# LAND OF CONFUSION: ATTORNEY-CLIENT PRIVILEGE AND DUTY OF CONFIDENTIALITY IN GUARDIANSHIPS AND CONSERVATORSHIPS

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## I. INTRODUCTION

The attorney-client privilege "has been a hallmark of Anglo-American jurisprudence for almost 400 years."[1] It is axiomatic that "[t]he fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client."[2] Indeed, this purpose is fundamental insofar as "it encourages the client to make complete disclosure to his or her attorney of all facts, favorable or unfavorable, without fear that others may be informed."[3]

In corollary fashion, the duty to maintain the confidences of a client is also fundamental. The California Legislature has mandated that an attorney is charged with the duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client,"[4] unless "necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."[5] Together, an attorney's duties to not reveal privileged information or client confidences foster candid, thorough discussions between those seeking legal advice and those providing it.

While practitioners need always be concerned with issues of privilege and confidentiality not every representation is cookie-cutter, nor is every answer to a question as to the application of the rules on privilege or confidentiality (and the interaction between the two) simple. Attorneys engaged in the practice of trusts and estates law in California know that the correct response to the query "are you my client?" is not always intuitive.

For example, it is not the trustee personally who holds the attorney-client privilege with counsel for the trust, but rather the office of the trustee.[6] Accordingly, a successor trustee accedes to the attorney-client privilege from the predecessor trustee "upon the successor's assumption of the office of trustee," meaning that, at that moment, those formerly inviolate "confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to the successor."[7]

These issues become no less complicated when attorneys are engaged in guardianship or conservatorship proceedings. The legal thicket through which guardians and conservators must navigate both for themselves and their charges is often sufficiently opaque as to render self-representation inadvisable. Therefore, attorneys play a critical role in guardianships and conservatorships in California. Indeed, both California's *Handbook for Conservators*[8] and *Guardianship Pamphlet*[9] provided by the courts recommend that fiduciaries seek legal advice in numerous instances.

However, the courts may also appoint counsel for "a ward, a proposed ward, a conservatee, or a proposed conservatee in any [guardianship, conservatorship, or other protective proceeding]" if that person is not otherwise represented by counsel and the appointment (1) would be helpful to the resolution of the matter, or (2) is necessary to protect the person's interests.[10] Indeed, regardless of whether the conservatee has legal capacity to act, the court is required to appoint either "the public defender or private counsel to represent the interest of [that] person"[11] in proceedings to establish or transfer a conservatorship,[12] to appoint a proposed conservator,[13] to terminate a conservatorship,[14] to remove a conservator,[15] to enter an order affecting the legal capacity of the conservatee,[16] or to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.[17] Similarly, the court "may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding . . . to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:"[18] "[a] minor,"[19] "[a]n incapacitated person,"[20] "[a]n unborn person,"[21] "[a]n unascertained person,"[22] "[a] person whose identity or address is unknown,"[23] or "a designated class of persons who are not ascertained or are not in being."[24]

But while it is clear that conservatees/wards and their fiduciary counterparts are generally entitled and encouraged (and, in some cases, required) to have counsel, other issues are less clear. To wit: how are attorney-client privilege rules applied in guardianship/conservatorship proceedings, particularly where the client is either a fiduciary or a person who may not have decisional or functional capacity? While a discussion of that subject could fill far more space than available in this article, this article will address some scenarios where those questions arise.

This article first outlines attorney-client privilege and confidentiality rules for attorneys generally. Next, it examines several scenarios in which attorneys in guardianship and conservatorship cases face novel challenges with respect to privilege and confidentiality. Finally, it proposes some guidelines (as well as no-fly zones) to assist attorneys for conservatees, wards, and their fiduciary counterparts in navigating these challenges. Because even where such an attorney genuinely believes he or she is doing the right thing, a misstep with respect to privilege or confidentiality can pave the wrong path.

## II. DISCUSSION

### A. Basics of the Attorney-Client Privilege in California

In California, a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by"[25] the "holder of the privilege,"[26] "[a] person who is authorized to claim the privilege by the holder of the privilege,"[27] or the "lawyer at the time of the confidential communication" (though that lawyer may not claim the privilege if there is no longer a holder of the privilege or if he or she is otherwise instructed by a person authorized to permit disclosure to do so).[28] For these purposes, a "lawyer" means "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."[29] "Where a person consults an attorney with a view to employing him professionally," formal retention of the attorney is not required for the privilege to attach to "any information acquired by the attorney in the course of interviews or negotiations looking toward such employment . . . even though no actual employment of the attorney as such follows."[30]

Meanwhile, a "client" means a person "who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity."[31] When it comes to guardianships or conservatorships, this definition "includes an incompetent [person] who himself [or herself] so consults the lawyer"[32] or a "guardian or conservator [who] consults the lawyer [on] behalf of the incompetent."[33] "Confidential communications" subject to the privilege include those between a lawyer and a client (or a person who is "present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted").[34]

Subject to certain exceptions, a client waives the privilege if he or she "disclose[s] a significant part of the communication or has consented to disclosure."[35] However, there are exceptions to the waiver section, including (i) joint representations (where one joint holder cannot waive the right of another joint holder to claim the privilege);[36] (ii) disclosures that themselves are privileged;[37] and (iii) disclosures in confidence of a communication that is otherwise protected by a privilege such as the physician-patient privilege or the psychotherapist-patient privilege.[38]

One major difference in the guardianship/conservatorship context is that, where a client is incompetent, it is the guardian or conservator—not the client—who may invoke or waive the attorney-client privilege.[39] And, where a guardian/conservator consults an attorney on behalf of an incompetent client, those statements also come under the privilege's aegis.[40]

### B. Communications Between a Guardian Ad Litem and a Ward Made in Furtherance of the Attorney-Client Relationship are Privileged

Though a guardian ad litem is imbued with certain rights, such that a guardian ad litem stands in the shoes of the ward, the guardian ad litem is not the real party in interest to the action "any more than the incompetent person's attorney of record is a party."[41] A guardian ad litem "is not a party to an action, but merely the representative of record of a party."[42] For this reason, a guardian ad litem may not repudiate a settlement favorable to a ward without court approval,[43] nor may a guardian ad litem simply waive a ward's fundamental rights, such as a right to a jury trial, over the ward's objection.[44] But courts have acknowledged that a guardian ad litem may, in some instances, be subsumed within the meaning of the word "party." For instance, a guardian ad litem is required to respond to (and verify the accuracy of) discovery requests propounded on an incompetent person.[45] While it may not be a terribly useful bright-line standard for the practitioner to apply in close calls, the jurisprudence in this state tends to demonstrate "a guardian ad litem's role is more than an attorney's but less than a party's."[46]

The good news is the law is well settled when a guardian ad litem is appointed to represent a minor's interests in litigation. That guardian ad litem's communications with the minor, which are obtained for the purpose of the guardian ad litem's communications with counsel, are protected by the attorney-client privilege. Indeed, the California Supreme Court held as such in *De Los Santos v. Superior Court ("De Los Santos")*.[47]

In *De Los Santos*, the court was asked to decide whether statements made by a nine-year-old boy to his guardian ad

litem—his mother—about a car accident were protected by the attorney-client privilege. In the course of preparing his responses to interrogatories, the boy talked with his mother about a car hitting him while he was on his bicycle. Later, the defendants sought to depose the boy's mother (his guardian ad litem) to discover what he said to her about the accident. The trial court held, and the appellate court agreed, that the boy's statements to his mother were not protected by the attorney client-privilege. But the California Supreme Court disagreed, finding several avenues to confirm that those statements were privileged. First, the court held that:

> In her capacity as guardian ad litem, Mrs. De Los Santos is the holder of the privilege, and she was authorized to assert it on Jesse's behalf. [Evid Code, section 953, subd. (b).] Thus, she was entitled to refuse to answer the questions put to her by the defendants if the information requested was subject to the privilege [citation] and the privilege was not waived.[48]

The court also held that the defendants had not rebutted the presumption that the boy's statements to his guardian-mother were privileged because they were made during the course of a lawyer-client relationship and intended to be confidential.[49]

Notwithstanding those first two bases, the court identified another means by which these statements were protected. The court held that a ward's "disclosure to the guardian is unquestionably necessary for the transmission of the information to the attorney or the accomplishment of the purpose for which he is consulted, and is therefore protected by the statutory privilege."[50] In other words, the ward's statements to his guardian ad litem also came within the ambit of Evidence Code section 952's definition of a "confidential communication between client and lawyer" because the ward's communications to his guardian were "reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."[51] This followed from the principle that the attorney-client privilege extends to communications intended to be confidential if they "are made to . . . family members . . . on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant."[52] Thus, whether the communication is from ward to attorney, ward to guardian ad litem, or guardian ad litem to attorney, those communications are privileged. Moreover, the *De Los Santos* court held these communications remain protected from disclosure even if a guardian ad litem failed to transmit the ward's communications to the attorney.[53]

The *De Los Santos* court's affirmation that the attorney-client privilege protects statements to and from a guardian ad litem was grounded in "the sweeping powers enjoyed by the guardian ad litem in the conduct of the case."[54] The Supreme Court's decision in *De Los Santos* stands as a testament to the vigilant protection of the attorney-client privilege in the guardian ad litem context. And this makes sense—wards would not be able to enjoy their right to competent counsel unless courts shielded from disclosure communications to and from a guardian ad litem. However, it is important to recognize that it is the parent's appointment as a guardian ad litem, and not the parent-child relationship itself, that gives rise to the existence of the privilege—even where counsel may be appointed for the minor. Indeed, unless the parent can establish that the communication between the parent and the attorney is "to further the child's interest in communication with, or is necessary for the transmission of information to, a lawyer," a communication between parent and child is unlikely to be regarded as privileged in a proceeding concerning the welfare of a minor.[55]

### C. Who Really Holds the Conservatee's Privilege? A Brief Analysis in the Context of a Substituted Judgment Proceeding

Pursuant to Probate Code sections 2580 *et seq.,* in proceedings concerning a conservatorship of the estate, a conservator may file a petition requesting the court make certain decisions concerning the conservatee's estate.[56] The statutory scheme was enacted in 1979 in an effort to codify the common law principle established 12 years earlier that "in probate proceedings for the administration of the estates of insane or incompetent persons," the courts:

> have power and authority to determine whether to authorize transfers of the property of the incompetent for the purpose of avoiding unnecessary estate or inheritance taxes or expenses of administration, and to authorize such action where it appears from all the circumstances that the ward, if sane, as a reasonably prudent man, would so plan his estate, there being no substantial evidence of a contrary intent.[57]

Specifically, Probate Code section 2580 allows a court to enter an order authorizing or requiring the conservator to take a proposed action for the purpose of: (1) benefiting the conservatee or the estate; (2) minimizing current or prospective taxes; or (3) providing gifts to persons or charities which would be likely beneficiaries of gifts from the conservatee.[58] However, prior to entering such an order, the court must

determine "(a) that the conservatee is not opposed to the action, or if opposed lacks legal capacity for the action, and (b) that the action either will have no adverse effect on the estate or will leave the estate adequate to provide for the conservatee and for the support of those the conservatee is legally obliged to support, taking all circumstances into account."[59] Among the relevant circumstances that the court is to consider are: "[t]he past donative declarations, practices, and conduct of the conservatee,"[60] "[t]he wishes of the conservatee,"[61] "[a]ny known estate plan of the conservatee,"[62] and "[t]he likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so."[63]

In a substituted judgment proceeding, if the conservatee lacks the capacity to report such information credibly, a reasonable way to ascertain the conservatee's donative declarations, donative practices, wishes, or known estate planning might logically seem to be through discovery targeted at the conservatee's former estate planning lawyer. After all, in post-death will contests, trust contests, or other proceedings concerning the testamentary intent of the deceased, there is no attorney-client privilege as to a communication relevant to an issue between parties who claim through a deceased client,[64] nor as to a communication relevant to an issue concerning the intention of a deceased client as to a deed, will, or similar transaction document,[65] nor as to the validity of such a document.[66] This is because the person who drafted the estate plan is likely to be the most obvious source of competent, extrinsic evidence of the decedent's intent.[67]

However, the key words here are "deceased" and "decedent." So long as a conservatee is alive, these statutes do not, on their face, abrogate the attorney-client privilege. In the absence of such a statute, there is no applicable exception to the attorney-client privilege, as "the attorney-client privilege is a legislative creation, which courts have no power to limit by recognizing implied exceptions."[68] While no reported decision appears to have passed directly on the issue of whether an estate planner's file can be discovered in a substituted judgment proceeding, the suggestion has been made in at least one court of appeal case that, while a conservatee is still alive, the attorney-client privilege would prevent a party from compelling discovery of communications between the conservatee and his or her estate planning counsel.[69]

Thus, how can evidence of the conservatee's intentions as contained in privileged communications between the conservatee and his or her estate planning attorney be discovered in a substituted judgment proceeding? One method would be via waiver of the privilege, of course. And, because the conservator holds the privilege, it would be within the conservator's power to waive it.[70] Further, while a conservator owes fiduciary duties to the conservatee, the conservator would not be encumbered by the Business & Professions Code's mandate that an attorney maintain the confidences of his or her client.[71] So it would certainly appear to be within the conservator's power to waive the privilege as to the conservatee's communications with his or her prior estate planning counsel. It might be prudent for a conservator to seek instructions from the court as to whether he or she may waive the privilege, as conservators and guardians are permitted (along with others) to file a petition seeking authorization and/or instructions from the court "approv[ing] and confirm[ing] the acts of the guardian or conservator, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate…"[72]

### D. Does the Conservator of the Person and/or the Conservator of the Estate Hold the Privilege?

A related question to the foregoing concerns whether it is the conservator of the person or the conservator of the estate who holds the privilege. Evidence Code section 953(b) is silent, referencing simply the "conservator of the client" without further qualification.[73] However, it would make sense that the conservator of the estate would hold the privilege in this context, given that California Code of Civil Procedure Section 372(a)(1), which is found in Chapter 3 ("Disability of Party") of Title 3 ("Of The Parties to Civil Actions") of Part 2 ("Of Civil Actions"), provides as follows in pertinent part (with emphasis added):

> When a minor, a person who lacks legal capacity to make decisions, *or a person for whom a conservator has been appointed is a party, that person shall appear* either *by a* guardian or *conservator of the estate* or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case.[74]

Analogizing to *De Los Santos* (which held, among other things, that the guardian ad litem held the attorney-client privilege by virtue of having the right to control the lawsuit),[75] it follows that if a conservator of the estate has the right to control a lawsuit on behalf of the conservatee, the conservator of the estate is the holder of the privilege as to communications between a conservatee and his or her lawyer.[76] This argument is supported by a review of the commentary associated with the statutes that confer the physician-patient privilege (Evidence Code section 993) and the psychotherapist-patient

privilege (Evidence Code section 1013) upon the "guardian or conservator of the patient when the patient has a guardian or conservator."[77] The Law Revision Commission commentary to Evidence Code section 993 (the physician-patient privilege) provides as follows in pertinent part:

> A guardian of the patient is the holder of the privilege if the patient has a guardian. If the patient has separate guardians of his estate and of his person, either guardian may claim the privilege.[78]

While the commentary to Evidence Code section 993 makes no reference to "conservators," by analogy it would appear that, at least for the physician-patient privilege, either the conservator of the person or the conservator of the estate could assert the privilege. Indeed, the powers peculiar to conservators of the person and guardians of the person are both addressed in Probate Code sections 2350–2361 ("Chapter 5 – Powers and Duties of Guardian or Conservator of the Person"),[79] while the powers for the conservator of the estate and guardian of the estate are both found in Probate Code sections 2400–2595 ("Chapter 6 – Powers and Duties of Guardian or Conservator of the Estate.").[80]

It resonates with respect to the physician-patient privilege that a conservator of the person would hold the privilege, as the conservator of the person is charged with "the care, custody, and control of . . . [the] conservatee."[81] It also makes sense that, as discussed, given the conservator of the estate's powers to litigate, the conservator of the estate would also hold the privilege in the physician-patient context.[82]

Meanwhile, the commentary to the psychotherapist-patient privilege simply states "See the Comment to Section 993," which suggests that the same logic applies there. By contrast, there is no analogous commentary with respect to the attorney-client privilege. While perhaps not conclusive, a logical inference to draw is that only the conservator of the estate holds the attorney-client privilege, as it is the conservator of the estate, like the guardian ad litem in *De Los Santos*, who has the authority to litigate on behalf of the conservatee.

Despite the foregoing, it is also reasonable to surmise that the court's decision as to which type of conservator holds the privilege may depend on the circumstances of the case. In the guardianship context, at least one Court of Appeal panel has held that a guardian "cannot shield his or her behavior from scrutiny by keeping damaging information hidden from view under the guise of exercising the child's [psychotherapist-client] privilege of confidentiality."[83] It is likewise conceivable that a court would decide that the holder of the privilege in a case between a conservator of the estate and a conservator of the person depends on who is accused of trying to conceal their behavior behind the privilege. But that line of authority in guardianships is based on the Legislature's amendment to Welfare & Institutions Code section 317, subdivision (f), which permits a "dependent child who is 'of sufficient age and maturity to so consent [to] invoke the psychotherapist-client privilege.'"[84] Cases discussing this amendment note that "[a]bsent such amendment, it appears, under the provisions of the Evidence Code, that the parent or guardian would otherwise be the holder of the privilege."[85] Perhaps, then, until the Legislature clearly says to the contrary, conservators, individually or in concert, may shield their potentially bad behavior from scrutiny.

In sum, the better argument appears to be that in the substituted judgment context, it is the conservator of the estate who has the power to decide whether to waive the privilege to allow for discovery of the conservatee's communications in connection with the estate planning file. But the answer is far from conclusive.

### E. Who Holds the Attorney-Client Privilege Where the Conservatee and the Conservator are Adverse?

Accepting the premise that the conservator of the estate holds the attorney-client privilege for the conservatee, what happens when the conservatee and the conservator are adverse? For example, a conservatee has the right to be represented by court-appointed counsel in a proceeding concerning the removal of a conservator.[86] If the conservatee and his or her appointed counsel are supportive of removing the conservator, and the conservator is contesting the removal effort, does the conservator of the estate nevertheless hold the conservatee's attorney-client privilege? As such, can the conservator of the estate waive the conservatee's attorney-client privilege with his or her counsel, even though the conservator is adverse to the conservatee in the removal context?

It appears the answer is "yes." The Evidence Code is clear that the conservatee does not hold the privilege because an attorney's client only holds the privilege if that "client has no guardian or conservator."[87] The Evidence Code, as discussed above, is equally clear that the conservator holds the privilege if the client has a conservator.[88] In the absence of any statutory exception, the conservator of the estate has the ability to waive the conservatee's privilege with the conservatee's counsel in a proceeding that is adverse to the conservator of the estate.

Of course, this becomes a conundrum for the conservatee's counsel in such a proceeding. The conservatee's counsel must maintain "inviolate" the confidences of the conservatee.[89] But the conservatee's counsel also may not claim the attorney-client privilege if he or she "is otherwise instructed by a person authorized to permit disclosure."[90] Thus, in such a scenario, the conservatee's counsel is caught between the proverbial rock and a hard place. The best approach in that situation may be for the conservatee's counsel to petition the court as an "other interested person" to "instruct the . . . conservator" not to waive the conservatee's privilege in connection with the "administration . . . of the estate."[91]

### F. Competing Duties: Confidentiality, Candor, and a Conservatee's Best Interests

Attorneys for conservatees may also find themselves in a bind when their duties to their clients conflict with other duties, such as their duty of candor to courts and duty to pursue a client's best interests. In addition to protecting privileged statements, attorneys also must be mindful of their duty of confidentiality to their clients. That duty obligates attorneys to "maintain inviolate" their clients' confidences and secrets,[92] which attorneys may not reveal without a client's consent.[93] The California Supreme Court has declared that an attorney's duty of confidentiality "involves public policies of paramount importance."[94] Attorney-client privileged information and "confidential" information are not co-extensive; "th[e] duty of confidentiality is broader than the lawyer-client privilege and protects virtually everything the lawyer knows about the client's matter regardless of the source of the information."[95]

But while attorneys must maintain their clients' secrets, they also are duty bound to employ "means only as are consistent with the truth"[96] when they advocate. They also may not "seek to mislead [a] judge, judicial officer, or jury by an artifice or false statement of fact or law."[97] Further complicating matters in the context of conservatorships is the fact that attorneys for conservatees also have a duty to "advocate [for] the conservatee's best interest."[98] *Conservatorship of Drabick* ("*Drabick*") is an illuminating case in that it confirms that attorneys for conservatees (along with conservators themselves) must also include the conservatee's best interests when deciding how to proceed.[99]

In *Drabick*, William Drabick was in a persistent vegetative state for more than five years after a car accident. William's brother and conservator, David, asked a court for permission to remove life support so William could die. William's three other brothers, his girlfriend of twelve years, and a public defender appointed to represent William at the trial court agreed with David that withdrawal of life support was in William's best interest. Nevertheless, the trial court denied David's petition, reasoning that "continued feeding is in the best interest of a patient who is not brain dead."[100] The court of appeal disagreed, reversing and explaining that the conservatee "ha[d] a right to have medical treatment decisions made in his best interests" while he was incapacitated.[101]

The appellate court appreciated the risk "that the surrogate's choices will not be the same as the incompetent's hypothetical, subjective choices." But ultimately, the court recognized that

> [a]llowing someone to choose . . . is more respectful of an incompetent person than simply declaring that such person has no more rights. Thus, by permitting the conservator to exercise vicariously William's right to choose, guided by his best interests, we do the only thing within our power to continue to respect him as an individual and preserve his rights.[102]

As for the conservatee's attorney, the appellate court said the attorney was not forbidden from joining in David's petition for permission to remove life support. The conservatee's appellate attorney had argued that the conservatee's trial attorney should have had to "advocate [for] continued treatment" because, essentially, "the irreducible minimum condition of effective representation is the adoption of an adversary position toward the opposing party."[103] The appellate court did not agree. Acknowledging that "[t]his issue usually arises in the context of determining the responsibilities of a guardian ad litem, as opposed to the guardian or conservator of the person," the appellate court held that "the conservatee's attorney must advocate the conservatee's best interests."[104] The appellate court recommended the following guidance (such as it is) to attorneys for conservatees:

> [w]hen an incompetent conservatee is still able to communicate with his attorney it is unclear whether the attorney must advocate the client's stated preferences—however unreasonable—or independently determine and advocate the client's best interests. When 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.[105]

Looking beyond the *Drabick* court's ambiguity over how to resolve the tension of competing duties with an incompetent

conservatee, its revelation of the absolute bedrock principle in the case of conservatees—the client's best interests—is telling. *Drabick* instructs that, where there is no guidance from the conservatee-client, "the conservatee's attorney must advocate the conservatee's best interests."[106] But it is not difficult to imagine scenarios in which the *Drabick* court's ambiguity might come back to haunt a conservatee's counsel.

For instance, consider an attorney whose client, H, is a proposed conservatee. H's wife, W, has filed a petition to impose a conservatorship on H. H tells his attorney that he wants to oppose the conservatorship petition, but H also admits to his attorney that his doctors recently diagnosed him with moderate (but not severe) cognitive impairment resulting from Alzheimer's/dementia. Is H's attorney permitted—or, indeed, *required*—to oppose the conservatorship petition? And, may the attorney reveal confidential information to the court if the attorney believes that it is in H's best interests for the court to hear that information?

*Drabick* acknowledges there is no clear resolution of the tension the attorney may be feeling; because H can communicate with his attorney, "it is unclear whether the attorney must advocate the client's stated preferences."[107] But one thing H's attorney likely cannot do in this situation is reveal any privileged or confidential information (absent a waiver). There does not appear to be an exception that applies to permit disclosure here. Thus, the attorney may not disclose the diagnosis of H's doctor, as that information is both privileged and confidential.

The attorney may genuinely feel that H's best interests are to have a conservatorship established, in which case the attorney may argue that he or she is discharging his or her ultimate duty to serve the client's best interests by not opposing the conservatorship. H might, in turn, try to fire the attorney or make his attorney's ability to represent him impossibly difficult. But absent some exceptional circumstances, H's attorney should not disclose privileged or confidential information—even where the attorney thinks it would be helpful to the resolution of the matter (e.g., where revealing the diagnosis from H's doctor would increase the likelihood that a conservatorship is established).

Several ethics opinions from state and local bar associations have weighed in on this issue and concluded that an attorney may not disclose a conservatee's confidences—even where it might arguably be in the conservatee's best interests. Opinion 1989-112 by the California State Bar's Standing Committee on Professional Responsibility and Conduct ("Opinion 1989-112") determined that "[a]lthough 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 . . .".[108] Opinion 1989-112 acknowledged that while the conservatee's attorney may "be torn between a duty to pursue the client's interest (including protecting his secrets) and a duty to represent his interests," "the attorney must maintain the client's confidence and trust." Moreover, Opinion 1989-112 held that an attorney does not act incompetently by failing to institute conservatorship proceedings against a client, even where the attorney believes it's in the client's best interests.[109] Opinion 1989-112 thus suggests that even a conservatee's best interests should yield to the profession's paramount interest in maintaining confidentiality.

Several other local bar associations have issued guidance in accordance with Opinion 1989-112. The San Diego County Bar Association concluded that a conservatee's "attorney should not ignore, or overrule, the express directions of his client," and agreed with Opinion 1989-112 that "the attorney [may] not initiate conservatorship proceedings" because doing so would result in revelation of client confidences.[110] Similarly, the Los Angeles County Bar Association determined that "it is improper for an attorney to bring an action for appointment of conservator for a present or former client . . . even where the attorney believes that a conservatorship is in the client's best interest."[111] The Orange County Bar Association concluded that a court-appointed attorney for a proposed conservatee could not disclose the proposed conservatee's confidences where she opposed the conservatorship, even though the attorney thought the conservatorship was in the client's best interests.[112] These ethics opinions cast doubt on the "client's best interests" being the bedrock principle in conservatorship proceedings.

However, the Bar Association of San Francisco issued an ethics opinion to the contrary, which held that "[a]n attorney who reasonably believes that a client is unable to manage his or her own financial resources or resist fraud or undue influence may, but is not required to, take protective action with respect to the client's person and property."[113] The "protective action" permitted in such a scenario includes not only the ability to recommend appointment of a trustee, conservator, or guardian ad litem, but also the "implied authority to make limited disclosures necessary to achieve the best interests of the client."[114] Ultimately, however, these ethics opinions are merely advisory and do not necessarily reflect how a court would rule on or approach this issue.

Thus, even if the attorney believes his conservatee-client's best interests would be served by revealing confidential client information, the attorney ordinarily should not do so without his

client's consent. Of course, there is the exception to this general rule that permits an attorney to reveal confidential information where "disclosure is necessary to prevent a criminal act that the [attorney] reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."[115] But even in that scenario, an attorney "may, but is not required to, reveal" the confidential information;[116] an attorney's failure to reveal the confidential information necessary to avoid such harm in these circumstances "does not violate this rule."[117]

Because an attorney may want to protect a conservatee-client's best interests, yet feels ethically bound to maintain the client's confidences, the attorney may believe that the conflict is too deep to be resolved. In such a case, Opinion 1989-112 proposes that "withdrawal may be appropriate or even mandatory."[118] Until the Legislature or the courts give better guidance on how to resolve an attorney's tripartite duties to the courts, their clients' wishes, and their clients' best interests, withdrawal may be the only way an attorney can avoid failing to discharge arguably the attorney's most important duties (at least in the eyes of California courts): safeguarding confidential and attorney-client privileged statements. Until binding California authority permits an attorney's disclosure of a conservatee's secrets when in the conservatee's best interests, it is best for the attorney to err on the side of caution and keep those secrets "at every peril to himself or herself."[119]

## III. CONCLUSION

The dearth of binding case law creates challenging questions of privilege and confidentiality when representing conservatees, wards, and their fiduciary counterparts. It is not always clear which fiduciary holds a particular privilege (e.g., as between conservators of the estate and conservators of the person). But generally speaking, courts are eager to foster a client's frank communications with counsel, and where those communications are facilitated by or through fiduciaries like guardians and conservators, courts do not hesitate to enable those fiduciaries to invoke the privilege. Another layer of protection is afforded through the attorney's duty of confidentiality, which may, at times, supersede the duty to serve a conservatee's best interests. While strong arguments have been made that confidentiality and the attorney-client privilege should yield when a waiver would be in the best interest of the conservatee, that conclusion is not clear at all from binding decisional law. Until these issues are clarified, attorneys to conservatees, wards, and their fiduciaries would do well to keep confidentiality and privilege foremost in their minds while balancing the other, often competing, duties they must discharge.

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1 *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.

2 *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740–41.

3 *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 483.

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

5 Bus. & Prof. Code, section 6068, subd. (e)(2).

6 *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1130–31.

7 *Id.* at p. 1139.

8 Judicial Council of Cal., Handbook for Conservators (2016 Rev. Ed.), 5-1.

9 Judicial Council of Cal., Guardianship Pamphlet (For Guardianships of Children in the Probate Court) (Form GC-205, Rev. 2001), p. 12; *see also* Form GC-348 (outlining duties of conservator and explaining that that conservators should "communicate frequently and cooperate fully with [their] attorney at all times" and that their attorney "will advise [them] on [their] duties, the limits of [their] authority, the conservatee's rights, [their] dealings with the court, all other topics discussed in this form, and many other matters").

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

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

12 Prob. Code, section 1471, subd. (a)(1).

13 *Ibid.*

14 Prob. Code, section 1471, subd. (a)(2).

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

16 Prob. Code, section 1471, subd. (a)(4).

17 Prob. Code, section 1471, subd. (a)(5).

18 Prob. Code, section 1003, subd (a).

19 Prob. Code, section 1003, subd. (a)(1).

20 Prob. Code, section 1003, subd. (a)(2).

21 Prob. Code, section 1003, subd. (a)(3).

22 Prob. Code, section 1003, subd. (a)(4).

23 Prob. Code, section 1003, subd. (a)(5).

24 Prob. Code, section 1003, subd. (a)(6).

25 Evid. Code, section 954.

26 Evid. Code, section 954, subd. (a).

27 Evid. Code, section 954, subd. (b).

28 Evid. Code, section 954, subd. (c).

29 Evid. Code, section 950.

30 *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, 69.

31 Evid. Code, section 951.

32 Evid. Code, section 951, subd. (a).

33 Evid. Code, section 951, subd. (b).

34 Evid. Code, section 952.

35 Evid. Code, section 912, subd. (a).

36 Evid. Code, section 912, subd. (b).

37 Evid. Code, section 912, subd .(c).

38 Evid. Code, section 912, subd. (d).

39 Evid. Code, section 953.

40 Evid. Code, section 951.

41 *Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 13.

42 *In re Cochems' Estate* (1952) 110 Cal.App.2d 27, 29.

43 *Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, 1608.

44 *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454–55.

45 *See Regency Health Services, Inc. v. Superior Court* (1998) 64 Cal. App.4th 1496.

46 *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454.

47 *De Los Santos v. Superior Court* (1980) 27 Cal.3d 677.

48 *De Los Santos v. Superior Court, supra,* 27 Cal.3d at p. 682.

49 *Ibid.* (citing Evid. Code, section 917).

50 *De Los Santos v. Superior Court, supra,* 27 Cal.3d at p. 684.

51 Evid. Code, section 952.

52 *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588.

53 *De Los Santos v. Superior Court*, *supra*, 27 Cal.3d at p. 685.

54 *De Los Santos v. Superior Court, supra,* 27 Cal.3d at p. 684.

55 *In re Terry W.* (1976) 59 Cal.App.3d 745, 748.

56 Prob. Code, section 2580 et seq.

57 *Estate of Christiansen* (1967) 248 Cal.App.2d 398, 424.

58 Prob. Code, section 2580, subd. (a).

59 *Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1252 (citing Prob. Code, section 2582).

60 Prob. Code, section 2583, subd. (b).

61 Prob. Code, section 2583, subd. (e).

62 Prob. Code, section 2583, subd. (f)

63 Prob. Code, section 2583, subd. (k).

64 Evid. Code, section 957.

65 Evid. Code, section 960.

66 Evid. Code, section 961.

67 *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1601.

68 *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739.

69 *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 406-7.

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

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

72 Prob. Code, section 2403, subd. (a).

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

74 Cal. Code of Civ. Proc., section 372, subd. (a)(1).

75 *De Los Santos v. Superior Court*, *supra*, 27 Cal.3d at pp. 683–84.

76 *See* Prob. Code, section 2462 (permitting guardians and conservators of the estate to "[c]ommence and maintain actions and proceedings for the benefit of the ward or conservatee or the estate," and to "[d]efend actions and proceedings against the ward or conservatee, the guardian or conservator, or the estate"); *see also* Judicial Council of California Form GC-348, p.4 (conservator of the estate's duties include "[p] ursu[ing] claims against others on behalf of the conservatee's estate" and "[d]efend[ing] against actions or claims against the conservatee or his or her estate…").

77 Evid. Code, section 993, subd. (b); Evid. Code, section 1013, subd. (b).

78 Cal. Law Revision Com., West's Ann. Cal. Evid. Code (1965) foll. section 993.

79 Prob. Code, Section 2350 et seq.

80 Prob. Code, Section 2400 et seq.

81 Prob. Code, section 2351, subd. (a).

82 *See De Los Santos v. Superior Court*, *supra*, 37 Cal.3d 677 at pp. 683-84; Code Civ. Proc. section 372, subd. (a)(1); Prob. Code, section 2500, subd. (a)(1).

83 *In re Mark L.* (2001) 94 Cal.App.4th 573, 582–83.

84 *Ibid.*

85 Assem. Com. on Judiciary, Analysis of Sen. Bill No. 2160 (1999-2000 Reg. Sess.) as amended April 25, 2000, p. 7. (discussing provision codified at Welf. & Inst. Code, section 317, subd. (f)).

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

87 Evid. Code, section 953, subd. (a).

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

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

90 Evid. Code, section 954, subd. (c).

91 Prob. Code, section 2403, subd. (a).

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

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

94 *In re Jordan* (1974) 12 Cal.3d 575, 580.

95 *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 151.

96 Bus. & Prof. Code, section 6068, subd. (d); *see also* Rules of Prof. Conduct, rule 5-200(A).

97 Rules of Prof. Conduct, rule 5-200(B).

98 *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, 213–14.

99 While *Drabick* was, in part, superseded by amendments to Probate Code section 2355, those pertained to the requirement that a conservator of the person must make health care decisions in accordance with the wishes of a conservatee when they can be known. *See Conservatorship of Wendland* (2001) 26 Cal.4th 519, 540–41.

100 *Conservatorship of Drabick*, *supra*, 200 Cal.App.3d at p. 193.

101 *Id*. at p. 209.

102 *Ibid*.

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

104 *Id*. at pp. 213–14.

105 *Id*. at pp. 212–13.

106 *Conservatorship of Drabick, supra, 200 Cal.App.3d* at p. 214.

107 *Conservatorship of Drabick, supra, 200 Cal.App.3d* at pp. 212–13.

108 State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, formal opn. No. 1989-112 (1989).

109 *Ibid*.

110 San Diego County Bar Ass'n Legal Ethics Comm., opn. No. 1978-1 (1978).

111 Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm., opn. No. 1988-450 (1988).

112 Orange County Bar Ass'n Prof'l Responsibility & Ethics Comm., opn. No. 95-002.

113 Ethics Comm. of the Bar Ass'n of San Francisco County, opn. No. 1999-2 (1999).

114 *Ibid*.

115 Rules of Prof. Conduct, rule 3-100(B).

116 *Ibid*.

117 Rules of Prof. Conduct, rule 3-100(E).

118 State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, formal opn. No. 1989-112 (1989).

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