



*CCCBA's Elder Law Section proudly presents...*

**#3 DO I SAY YES TO THIS MESS?**  
**What You Need to Know When Representing**  
**Incapacitated Clients as a GAL or as CAC**

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## AGENDA

1. Overview of New and Relevant Laws
  - AB 1194
  - Probate Code §1471
  - Probate Code §1850
  - Probate Codes §1863
  - California Rules of Court Rule 7
  - Business & Professions Code §6068; Evidence Code §952
  - California Rules of Professional Conduct 1.1
2. Applying the Law – Role of CAC
3. Applying the Law – Role of GAL
4. The Capacity Evaluation Conundrum
5. Hypothetical/Case Study Discussion




# PROGRAM MATERIALS

# DO I SAY YES TO THIS MESS?

What you need to know when working with  
incapacitated clients as Court Appointed Counsel or  
*Guardian Ad Litem*

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# Lara J. Heisler

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- ▶ Lara Heisler has been practicing law for over 20 years and specializes in conservatorships and guardianships. She grew up in Contra Costa County and is passionate about serving the community where she grew up and is raising her children. She lives in Walnut Creek with her husband, daughter, and son. Lara is not only active in the local legal community, but she is committed to involvement in her children's school, assisting with field trips and the annual fundraising gala.
- ▶ Bar Admissions:
- ▶ California State Bar
- ▶ New York State Bar (Inactive)
- ▶ Heisler Rosenfeld LLP is a family-oriented boutique law firm located in Contra Costa County and serving the greater East Bay. Our specialty is estate planning, trust administration, and all aspects of probate and estate litigation, including conservatorships and guardianships.



# Oliver A. Greenwood

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- ▶ Oliver Greenwood is the founder of the Pleasant Hill, California based law firm, Law Offices of Oliver Greenwood In California. He received his B.A. from the University of California, Berkeley and his J.D. from Golden Gate University in San Francisco. Mr. Greenwood's areas of practice include conservatorships, guardianships, wills, trusts, probate, and estate planning. Previously he worked as a magician, a dishwasher, and an enlisted infantryman in the US Marine Corps.
- ▶ Member of Judicial Council Probate & Mental Health Advisor Committee
- ▶ Contributing Author to The California Conservatorship Practice (Cal CEB), California Powers of Attorney and Health Care Directives (Cal CEB), and the California Guardianship Practice (Cal CEB)



# Dr. Melinda Ginne, PhD

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- Dr. Melinda Ginne, PhD is an Oakland based licensed psychologist specializing in behavioral medicine and gero-psychology. She grew up in Los Angeles and earned her B.A. in Sociology at the California State University at San Diego (CSUSD). She then went on to earn her PhD in Clinical Psychology at the California School of Professional Psychology.
- Dr. Ginne specializes in the treatment of the psychological aspects of acute, chronic, and life threatening illnesses. She works with the patients and their families to help them understand and cope with illnesses and the treatments options; providing education, advocacy, and support for her patients along side their other medical providers.
- Activities and societies: American Psychological Association, American Society on Aging, Alameda County Psychological Association.



# AGENDA

## 1. Overview of New and Relevant Laws

A. AB 1194

B. Probate Code §1471

C. Probate Code §1850

D. Probate Codes §1863

E. California Rules of Court Rule 7

F. Business & Professions Code §6068; Evidence Code §952

G. California Rules of Professional Conduct 1.1

## 2. Applying the Law – Role of CAC

## 3. Applying the Law – Role of GAL

## 4. The Capacity Evaluation Conundrum

## 5. Hypothetical/Case Study Discussion



# OVERVIEW OF CONSERVATORSHIP LAW



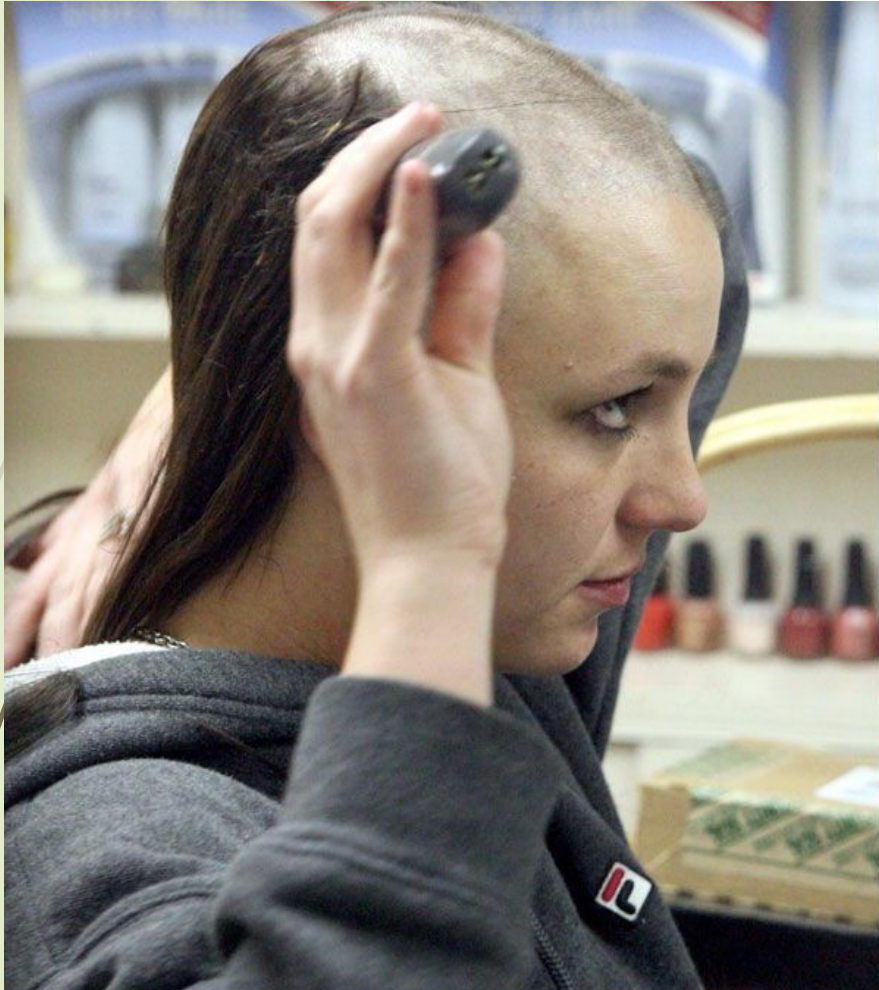


## How it used to be when you were appointed to represent a proposed conservatee:

- Balancing act between “best interests” and advocacy.
- Advocacy was generally not “zealous.”
- Winks and Nods to the Court - “my client told me that they want their son – who got out of prison for meth related charges and moved in to my client’s home and now has created a meth lab in the home and keeps my client locked in the closet, so....”

➤ What changed?

It's Britney, B\* & \$%.



# OVERVIEW OF AB 1194

- **What?**
  - Broad changes to conservatorship and guardianship law.
  - Changes to the California Business and Professions Code and the California Probate Code.
  - In general, designed to empower conservatees to have more say in decisions being made about their lives and to increase scrutiny of private fiduciaries.
  - Expands the duties of court investigators and the courts in overseeing conservatorships.
  - Changes also involve the subject of terminating conservatorships or situations where the conservatee wishes to do so.
  - Also, proposed conservatees and conservatees given more power to contest the establishment or maintenance of a conservatorship.



# OVERVIEW OF AB 1194 (cont'd)

- **When?** Went into effect on January 1, 2022
- **Why?**
  - California conservatorship law had major reforms in the Omnibus Conservatorship and Guardianship Reform Act of 2006 (“Omnibus Act”) but optional not mandatory/funding issues.
  - Media attention - Documentary *Framing Britney Spears* and dark comedy movie *I Care a Lot* (professional fiduciary who preys on elderly individuals).
- **What Now?** Today, we examine possible interaction of the AB 1194 changes with existing law and ethics duties for CAC



What “One Flew Over the Cuckoo’s Nest” did for Psychiatry, “I Care A Lot” did for Conservatorships.

***I CARE A LOT.***



**NETFLIX**



# Overview of Relevant Changes for Court Appointed Counsel

AB 1194 includes amended laws that directly or indirectly affect court-appointed counsel's (CAC's) practice, including:

- **Probate Code section 1471** - clarifies that CAC shall act as **zealous advocates** representing the wishes of the client in conservatorship proceedings instead of representing the “best interests” of the client. Role of CAC is not akin to that of a guardian ad litem. Also amended to require a **conservatee** be **allowed to retain preferred counsel** even if that counsel is not on the court's list of court approved court-appointed attorneys.
- **Probate Code section 1850** - amended to now require that an **annual investigation** by the court investigator occur after the establishment of a conservatorship. Previously, reviews every two years were allowable.
- **Probate Code section 1863** - modified and added to the statutes governing the hearing process for **termination** of conservatorships.



# Probate Code section 1471

- **Section 1471** was changed to make clear the role of counsel appointed by the court to represent conservatees, proposed conservatees, and persons alleged to lack legal capacity.
- Statutory language stating counsel was to represent the “interests” of the person was removed. Additionally, the statute now states that the role of counsel is that of “**a zealous, independent advocate representing the wishes of their client . . . .**” The amendments also direct the court to allow representation by the preferred attorney of the person unless the attorney cannot provide zealous advocacy or has a conflict of interest.
- Before AB 1194, some California jurisdictions expected CAC to state both the proposed conservatee's wishes and their best interests. There were some conflicting ethics opinions.



## Probate Code section 1471 (cont'd)



Text of NEW Probate Code section 1471  
Effective: January 1, 2022

### § 1471. Mandatory appointment; proceedings

(a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not that person lacks or appears to lack legal capacity, **the court shall**, at or before the time of the hearing, **appoint an attorney** [the public defender or private counsel] **to represent the person** in the following proceedings under this division:

(1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator. *(continued...)*



## Probate Code section 1471 (cont'd)

- (2) A proceeding to terminate the conservatorship.
- (3) A proceeding to remove the conservator.
- (4) A proceeding for a court order affecting the legal capacity of the conservatee.
- (5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

*(continued...)*

## Probate Code section 1471 (cont'd)

(b) If a conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the person in any proceeding listed in subdivision (a).

(c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if they are able. This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

*(continued...)*

## Probate Code section 1471 (cont'd)

(d) If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court's list of a court-appointed attorneys, and the attorney shall provide zealous representation as provided in subdivision (e). However, an attorney who cannot provide zealous advocacy or who has any conflict of interest with respect to the representation of the conservatee, proposed conservatee, or person alleged to lack legal capacity shall be disqualified.

(e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous, independent advocate representing the wishes of their client, consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.

(f) In an appeal or writ proceeding arising out of a proceeding described in this section, if a conservatee or proposed conservatee is not represented by legal counsel, the reviewing court shall appoint legal counsel to represent the conservatee or proposed conservatee before the court.



## Probate Code section 1471 (cont'd)

### Notes on 2021 Legislation:

Stats.2021, c. 417 (A.B.1194), in subd. (a), deleted “interest of that” following “represent the”; rewrote subd. (b); and added subds. (d) to (f); and made nonsubstantive changes. Prior to amendment, subd. (b) read:

“(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, 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.”

## Probate Code section 1850

- Explicitly defines additional areas the court investigator must examine. For example, the court investigator must determine whether the conservatee wishes to remove the conservator, whether the conservatee still meets the criteria for a conservatorship, and whether the conservatorship is still the least restrictive alternative.

§ 1850(a)(2):

One year after the initial appointment of the conservator and annually thereafter, the court investigator shall, as provided in Section 1851, visit the conservatee, conduct an investigation, and report the findings of the investigation to the court. On receipt of the investigator's report, the court shall consider terminating the conservatorship at a hearing pursuant to Section 1863 and take any other appropriate action.



## Probate Code section 1863(c) and (d)

- Upon a conservatee's filing of a **petition for termination** under Probate Code section 1861(a)(2), changes to Probate Code section 1863(c) and (d) appear to **require that the opposing party then has the burden to prove anew by clear and convincing evidence its case for a conservatorship**:

(c) Unless the court determines, on the record and by clear and convincing evidence, that (1) the conservatee still meets the criteria for appointment of a conservator of the person under subdivision (a) of Section 1801, a conservator of the estate under subdivision (b) of Section 1801, or both; and (2) a conservatorship remains the least restrictive alternative needed for the conservatee's protection, as required by subdivision (b) of Section 1800.3, the court shall enter judgment terminating the conservatorship.

(d) If the court determines, by clear and convincing evidence, that the conservatee meets the criteria for appointment of a conservator of the person under subdivision (a) of Section 1801, a conservator of the estate under subdivision (b) of Section 1801, or both, the court shall determine whether to modify the existing powers of the conservator to **ensure that the conservatorship remains the least restrictive alternative** needed for the conservatee's protection and shall order the conservatorship to continue accordingly. If the court modifies the existing powers of the conservator, new letters shall issue.



## RULES APPLICABLE TO CAC BUT NOT NECESSARILY TO PROPOSED CONSERVATEE'S OR CONSERVATEE'S CHOSEN COUNSEL



**Probate Code section 1456** – effective January 1, 2008. Judicial Council shall adopt a rule of court that, among other things, specifies the qualifications of, annual number of hours of education, particular educational subject matter, and reporting requirements for CAC appointed pursuant to Sections 1470 and 1471.

**Cal. Rules of Court, Rule 7.1101 & Rule 7.1103 & Rule 7.1105** - minimum qualifications, annual education requirements, and certification requirements for CAC. (Adopted, eff. Jan. 1, 2020.)

**Local Rules of the Superior Court of California, County of Alameda, Rule 7.820** - appointment of legal counsel for conservatees and proposed conservatees.

# Cal.Rules of Court, Rule 7.1101(c)

## General Qualifications CAC

- To qualify for any appointment under Probate Code section 1470 or 1471, an attorney must:
- (1) Be an active member in good standing of the State Bar of California or a registered legal aid attorney qualified to practice law in California under rule 9.45;
- (2) Have had **no professional discipline** imposed in the 12 months immediately preceding the date of submitting any initial or annual certification of compliance; and
- (3) Have demonstrated to the court that the attorney or the attorney's firm or employer:
  - (A) Is covered by **professional liability insurance** with coverage limits no less than \$100,000 per claim and \$300,000 per year; or
  - (B) Is covered for professional liability at an equivalent level through a self-insurance program;
- (4) Have **met the applicable qualifications and annual education requirements** in this chapter and have a current certification on file with the appointing court; and
- (5) Have satisfied any additional requirements established by local rule.

# Overview of Relevant California Rules of Professional Conduct, Bus. & Prof. Code Section 6068, Evid.Code Section 952



- **Rule 1.1** Competence
- **Rule 1.2** Scope of Representation and Allocation of Authority
- **Rule 1.6** Confidential Information of a Client
- **Bus. & Prof.Code section 6068** - Duties of Attorney
- **Rule 7.3** Solicitation of Clients
- **Evid.Code section 952** - Confidential Communication Between Client and Lawyer

# California Rules of Professional Conduct Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) **learning and skill**, and (ii) mental, emotional, and physical ability reasonably\* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, **professionally consulting another lawyer** whom the lawyer reasonably believes\* to be competent, (ii) **acquiring sufficient learning** and skill before performance is required, or (iii) **referring** the matter to another lawyer whom the lawyer reasonably believes\* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. **Assistance in an emergency must be limited to that reasonably\* necessary in the circumstances.**





## California Rules of Professional Conduct

### Rule 1.2 Scope of Representation and Allocation of Authority

- ▶ the objectives of representation and, as required by rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued.
- ▶ Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- ▶ (b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning settlement.\*

# California Rules of Professional Conduct Rule 1.6(a) Confidential Information of a Client

➤ (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,\* or the disclosure is permitted by paragraph (b) of this rule.




# Bus. & Prof. Code section 6068(e)

- It is the duty of an attorney to do all of the following:
- [...]
- (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the 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.







# Attorney- Client Privilege – Evidence Code section 952

- In California, a client and other 3rd parties can all meet together with client's attorney in certain situations without triggering destruction of confidentiality and waiver of the attorney-client privilege in litigation. For example, if all the other 3rd parties "are present to further the client's interest," then there is not necessarily waiver.
- This did not used to be the law in California, but it is now.
- Evidence Code section 952 - confidential communication between client and lawyer:
- "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, **discloses the information to no third persons other than those who are 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, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Emphasis added.)

## Attorney-Client Privilege - Evidence Code section 952 (cont'd)



- LAW REVISION COMMISSION COMMENTS
- 1965 Amendment excerpt:
  - The words “other than those who are present to further the interest of the client in the consultation” indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person--such as a spouse, parent, business associate, or joint client--who is present to further the interest of the client in the consultation.
  - These words refer, too, to another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern. This may change existing law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client.
  - See Attorney-Client Privilege in California, 10 Stan. L. Rev 297, 308 (1958), and authorities there cited in notes 67-71. See also *Himmelfarb v. United States*, supra. [7 Cal.L.Rev.Comm. Reports 1 (1965)].

# Practical Application of the Law to Our Contra Costa Conservatorship Cases

CONTRA COSTA RULES FOR COURT APPOINTED COUNSEL/GALS TO BE AWARE OF:

## **Court Appointed Counsel:**

Selection process for Conflicts Program

## **Guardian Ad Litem:**

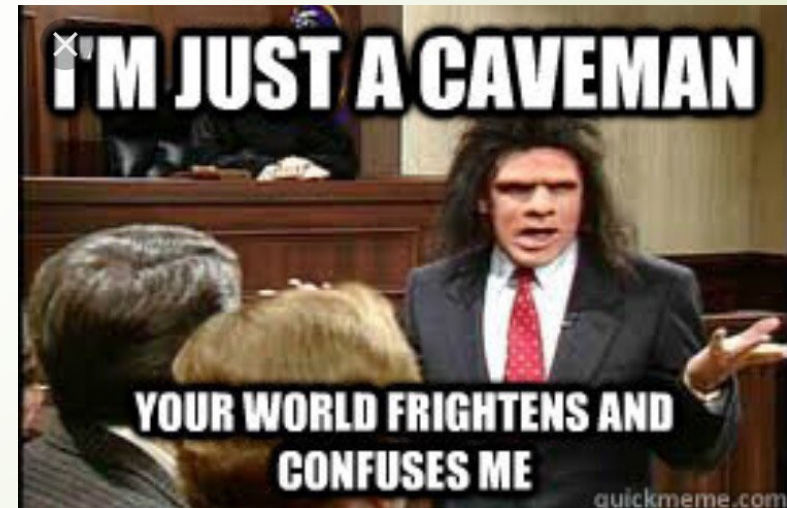
Selection from the Bench

## **Fees**



# OVERVIEW OF ROLE OF COURT APPOINTED COUNSEL

ZEALOUS ADVOCACY FOR  
CLIENT'S WISHES.







# Court Appointed Counsel

## Contra Costa County

<https://www.conflictprogram.org/>

- experience requirements
- mentorship options

## Alameda County

<https://www.lashicap.org/>

- Legal Assistance for Seniors

<https://publicdefender.acgov.org/index.page?>

- Alameda County Public Defender

## Solano County

<https://www.solanocounty.com/depts/pubdefender/home.asp>

- Solano County Public Defender

# Duration of Appointment in a Conservatorship

How long does CAC serve?

- relieved as counsel by the Court?
- serve until conservatorship terminated?
- serve until conservatee passes?



## Rule 7.61. Court Ordered Fees for Fiduciaries and Attorneys

No attorney for a guardian, guardian ad litem, minor, conservator, conservatee or personal representative shall request or accept any compensation from the estate (whether or not subject to court supervision) of the ward, incapacitated person, conservatee or decedent's estate without prior court order. **This does not require prior court approval of payments received from trusts or other persons.**

The requirement of prior court approval applies to any attorney for any of the specified fiduciaries who is representing the fiduciary in any other civil action. For example, if a creditor files suit against a decedent's estate, and the personal representative hires separate counsel to defend the suit, prior court approval is required before payment of any fees to the separate counsel.

In awarding or allowing reimbursement for compensation in situations described in paragraph (a), the Court is neither bound by (1) the terms of any attorney fee agreement executed without prior court approval in the proceeding nor (2) any amounts that have been paid previously. (See California Rules of Court, 7.753, 7.754, 7.755.) For information about Contra Costa Probate Court Fees and Costs Guidelines, go to the Probate Guidelines section at [www.cc-courts.org](http://www.cc-courts.org)







# Attorney Years of Experience Guidelines for Hourly Rates Range

0-5 \$295-\$350   6-10 \$350-\$400   11-19 \$400-\$475   20+ \$500

Attorneys with California State Bar Specializations or LL.M. degrees in either Estate Planning, Trust & Probate Law, or Taxation shall receive an additional \$50.00 per hour.

Multiple increases are not permitted for attorneys with a State Bar Specialization and LL.M. degree.

Fiduciary rates: The maximum allowable hourly rate for professional fiduciaries is between \$125 and \$195 per hour.

Fiduciary staff rates for care managers are between \$95 and \$175 per hour, and between \$85 and \$125 per hour for administrative staff.

Non-professional fiduciary rates:

The standard maximum hourly rate for other fiduciaries is \$75.00 per hour.

Higher rates: The determination of requests for higher rates will be based on all relevant factors presented, including special expertise applicable to the services provided, circumstances of the service, and relationship to the decedent, or other parties.

Travel: The Court will not generally allow attorney fees for more than two hours of travel time, total, per appearance



# **Overview of the Role of Guardian Ad Litem**

# Guardian Ad Litem: FIGHTING FOR BEST INTERESTS





# What is a Guardian Ad Litem?

- ▶ A guardian ad litem or GAL is appointed by a court to look out for another person's *best interests* during a legal case. The [Probate Code](#) specifically provides for the appointment of guardian ad litem in probate cases.
- ▶ In California civil cases, a guardian ad litem may be appointed under [Code of Civil Procedure section 372](#) for a minor or for an adult “who lacks legal capacity to make decisions” by the court in which the proceeding is pending. [California Judicial Council Form CIV-010](#) must be used to seek the appointment of a guardian ad litem in a civil case. A “relative or friend” of an adult lacking competence to make decisions may apply for appointment of a GAL or the court may act on its own motion.
- ▶ [Probate Code section 1003](#), however, controls the appointment of guardians ad litem in proceedings under the Probate Code. Section 1003 permits any interested person to seek the appointment of a guardian ad litem “at any stage of a proceeding.”





# When is a Guardian Ad Litem Appointed?

- In California, the court may appoint a guardian ad litem when someone who is the subject of a case lacks the legal capacity to make decisions.
- The probate court can appoint a guardian ad litem on its own motion or at the request of a “personal representative, guardian, conservator, trustee, or other interested person.”
- The Probate Code allows for these appointments at any stage of the probate proceedings.

## ➤ Who Can be Appointed a Guardian Ad Litem by a Probate Court?

- The probate court can appoint a GAL for incapacitated persons, unborn persons, minors, persons whose identity or address is unknown, unascertained persons, or a class of persons who are not ascertained or not in being.

## ➤ How Long Does a Guardian Ad Litem Serve?

- Once appointed, a guardian ad litem will serve for the length of the case. In some instances, a GAL may withdraw or may be replaced. However, outside of these situations, the GAL will remain on the case for its entirety.



# What if the Allegedly Incapacitated Person Opposes Having a GAL?

- While appointment of a GAL is usually unopposed, an allegedly incapacitated adult may object. [Probate Code sections 810-813](#) will guide the court in assessing mental capacity with the statutory presumption being that “all persons have the capacity to make decisions and to be responsible for their acts and decisions.”
- As section 372 indicates, if a vulnerable adult already has a conservator of the estate, such a conservator may litigate on behalf of the conservatee without a GAL. Likewise, a generally-appointed guardian may act for a minor. However, a GAL may be appointed even for adults with conservators and minors with guardians, thus giving the court situational flexibility.
- If the person objects to having a guardian ad litem appointed on their behalf, the probate court will take steps to evaluate their mental capacity. [California law](#) begins this process with the presumption that “all persons have the capacity to make decisions and to be responsible for their acts and decisions.” If, after the person is evaluated, it’s determined that he or she needs a GAL, one will be appointed.

# What considerations factor into seeking appointment of a GAL?



- The need for a guardian ad litem may be obvious in some situations and a closer call in others. In the former situation, the court may require appointment of a GAL even if the parties are silent. Often, however, the issue may be more subtle, leaving a tactical choice as to whether to seek a GAL.
- Once appointed, a GAL in a sense is a “guardian of the galaxy,” especially when the represented interests – like those of unborn descendants – are nebulous. Without a client to give direction, the GAL has to reach his or her own conclusions as to what is in the best interests of the person(s) he or she is to champion.
- Catch 22: Does the proposed conservatee need to be assessed for capacity before a GAL is appointed? What if the proposed conservatee (who is subjected to undue influence) objects to an assessment?

# When (and Why) Does Someone with a Temporary or General Conservator Need a GAL?

- Probate Code section [372](#) permits a conservator to represent the interest of a conservatee without having to appoint a GAL. However, the court can appoint a GAL for an adult who is under a conservatorship if needed.
- [California Judicial Council Form CIV-010](#) must be used to seek the appointment of a guardian ad litem in a civil case. A “relative or friend” of an adult lacking competence to make decisions may apply for appointment of a GAL or the court may act on its own motion.
- [Probate Code section 1003](#), however, controls the appointment of guardians ad litem in proceedings under the Probate Code. Section 1003 permits any interested person to seek the appointment of a guardian ad litem “at any stage of a proceeding.”
- A probate judge may appoint a GAL for minors, incapacitated persons, unborn persons, unascertained persons, persons whose identity or address is unknown, or a class of persons who are not ascertained or not in being – the question being whether the representation of an interest would be inadequate without a GAL to advocate for the interest.
- Applications to appoint a guardian ad litem in California probate court must be made using [Judicial Council Form DE-350/GC-100](#), not the form for civil cases.
-



# Who chooses and pays for the GAL: “It depends.”

- GALs generally cannot represent themselves in California courts unless they are licensed attorneys. Given that a nonlawyer GAL will need counsel, many parties choose to nominate an attorney who practices in the trusts and estates area, and who will be familiar to the local probate judge, to serve in the role.
- Once appointed, the GAL may end up taking a position adverse to other family members, as by pushing for the funding of a share for minor and unborn beneficiaries.
- Under Probate Code section 1003(c), however, the reasonable fees and legal expenses of the guardian ad litem are payable in the court’s discretion from the estate or trust, so a GAL who is overly litigious runs the risk of not being paid. The GAL may not be rewarded for taking the family trust on a costly journey.





## **Contra Costa County Rule 7.63 Guardian ad Litem**

### **a) Representation of guardian ad litem**

A guardian ad litem must be an attorney or must be represented by an attorney.

**(b) Waiver of beneficiary rights** A guardian ad litem may not waive or disclaim any substantive rights of the beneficiary without prior approval by the Court.

**Attorney's rates:** The standard maximum attorney's fees for guardianships, conservatorships and extraordinary probate services is set forth below. The Court will consider higher hourly rates upon a showing of good cause. The standard maximum attorney's legal assistant rate is \$175.00 per hour.

**Contra Costa GALS:** Specifically chosen by the Court

**Alameda GALS:** Rotating list of qualified attorneys

## WHO DOES WHAT?

- Role of CAC
- Role of GAL
- Role of Conservator (p/e)
- Role of Trustee
- Role of Court Investigator
- Role of Capacity Evaluator/730 Expert
- Role of Judge
- Role of Professional Fiduciaries
- Role of APS/Law Enforcement



# California Rules of Professional Conduct Rule 7.3 Solicitation of Clients

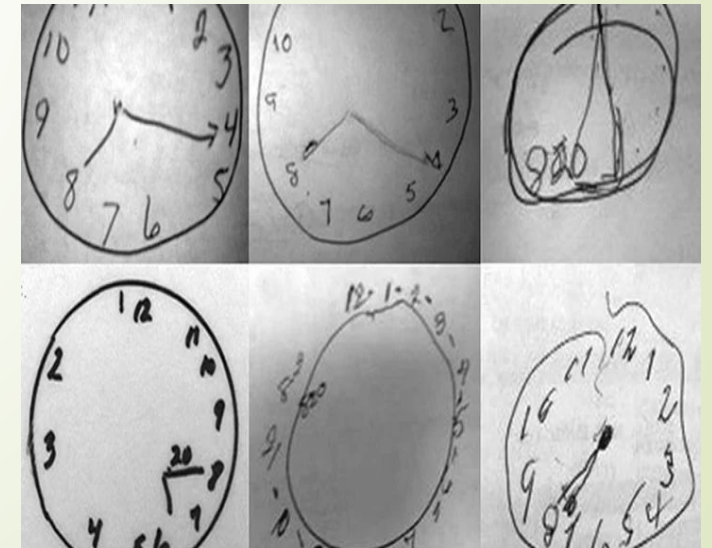
- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person\* contacted:
  - (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.
- [...]
- (e) As used in this rule, the terms "solicitation" and "solicit" refer to an oral or written\* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person\* and that offers to provide, or can reasonably\* be understood as offering to provide, legal services.





# The Capacity Evaluation Conundrum

1. How do we get a capacity evaluation -- House Call or Office Appointment?
2. Who should conduct the capacity evaluation – Neuropsychologist or Geropsychologist?
3. What is the difference between a neuropsychologist and a geropsychologist?



# Philosophical Approach to Capacity Evaluation

What is a patient centered, humanistic approach to a capacity evaluation?

Who attends the evaluation – what are the circumstances surrounding the evaluation?



## When to Just Say No

Be a detective!

Tips for quick assessments to determine potential client's capacity.

Tools for helping the client and the parties avoid incapacity pitfalls.





# Hypotheticals and Case Studies



**HOW TO SPOT ELDER ABUSE**

Elder financial exploitation is the illegal or improper use of an older person's funds, property or assets.


**WILLS OR POWERS OF ATTORNEY**

A sudden change in beneficiary, especially if involving a caregiver, could be a sign of exploitation.

**WITHDRAWALS OR PURCHASES**

Large cash withdrawals from banking and investment accounts, as well as using credit cards more frequently, are trouble signs.

**WARNING SIGNS**



A graphic showing the silhouettes of an elderly man and woman holding hands. The man is on the left, wearing a cane, and the woman is on the right. Above them is a speech bubble containing the text 'WARNING SIGNS'.

**UNPAID BILLS OR LACK OF FOOD IN HOUSE**

If a person is not paying bills or isn't buying food or other necessities, it's time to investigate.

**MISSING POSSESSIONS**

If you notice that belongings seem to be missing, ask where the items went.







## Some problematic scenarios:

- **Role of Original Estate Planner**
  - New Attorney found by proposed conservatee
  - **New attorney for proposed conservatee found by party accused of elder abuse**



How do YOU involve or exclude spouses, adult children, caregivers or siblings when meeting with a potentially incapacitated client?



**Question for the attorney: Although you theoretically can do a group meeting, SHOULD you?**

**How can you, the attorney, be certain all parties present actually do and/or will continue to be aligned with your client's interests?**

**How and when to make that determination? Especially problematic if it is your first meeting with a client, as you may not yet know client's position.**

**The better practice may be to meet separately with the 3rd parties out of the presence of the client.**



## Potential Issues With Choice of Counsel, Zealous Advocacy & Termination Requests

- What if client is unconscious and GAL might be needed? Communication skills are not a prerequisite for appointment of counsel. See *Wendland v. Superior Court* (App. 3 Dist. 1996) 56 Cal.Rptr.2d 595, 49 Cal.App.4th 44.





What if client is subject to undue influence and wants a recently sworn in attorney that they just met at the grocery store?

What if the attorney is likely to cost more, be less familiar with the practice, and cause more stress for client?





- ▶ What if client has a longstanding relationship with a business attorney, but they have not met in person for years?
- ▶ What are the ethical duties to assess whether to represent the client and to form a new client service agreement?

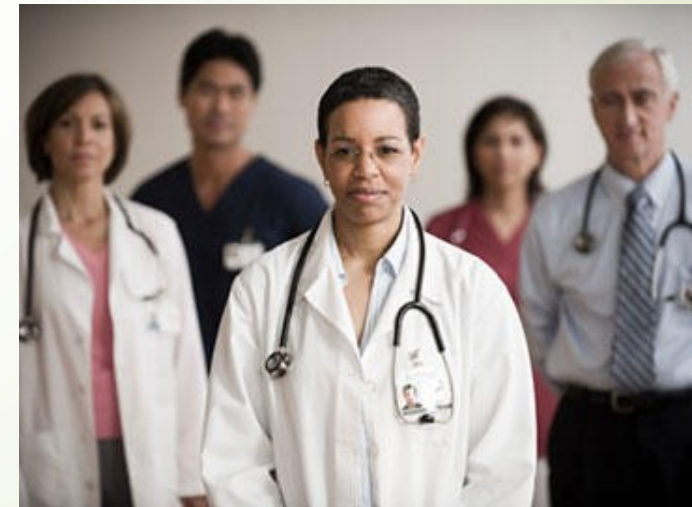
The “FAMILY” wants your help....

**What if client does not themselves reach out to you, the attorney?**


Instead, you get a call from client's concerned team after a conservatorship petition is filed.

Can you then call client or show up for a pre-arranged meeting set up by others?

What if client wants their ostensibly helpful caregiver or POA agent in the room when you arrive for your first meeting?







When client is very cognitively impaired, how does the attorney reconcile the duty to advocate zealously/maintain confidentiality with instances where client's own informed consent is required?

For example, if conservator argues that disclosure of APS records is in the best interest of client, but per the law county counsel will not release the records unless client consents?

In obtaining client's informed consent, you determine that the client cannot appreciate the risk of future prejudice, so client does not consent.

How to communicate this to the conservator ethically? Is this treading close to "best interest" practice? Or instead, is it simply abiding by client's objectives while taking steps "impliedly authorized to carry out the representation"?



