the debtor are crooks.[2] Such a discovery will immediately cause the attorney to seriously consider whether she should withdraw from representing the debtor.[3] Assuming that the individuals acting as debtors-in-possession (DIPs) do not take steps to rectify their improper actions, this action is probably inevitable.[4] At such a time, many bankruptcy practitioners think in terms of the famous (or infamous) "noisy withdrawal" as a way out. Unfortunately, there is little authority that describes what constitutes a noisy withdrawal in a bankruptcy proceeding or that explains exactly how a noisy withdrawal may be accomplished. This article attempts to address the question of what a noisy withdrawal is, how a noisy withdrawal can be accomplished and what steps an attorney must take to ensure that her noisy withdrawal is effective.

Please note, for purposes of this article, it will be assumed that the confidences of a chapter 11 client[5] will be revealed if the attorney takes any action to disclose the fraud to the bankruptcy court. Although an interesting question, it is beyond the scope of this article to determine whether your client is the chapter 11 bankruptcy estate[6] or the DIP that operates the debtor.[7]

Formal Opinion 92-366—the Mother of "Noisy Withdrawals"

The genesis of what constitutes a "noisy withdrawal" can be found in ABA Formal Opinion 92-366. Under that opinion, a noisy withdrawal is a withdrawal from the representation of a client accomplished by a disavow of work product provided by the attorney.[8] The ABA Committee on Ethics and Professional Responsibility concluded that an attorney could only make a "noisy withdrawal" if the attorney's work product was being used or was intended to be used in a *future* fraud or criminal activity. Opinion 92-366 stated that a noisy withdrawal was a permissive step the attorney *could take,* not a required step.[9] In fact, the ABA Committee further held that if a fraud had already been completed, or if the attorney did not know or reasonably believe that the client would continue the fraud or commit a future fraud through the use of the attorney services or work product, the attorney *could not* make a noisy withdrawal.[10]


C.R. "Chip" Bowles Jr.

While Opinion 92-366 is important to understand the ethical framework surrounding a noisy withdrawal, it is not directly applicable to a typical bankruptcy situation. In a fact pattern presented to the ABA Committee, the fraud involved the use of an attorney's opinion letter, which was based on false evidence given to the attorney by his clients. The opinion letter was used to obtain a loan and was not used in proceedings before a court. Indeed, Opinion 92-366 noted that while the ABA Committee had considered the ramifications of Rule 1.6[11] of the Model Rules of Professional Conduct, given the facts submitted to the ABA Committee, it did not have to address the issue of whether Model Rule 3.3[12] requiring the disclosure of the fraud to the tribunal would require a noisy withdrawal or even a more explicit disclosure.[13]

Strike Up the Band: A Noisy Withdrawal in Bankruptcy

Chapter 11 debtor representations, unlike many legal services provided by attorneys in civil practice, tend to involve activities that are generally governed by a tribunal, where counsel has been appointed by the bankruptcy court and all activities of debtor's counsel are technically done before the tribunal.[14] Therefore, unlike the situation governed by Opinion 92-366, Model Rule 3.3 is almost always implicated when the question of client fraud arises in chapter 11 debtor representation. It is the difficulties in balancing an attorney's duties to keep certain information confidential under Rule 1.6, with a duty to disclose fraud on a tribunal under Rule 3.3, that places debtor's counsel in such a difficult position.[15]

In many respects, this difficulty is misperceived. The vast majority of cases[16] clearly indicates that a chapter 11 debtor's counsel's duty to the court, under either Model Rule 3.3 or under the common-law duty of counsel as an "officer of the court," will override his duty to maintain client confidentiality under Model Rule 1.6.[17] However, even if counsel for a chapter 11 debtor has a duty to disclose fraudulent activity to a court, there is no clear-cut rule as to how that disclosure should be made.[18] Indeed, although Rule 3.3 does require disclosure of facts necessary to prevent fraud

1 The author would like to thank Tracy Sullivan, an associate at Greenebaum Doll & McDonald PLLC, for her assistance with this article.

2 *In re Bonneville Pac Corp.*, 196 B.R. 868 (Bankr. D. Utah); *aff'd., in part, rev'd., in part, Hansen, Jones & Leta P.C. v. Segal,* 220 B.R. 434 (D. Utah 1998).

3 ABA Model Rule of Professional Conduct 1.16(a)(1) requires an attorney to withdraw from representing a client "if the representation will result in violation of the Rules of Professional Conduct or other law." Rule 1.2 states that an attorney may not "counsel...or assist a client, in conduct that the lawyer knows is criminal or fraudulent..."

4 *Id. See, also,* ABA Formal Opinion 92-366 (1992); Rule 3.3, Comment Paragraph 11.

5 *Compare In re Perez,* 30 F.3d 1209, 1219 (9th Cir. 1994) (bankruptcy estate is client of chapter 11 debtor's attorney) with *Hansen,* 220 B.R. 434, 449 (DIP is client).

6 *See In re Perez,* 30 F.3d at 1219; *Hansen,* 220 B.R. at 448-449 (citing cases).

7 *See Hansen,* 220 B.R. at 449; *In re Sidco Inc.,* 173 B.R. 194 (E.D. Cal. 1994).

8 Opinion 92-366. It is important to note that there was strong dissent to this opinion that would have found that the attorney could not disavow any work product under the facts as presented.

9 *Id.* ("A lawyer may disavow any of her work product to prevent its use in the client's continuing or intended future fraud..." (emphasis added)).

10 *Id.* ("If the fraud is completed and the lawyer does not know or reasonably believe that the client intends to continue the fraud...the lawyer may not disavow any work product.")

11 (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantially bodily harm, or
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

12 (a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal,
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal to make an informed decision, whether or not the facts are adverse.

13 *See, generally,* Rapoport and Bowles, "Has the DIP's Attorney Become the Ultimate Creditor's Lawyer in Bankruptcy Reorganization Cases?" 5 Am. Bank. Inst. L.R. 47, 64 n. 140 (1997) (collecting cases where debtor's counsel were required to disclose fraud or DIP's breaches of fiduciary duty).

14 *See, generally, In re Ward,* 894 F.2d 771, 776 (5th Cir. 1990).

15 *See In re DeVlieg,* 174 B.R. 497, 502 n. 7 (N.D. Ill. 1994) (counsel who sued debtor's corporate officers against their direction was found to have followed duty to estate in filing suit, but court refused to "pass on whether such behavior would comply with applicable standards of professional responsibility").

16 *See* Note 12, *supra.*

17 Opinion 92-366, n. 8 ("Rule 3.3...whose text contains an explicit exception to the confidentiality requirement of Rule 1.6...").

18 *See* Rapoport and Bowles, "DIP's Attorney" at 65, n. 147.

by a client on a tribunal, attorneys should not ignore the dictates of Model Rule 1.6 in a frenzied effort to comply with Rule 3.3.[19]

Rule 3.3 Comment 11, "Remedial Measures," offers some important guidance on this point. Comment 11 states in pertinent part that "if perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to redemonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court." It would seem from this comment that immediate disclosure of fraud to the court is not the required or even preferred ethical course of action in a situation where an attorney has knowledge of a client's fraud and less drastic action than disclosure will be effective in alerting the tribunal of the problem. However, steps must be taken to remedy any fraud perpetuated by a client on a court. Therefore, given the unique nature of bankruptcy, where a client refuses to correct the false testimony or disclose the fraud, a noisy withdrawal may very well be the preferred course of action in order to disclose the fraudulent conduct.

Tuning Your Tuba: How to Properly Make a "Noisy Withdrawal" in Bankruptcy Court

Assuming that a bankruptcy court could be alerted as to a potential "problem" with a debtor, or more importantly, the people running the debtor as DIP, by a noisy withdrawal,[20] such a withdrawal may be the most appropriate course of action. Given the fact that bankruptcy courts must approve both the hiring and the withdrawal of debtor's counsel in a chapter 11 proceeding, performing a noisy withdrawal is often easier in a bankruptcy case than it is in other situations. Further, given the frequent active participation of numerous other groups in a bankruptcy proceeding, a proper motion for a noisy withdrawal will more than likely have the desired effect of alerting the court to a potential fraud on the tribunal than it would in other proceedings.[21]

In order to effectively make a noisy withdrawal, counsel should include three things in their pleading in order to properly alert the court as to the possibility of a serious issue concerning the DIP's activities. First, upon discovery of the fraud and the failure of the attorney to have the DIP rectify and/or disclose the fraud, counsel should move on an *expedited basis* to be permitted to withdraw as counsel for the estate. Delaying withdrawal as debtor's counsel after determining your clients will not rectify or disclose the fraud[22] will not only allow your client's fraud to continue uninvestigated, but may be a violation of your own fiduciary duty to the bankruptcy estate,[23] as well as your ethical duties under the State Rules of Professional Conduct.

The second element required to make an effective noisy withdrawal is to set forth, as your primary grounds for withdrawal, that continued representation is impossible under your applicable state rules of ethics. Depending on the circumstances, you may wish to cite Rule 1.2,[24] which prohibits attorneys from assisting a client in a crime or fraud; Rule 1.16,[25] which requires withdrawal of representation when continued representation of a client will result in a violation of the rules; and/or Rule 3.3, which governs candor to the tribunal. Not only will invoking these ethics rules make it far more likely that the court will grant the motion to withdraw, it will also clearly illustrate to the court the underlying reasons for the withdrawal and the need for additional inquiry without having to directly divulge any client confidential information.

Finally, if necessary under the circumstances of your case, in your motion to withdraw you may also have to disavow any pleadings based on your client's fraud or on false evidence.[26] Whether this should be included in the motion to withdraw will depend on the individual facts and circumstances of your case, but counsel cannot continue to allow the court or other third parties in a case to be deceived or defrauded by documents based on false evidence, perjured testimony or some other variety of a client's fraud.

The Female Nordic Opera Star Begins Her Final Aria: Conclusion

Exposing fraud by a DIP as the chapter 11 debtor's counsel is a difficult task, especially given the fact that the people who have committed the fraud are likely the ones who hired you as debtor's counsel and from whom you take your orders.[27] A noisy withdrawal gives you a middle ground on which to fulfill

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19 *See In re Brennan*, 187 B.R. 135, 150 (Bankr. D. N.J. 1995) (generally discussing balancing Rule 1.6 concerns with Rule 3.3 duty to courts).

20 It is important to note that in certain situations (*i.e.*, the debtor's president calling from the airport with $1 million of the debtor's cash and a one-way ticket to the Crook Islands), only immediate and direct disclosure of the fraud will be an adequate remedy under Rule 3.3.

21 In a case with competent counsel, a well-done "noisy withdrawal" motion will at least draw motions for 2004 exams of the debtor and more likely motions for the appointment of a trustee or receiver.

22 Rule 3.3, Comment 11.

23 *See, generally, In re Banie Reed Buick-GMC Inc.*, 164 B.R. 378 (Bankr. S.D. Fla. 1984).

24 Rule 1.2, Scope of Representation.

25 Rule 1.16, Declining or Terminating Representation.

26 Opinion 92-366.

27 *See* "The Debtor's Lawyer as Trojan Horse," reprinted in Warren & Westbrook, *The Law of Debtors and Creditors: Text Cases and Problems* (3d ed. 1996), for a discussion of why counsel for the debtor's first duty may be to oust the person who hired him.

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your ethical and fiduciary duties to the bankruptcy court and the bankruptcy estate without having to directly disclose a client's confidences directly to the tribunal or other parties. Given the nature of bankruptcy, if a noisy withdrawal is not deemed sufficient by a bankruptcy court, the court has other options, including appointing a trustee or examiner who can waive the attorney/client privilege and question you about the fraud, thereby bypassing the Rule 1.6 issues, or simply taking you "off the hook" by determining that there is no attorney/client privilege concerning the actions of the parties that are conducting the fraud (*i.e.*, the DIP) and ordering you to reveal any material facts concerning fraud to the court or any other appropriate party. Hopefully, the ethical nightmare discussed above will not happen to you, but in the event that you are faced with such an ethical disaster, be sure to consider the loud, proud and noisy withdrawal as a way out of your dilemma. ■

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Editor's Note:

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct Cross Reference Chart for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

FORMAL OPINION NO 1989-112

ISSUE:

May an attorney institute conservatorship proceedings on a client's behalf, without the client's consent, where the attorney has concluded the client is incompetent to act in his best interest?

DIGEST:

Although the attorney may feel that it is in the client's best interest to do so, it is unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes, since by doing so the attorney will be divulging the client's secrets and representing either conflicting or adverse interests. However, should the client's conduct interfere with or unduly inhibit the attorney's ability to carry out the purpose for which the attorney was retained, withdrawal may be appropriate.

AUTHORITIES INTERPRETED:

Rules of Professional Conduct 3-110, 3-310, 3-700 and 5-210 of the State Bar of California. Business and Professions Code section 6068, subdivision (e).

DISCUSSION

The Committee has been asked to opine on the ethical propriety of an attorney instituting conservatorship proceedings on behalf of a client but against that client's express wishes. For purposes of this discussion, it is assumed that the client's behavior patterns and dealings with his attorney over a significant period of time have convinced the attorney that the client requires a conservator. It is also assumed that other lawyers in the community would have a reasonable basis for concluding the same.

1. Duty to Protect Client Secrets

This situation is governed broadly by Business and Professions Code section 6068, subdivision (e), which provides that an attorney has the duty to:

> maintain inviolate the confidence, and at every peril to himself [or herself] to preserve the secrets, of his or her client.

What the attorney has seen or heard during the course of the relationship with the client may be a client "secret." (See State Bar Formal Opinion 1987-93 which states ". . . the attorney-client relationship involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between a client and his attorney.") Here, it is assumed that the attorney has spent considerable time in the client's presence, observing his behavior and coming to the conclusion that he can no longer properly care for himself.[1]

It is also assumed that information imparted to the attorney by the client during the course of their relationship of confidence, while not necessarily a protected "communication" (see Evidence Code, section 952), would be embarrassing or detrimental to the client if divulged by the attorney to third parties, and as such qualifies as a "secret." (State Bar Formal Opinions 1988-96 and 1987-93.)

By instituting conservatorship proceedings, the attorney will not only be disclosing such client secrets to the court, but also to any necessary third parties (including family members) called upon to act in the conservatorship role. An attorney is absolutely prohibited from divulging the client's secrets gained during the attorney-client relationship, and from acting in any manner whereby the attorney is forced to use such secrets to the client's disadvantage. (*Stockton Theatres v. Palermo* (1953) 121 Cal.App.2d 616 [264 P.2d 74].) The Committee thus concludes that the attorney may not divulge what the attorney has observed of the client's behavior.

While the American Bar Association has adopted a model rule providing that, under certain circumstances, an attorney may initiate conservatorship proceedings,[2] this rule has not been adopted in California.

2. Conflicting and Adverse Interests

Rule of Professional Conduct 3-310[3] provides that an attorney cannot represent conflicting interests, absent the *informed* written consent of all parties concerned, and cannot accept employment adverse to a client or former client absent the same consent. This rule creates two stumbling blocks in the situation under consideration. First, the attorney will necessarily be advocating and protecting the interests of those third parties with whom the client is coming into contact on a regular basis (including family members); and second, it is questionable whether the client, assuming he is unable to tend to his needs, can understand sufficiently the complexities of this dilemma to provide informed consent to the attorney's representation of conflicting interests. Thus, the conflict may not be waivable.

Rule 3-310 further contemplates that if the attorney has had a "relationship" with another party (such as a member of the client's family) who is interested in the representation, the attorney cannot continue such representation without all affected clients' informed written consent. In addition, under paragraph (E), the attorney here is barred from continuing to represent the client if she accepts compensation from the client's family at whose direction she participates in the conservatorship, absent the client's informed consent.

3. Attorney Competence

Under Rule of Professional Conduct 3-110[4], an attorney must act "competently," which means applying the learning, skill and diligence necessary to discharge duties connected with the employment or representation. Here, an argument can be made that there is a presumption of incompetence if a conservator is not appointed since the attorney is placing (or leaving) the client in a vulnerable position where he is helpless to care for himself properly, and his condition will likely worsen with time.

The attorney has represented the client "competently" if he or she diligently applies the learning and skill necessary to perform his or her duties arising from employment or representation. Rule 3- 110 defines "ability" as having the requisite level of learning and skill and being mentally, emotionally and physically able to perform legal services. Accordingly, the rule does not compel the conclusion here that the attorney has acted incompetently by failing to institute conservatorship proceedings, since the attorney has simply followed his or her client's instructions. Rather, the rule suggests that competency is synonymous with proficiency and adequate preparation. The attorney here has performed competently by carrying out the limited representation for which he or she was originally retained.

4. Withdrawal From Employment

Rule of Professional Conduct 3-700[5] subsections (B) and (C) provide for, respectively, mandatory and permissive withdrawal. While there is no explicit provision in rule 3-700 which either permits or requires a member to withdraw from employment based on initiating a conservatorship, under subsection (C)(1), if the client is engaging in conduct which "renders it unreasonably difficult" for the attorney to carry out the employment effectively, and that same conduct leads the attorney to the conclusion that the client needs a conservator, withdrawal may be permitted under the circumstances.[6]

CONCLUSION

It is the opinion of the Committee that instituting a conservatorship on these facts is barred by Business and Professions Code section 6068, subdivision (e), and furthermore creates a conflict that may not be waivable. The attorney must maintain the client's confidence and trust, even though the attorney will be torn between a duty to pursue the client's desires (including protecting his secrets) and a duty to represent his interests, which may best be served by instituting a conservatorship. While the attorney will not fall below the level of competence required by simply continuing the representation for which he or she was retained and avoiding filing a conservatorship for the client, withdrawal may be appropriate or even mandatory if the client's conduct impedes the attorney's ability to effectively carry out the duties for which he or she was retained.[7]

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[1] California Probate Code sections 1801 and 1828.5, while not controlling on the ethical issue presented here, will provide guidance to the attorney in deciding whether a conservatorship would be appropriate under the circumstances.

[2] American Bar Association Model Rule 1.14 provides that:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reasons, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

[3] California Rule of Professional Conduct 3-310 provides:

> (A) If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.
>
> (B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.
>
> (C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.
>
> (D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.
>
> (E) A member shall not accept compensation for representing a client from one other than the client unless:
>
> > (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
> >
> > (2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and
> >
> > (3) The client consents after disclosure, provided that no disclosure is required if:
> >
> > > (a) such nondisclosure is otherwise authorized by law, or
> > >
> > > (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

(F) As used in this rule "informed" means full disclosure to the client of the circumstances and advice to the client of any actual or reasonably foreseeable adverse effects of those circumstances upon the representation.

[4] Rule of Professional Conduct 3-110 provides:

(A) A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently.

(B) To perform legal services competently means diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation. If the member does not have sufficient learning and skills when the employment or representation is undertaken, or during the course of the employment or representation, the member may nonetheless preform such duties competently by associating or, where appropriate, professionally consulting another member reasonably believed to be competent, or by acquiring sufficient learning and skill before performance is required, if the member has sufficient time, resources, and ability to do so.

(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally, and physically able to perform legal services.

[5] Rule of Professional Conduct 3-700 provides:

(B) Mandatory Withdrawal

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) the member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that a member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

[6] The Committee wishes to stress that withdrawal under these circumstances should be viewed by the attorney as a last resort. Given his needs and questionable capacity, the client conceivably will be prejudiced by the attorney's withdrawal, which should be sought only if absolutely compelled by the circumstances, after the attorney has done everything he or she possibly can to assist the client.

[7] To the extent the client poses an actual or apparent threat to the safety of others, this opinion is not intended to reach the possible application of the "duty to warn" created by the California Supreme Court in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.

Faculty

Anerio V. Altman is the supervising bankruptcy attorney at Lake Forest Bankruptcy in Laguna Hills, Calif., and has been an attorney of record on more than 900 bankruptcy cases throughout California under chapters 7, 11 and 13. He has also appeared in numerous bankruptcy trials and contested matters in bankruptcy court and has appeared in four published cases as of December 2012. Mr. Altman sits on the board of the Orange County Bar Association's Commercial Law and Bankruptcy Section and on the Orange County Bankruptcy Forum. He also sits on the California Central District Rules Committee for the Bankruptcy Courts. Mr. Altman was admitted to the Southern, Eastern and Northern Districts of California by 2005. He received his J.D. from Case Western University School of Law.

Hon. Laurel M. Isicoff is Chief Judge for the U.S. Bankruptcy Court for the Southern District of Florida in Miami, initially appointed on Feb. 13, 2006, and named chief judge on Oct. 1, 2016. She serves on the Judicial Conference Committee on the Administration of the Bankruptcy System. Judge Isicoff is a member of the *Pro Bono* Committee of the American College of Bankruptcy and is the immediate past chair of its Judicial Outreach Committee. She also currently serves as judicial chair of the *Pro Bono* Committee of the Business Law Section of the Florida Bar and is a member of the Florida Bar Standing Committee on *Pro Bono*. Prior to becoming a judge, Judge Isicoff specialized in commercial bankruptcy, foreclosure and workout matters both as a transactional attorney and litigator for 14 years with the law firm of Kozyak Tropin & Throckmorton, after practicing for eight years with Squire, Sanders & Dempsey, now known as Squire Patton Boggs. In private practice, she also developed a specialty in SEC receiverships involving Ponzi schemes. Following law school, Judge Isicoff clerked for Hon. Daniel S. Pearson at the Florida Third District Court of Appeals before entering private practice. She is a past president of the National Conference of Bankruptcy Judges and of the Bankruptcy Bar Association (BBA) of the Southern District of Florida, and, until she took the bench, chaired the BBA's *Pro Bono* Task Force. Judge Isicoff speaks extensively on bankruptcy around the country, and is committed to increasing *pro bono* service, diversity in the bankruptcy community and financial literacy. She received her J.D. from the University of Miami School of Law in 1982.

Kelly K. Roberts is a bankruptcy and business law attorney with Roberts Law, PLLC in Sarasota, Fla. In addition to representing businesses throughout the state, her practice includes representing consumer bankruptcy debtors in chapters 7 and chapter 13 cases, and creditors, guarantors and interested parties in all bankruptcy chapters and adversary proceedings. Ms. Roberts previously practiced in Miami until 2018, at which time she relocated to Sarasota and opened her own firm. She is rated AV-Preeminent by Martindale-Hubbell, has been selected as a *Florida Super Lawyers* Rising Star in Consumer Bankruptcy for seven consecutive years, and was named a 2020 and 2021 *SRQ Magazine* Top Attorney in the area of Bankruptcy and Workout. Ms. Roberts has served as a Florida Bar Business Law Section Fellow, a Barrister Member of the Judge John M. Scheb American Inn of Court, a director for the Florida Association of Women Lawyers' Sarasota Chapter, and on the steering committee for the University of Miami Bankruptcy Skills Workshop, an annual continuing legal education program benefiting the Louis Phillips Scholarship Fund, which provides scholarships for law students interested in bankruptcy practice. She is currently leading a Florida Bar Business Law

Section study group examining how the Florida's exemption statutes compare to other states and whether modifications to the statutes would benefit Florida debtors and the administration of cases. Ms. Roberts received her J.D. from the University of Miami School of Law in 2010.

Hon. Deborah L. Thorne is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on Oct. 22, 2015. Prior to joining the bench, she was a partner in the Chicago office of Barnes & Thornburg LLP, where she was a member of its Financial Insolvency and Restructuring Department. Her practice included the representation of creditors and other parties in insolvency proceedings, and she frequently served as a federal equity receiver in commodity fraud cases brought by the Commodity Futures Trading Commission. In addition, she co-chaired the Women's Initiative for the firm. Judge Thorne is past chair of the Chicago Bar Association Bankruptcy and Restructuring Committee and past chair of the Bankruptcy Committee for the Seventh Circuit Bar Association. She currently serves as ABI's Vice President-Communications and Information Technology and is the author of ABI's *The Preference Defense Handbook: The Circuits Divided* and a co-author of its *Interrupted! Understanding Bankruptcy's Effects on Manufacturing Supply Chains*. Judge Thorne is a member of the Board of Governors for the Seventh Circuit Bar Association and a Fellow of the American College of Bankruptcy. She is included in *The Best Lawyers in America* in the area of bankruptcy and creditor/debtor rights law, is recognized as a Leading Lawyer in Illinois, and has been recognized by *Illinois Super Lawyers* every year since 2003. For seven years, she chaired Women Employed, a Chicago nonprofit policy organization focused on improving the lives of low-wage women through enhancing access to post-secondary education and improving job quality. She remains on the Board of Women Employed and co-chairs its Governance Committee. Judge Thorne received her B.A. from Macalester College, her M.A.T. from Duke University and her J.D. with honors from Illinois Institute of Technology Chicago-Kent College of Law.