

CCCBA Elder Law Section proudly presents...

**Who's First in Probate Court?
The Ethics and Interplay of Court-Appointed
Counsel, Guardians ad Litem
and Court Investigators**

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AGENDA

1. Brief review of current conservatorship law re:
Court-appointed counsel, Guardian ad Litem and
Court Investigators.
2. Panel discussion of hypotheticals highlighting ethical
and procedural issues.

 Contra Costa County
Bar Association

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PROGRAM MATERIALS

Who's On First – What is the Essential Function of Each Player?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Zealous advocacy for client's wishes.</p> <p>"Like all lawyers, the court-appointed attorney is obligated to keep [his] client fully informed about the proceedings at hand, to advise the client of [her] rights, and to vigorously advocate on [her] behalf. (Bus. & Prof. Code, S 6068, subd. (c); Conservatorship of David L. (2008) 164 Cal.App.4th 701, 710.</p> <p>A proposed LPS conservatee has a statutory right to effective assistance of counsel]; Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1037, fn. 6l</p> <p>"Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner."]; see Mary K. [(1991) 234 Cal.App.3d12651272; conservatorship of Ivey (1986) 186 Cal.App.3d 1559, 1566.)</p> <p>The attorney must also refrain from any act or representation that misleads the court (Bzs.& Prof. Code, S 6068, subd. (d); Rules Prof. Conduct, rule 5-200(8).)" (Conservatorship of John L., supra,48 Cal.4that i3i, 151-152.)</p>	<p>Best Interests</p> <p>The historical origin for a GAL is the doctrine of <i>parens patriae</i>, Latin for "parent of the people." Under <i>parens patriae</i>, the King of England was the "parent" with the duty to protect disabled citizens. See <i>Conservatorship of Wendland</i> (2001) 26 Cal.4th 519, 535.</p> <p>Present day authority—two statutes: Code of Civil Procedure section 372 & Probate Code section 1003.</p> <p>A GAL is not acting as a court-appointed attorney. Thus, a GAL does not have a "client." A GAL nevertheless has a fiduciary duty to ascertain and act solely in the best interest of her ward.</p> <p>"[T]he GAL does not advocate for her client the way an attorney does – her job is acting in the ward's best interest, and the ward may not agree with the GAL's decisions." <i>McClintock v. West</i> (2013) 219 Cal.App.4th 540, 551-552.</p> <p>A GAL may be appointed by the court to represent the interest of any of the following persons: 1) a minor, 2) an incapacitated person, 3) an unborn person, 4) an unascertained person, or 5) a person whose identity or address in unknown. Prob. Code §1003.</p>	<p>A court investigator conducts an independent investigation to guide the determination of whether a temporary or general conservatorship is in the best interests of a proposed conservatee. (See <i>Conservatorship of Cornelius</i>, 200 Cal.App.4th at 1206.)</p> <p>"[A]ppointment of a court investigator and receipt of the investigator's report are intended to protect the rights of the proposed conservatee." (<i>Conservatorship of Sides</i>, 21 Cal.App.3d at 1094.)</p> <p>"The duty of the court investigator is to ensure that a proposed conservatee who is not expected to attend the hearing is aware of her rights and to make certain determinations concerning the conservatee, appointment of counsel, and the establishment of a conservatorship.</p> <p>The investigator then must provide this information to the court in a written report before the hearing.</p> <p>(See Prob. Code, §§ 1826, subd. (a)(1), 2250.6, subd. (a)(6); see also <i>Conservatorship of Sides</i>, supra, 21 Cal.App.3d at 1094.)</p>

Which Cases Need Which Professionals?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Discretionary: Court may appoint "private legal counsel" for a conservatee or proposed conservatee in any proceeding if the person is not otherwise represented by legal counsel and the court finds that "the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests." Probate Code sec 1470(a).</p> <p>Mandatory: If the subject person "is not represented by legal counsel and does not plan to retain counsel, whether or not such 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 five proceedings (establish conservatorship/appoint conservator, terminate, remove conservator, order affecting legal capacity, removal of temp. conservatee from residence)</p> <p>Prob. Code sec 1471(a); limited conservatorships. Prob. Code sec 1471(b); Failure of conservator to file accounting. Prob Code sec 2620.2(c)(4)</p>	<p>Incapacitated Person: For a person who lacks legal capacity to make decisions "if the court determines that the representation of the interest otherwise would be inadequate." Prob. Code sec 1003(a)(2). For incapacitated spouse re: petitions requesting approval of a spousal property transaction. Prob. Code sec 3100 et seq. May be appointed where there are conflicting positions on the best interest of an incompetent individual, and the court would like a neutral to investigate and report back. <i>In re Estate of Snowball</i> (1909) 156 Cal. 235, 237</p> <p>GAL may be appointed for a person who has not yet been conserved. CCP §372-§373. See <i>In re Sarah D</i> (2001) 887 Cal.App.4th 661, 667.)</p> <p>Where there is a prima facie showing of potential undue influence.</p>	<p>All conservatorships</p>

Who is Qualified to Serve in Each Role?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Each court has its own procedure. If conservatee expresses a preference for a particular attorney, the court must allow representation by the preferred attorney "even if the attorney is not on the court's list of court appointed attorneys." Prob. C. §1471(c).</p> <p>An attorney with a conflict of interest shall be disqualified. Prob. C. §1471(c).</p> <p>Contra Costa has a panel. Solano uses PD office/private counsel. Alameda uses LAS. Each county is different.</p>	<p>A GAL may be, but is not required to be, a licensed attorney. There is no order of preference or priority.</p> <p>Appointment left to the discretion of the trial court.</p> <p><i>D.G. v Superior Court</i> (1979) 100 Cal.App.3d 535, 546.</p>	<p>Two years of employment experience performing casework or investigations in a legal, financial, law enforcement or social services setting.</p> <p>Additional continuing education requirements. CRC 10.478</p>

Who Can Request the Appointment of GAL?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Each court has own procedure; can be done on court's own motion or on party's request (Form GC-005)</p> <p>Ethical Issue: Can CAC ever request appointment of a GAL or is that a breach of confidentiality as admission of client's incapacity?</p>	<p>Any party has the ability to seek the appointment of a GAL – petitioner, objector, temporary conservator, trustee.</p> <p>Ethical Issue: Should a party be able to “cherry pick” a particular GAL by petitioning for appointment?</p> <p>Is that Ok? Should the court always make the selection off a rotating list?</p> <p>Is it OK for the Court to “cherry pick” a GAL?</p> <p>Can any “interested party” petition for appointment of a GAL?</p>	<p>There’s an argument to be made that the court investigator SHOULD be the one to request GAL in cases where capacity/undue influence is an issue.</p> <p>Cis and GALs are informants, not advocates. Make recommendations, not arguments.</p>

Advocacy – is it expected? Is it forbidden? Who does What?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>“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 [statutory]duties.”</p> <p>B&P sec 6068 and Cal Rules of Prof. Conduct". Prob. C. §1471(d)</p> <p>No more best interest/advocacy hybrid. Zealous advocacy required.</p> <p>Ethical Issue: What if client is unconscious and GAL might be needed? Communication skills are not a prerequisite for appointment of counsel.</p> <p>See <i>Wendland v. Superior Court</i> (App. 3 Dist. 1996) 56 Cal.Rptr.2d 595, 49 Cal.App.4th 44.</p> <p>Ethical Issue: CAC is still a counselor at law. How much “counseling” is appropriate when client wants advocacy for clearly dangerous or losing positions?</p>	<p>A GAL protects and manages legal rights.</p> <p><i>Williams v. Superior Court</i> (2007) 147 Cal.App.4th 36, 47.</p> <p>A GAL is not an advocate. “[T]he GAL does not advocate for her client the way an attorney does – her job is acting in the ward’s best interest, and the ward may not agree with the GAL’s decisions.”</p> <p><i>McClintock v. West</i> (2013) 219 Cal.App.4th 540, 551-552.</p> <p>“Eyes and ears of the Court.”</p>	<p>Makes recommendations.</p> <p>Arm of the court.</p> <p>Provides confidential information to court.</p>

What is Shared with or Reported to the Court?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Background facts, Conservatee's wishes, legal arguments supporting Conservatee's wishes. Traditional attorney/client relationship.</p> <p>Court appreciates written reports, but will accept oral reports.</p> <p>Ethical Issues: Under new laws requiring pure advocacy, are reports of counsel even appropriate?</p> <p>We would not provide courts a "report" about a client in other circumstances. S</p> <p>ould CAC avoid providing reports of counsel and simply engage in advocacy through pleadings, oral arguments, and discovery?</p>	<p>Typically, a report of the GAL investigation is sufficient to highlight issues, concerns, or problems without filing a complaint, petition, or objection. <i>Berry v. Chaplin</i>, 74 Cal.App.2d at 657.</p> <p>GAL is not an advocate advancing the position of a client, but is an advisor to the court and protector of a ward of the court.</p> <p>CONSERVATOR: Should conservators (temporary or general, professional or layperson) be providing status reports to the Court? If so, how often?</p>	<p>Written report required five days before hearing. Prob. C. §1826(a)(10). See above for content.</p> <p>Reports served on attorney for conservatee & petitioner, conservatee, relatives within first degree, anyone court orders. Prob. C. §§1826(a)(10)-(11).</p>

Who Holds Which Privileges?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Same privileges as any client. Attorney-client privilege is sacrosanct.</p>	<p>Because not a party, no attorney-client privilege.</p>	<p>No privileges.</p>

Confidentiality?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Will receive confidential filings (eg screening forms, CI reports).</p> <p>Ethically obligated to maintain the confidences of client. B&P §6068, Evid. §954. HIPAA applies.</p> <p>Report is served on parties, but not necessarily in public court file. <i>Conservatorship of Schaeffer</i> (2002) 98 Cal.App.4th 159.</p> <p>Not entitled to APS reports.</p> <p>ON ORDER: “Pursuant to Civil code Section 56.10(b)(1), counsel shall have access and authority to review and copy the medical records of the attorney’s client (the proposed conservatee) designated above without the consent of the client. Copies of the Court’s record including the Court Investigator’s report are to be provided at no cost to the attorney and the attorney’s office staff as long as the attorney remains counsel of record in this case. Copied records will be mailed to the attorney four days after the filing of this order.”</p> <p>Ethical Issue: <i>If CAC is required to advocate for client’s wishes, is it a problem that CAC is the professional entitled to medical records?</i></p> <p><i>Should it be GAL instead, under the new law?</i></p> <p><i>How should it impact CAC to learn from medical records that client lacks capacity when advocating for dangerous or losing positions?</i></p>	<p>Will receive confidential filings (eg screening forms, CI reports), minute orders. HIPAA applies.</p> <p>No duty of confidentiality; no duty of loyalty to a client.</p> <p>Not expressly entitled to APS reports</p>	<p>Will receive confidential filings (eg screening forms, CI reports), minute orders, APS investigations.</p> <p>Health care provider is authorized to disclose medical information about a conservatee to CI re any investigation required or authorized in conservatorship, if conservatee is unable to give informed consent.</p> <p>CC §56.10(c)(12).</p>

Immunity?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>No immunity, but only duties are to client.</p> <p><i>Hall v Kalfayan</i> (2010) 190 Cal.App.4th 927, 937.</p>	<p>Quasi-judicial immunity.</p> <p><i>McClintock v. West</i> (2013) 219 Cal.App.4th 540</p>	<p>Quasi-judicial officer with absolute common law immunity.</p> <p><i>Fisher v. Pickens</i> (1990) 225 Cal.App.3d 708, 712.</p>

Participant in Discovery?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Limited to promoting client's wishes.</p>	<p>Is a party for discovery purposes and is not exempt from the rules of discovery.</p> <p><i>Regency Health Services v. Superior Court</i> (1998) 64 Cal.App.4th 1496, 1503-1504.</p>	<p>No, except as witness.</p>

Participant in Settlement?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Yes, active participant. Guided by client's wishes.</p>	<p>A GAL has no authority to enter into an agreement compromising the claims of his or her ward without the approval of the court that appointed the GAL.</p> <p><i>Scruton v. Korean Air Lines</i> (1995) 39 Cal.App.4th 1596.</p> <p>Ethical Issue: Despite not entering into the agreement, should GAL be present to assure that ward's best interests are front and center?</p>	<p>No role.</p>

Participant at Trial?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Absolutely.</p>	<p>Litigation: Because the court is the guardian, and the GAL is the investigator for the court (charged with understanding the legal rights and individual circumstances of the ward), the GAL should be circumspect before making an objection or affirmative filing, absent instruction.</p> <p>Typically, a report of the GAL investigation is sufficient to highlight issues, concerns, or problems without filing a complaint, petition, or objection. See <i>Berry v. Chaplin</i>, 74 Cal.App.2d at 657 (court charged with protecting ward’s interests).</p> <p>TRIAL: No role at trial except as witness.</p> <p>Ethical Issue: Who calls GAL as witness? Conservator? Court Appointed Counsel? Objector?</p>	<p>A party may subpoena the testimony of the court investigator for trial and may seek admission of the court investigator's report into evidence.</p> <p><i>Conservatorship of Manton</i> (1985) 39 Cal.3d 645, 651. Subject to the rules of evidence.</p> <p>CIs could qualify as experts, business records, etc.</p>

When Does it End?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>If appointed by court, representation ceases on death, termination or further order of court, or by replacement by client. Prob. C. §1471(c)</p>	<p>Appointment lasts for duration of case.</p>	<p>Mandatory annual review is no longer required." Prob. C. §§1850(a)(2), (f).</p> <p>If temp conservatorship, CI must make second visit on general. Prob. C. §1826(f).</p>

Hypothetical #1

Gus and Gladys Grandparents

Gladys Granny and her husband, Gus Grandpa, were aging in place at their Lafayette estate. Dutiful Dora lives in So Cal, but is devoted to her grandparents and visits often. Gus was diagnosed with terminal brain cancer in 2019. Gus had a long illness, and Gladys was appointed as his conservator during the worst of the pandemic. Lisa Lawyer was his court appointed counsel. Everyone agreed that a conservatorship was appropriate as Gus was behaving erratically and would rebuke Gladys' efforts to help him as his POA. Lisa Lawyer convinced Gus that a conservatorship was in his best interests.

In 2021, Doris took Gladys Granny to a doctor's appointment, and Gladys was diagnosed with vascular dementia and mild cognitive impairment. The doctor suggested a neurological assessment for Gladys, then told her to quit smoking and lose weight. Gladys told Dora she would never see that quack again.

Dora visits when she can, but Gus and Gladys needed in-home help. In 2021, Gus and Gladys hired minimum wage caregivers from Craig's List, Ashlee Aid and her cousin, Hunky Handyman. Ashlee provided loving care to the couple and Hunky did some odd jobs around the house. This arrangement lasted a year, until Gus died in late 2022.

Within 2 weeks of Gus' death, Hunky declared his love for Gladys, and he and Ashlee moved in with Gladys. Gladys loves Hunky and has paid him \$250,000 to "fix up the house." Gladys loves Ashlee also. Ashlee helps Gladys with showering and other intimate care, does light housekeeping, and redirects Gladys when she awakens in the middle of the night. Gladys takes Ashlee with her to the salon and out to lunch daily – Ashlee is her best friend.

When Dora, who was Gladys' POA and successor Trustee, found out what was happening, she successfully sought temporary conservatorship of Gladys and temporary suspension of Gladys as Trustee of the Grandparent Family Trust. Dora filed for an EARO against Hunky and it was granted. However, Ashlee still lives with Gladys, and provides care in exchange for rent. Gladys and Ashlee refuse to let Dora in the house, so Dora is struggling to get a Capacity Declaration. Gladys wants to disinherit Dora, and she has signed a deed granting the Lafayette house to Ashlee.

Gladys is furious at Dora, and hired an experienced probate attorney Alan Aggressive to object to the conservatorship and trustee suspension. The Court confirmed Alan as CAC. The Court appointed a GAL on its own motion.

CAC filed a glowing capacity evaluation from Gladys' dermatologist.

CAC objects to all medical exams, and argues that Gladys is able to manage her affairs with a little help from Ashlee. Dora is worried that at the next hearing, CAC will be successful arguing that Dora has presented no evidence of Gladys' incapacity, and that the GAL should be dismissed. Dora has noticed Gladys' deposition, but it has been rescheduled several times due to "medical issues."

Discussion of Hypothetical #1

Gus and Gladys Grandparents

What should happen now?

Who advances arguments about Undue Influence?

Can Lisa Lawyer be appointed as GAL since she is familiar with the case?

Is there ever a time that the GAL and CAC can be the same person?

Does the GAL do discovery?

What information must be shared between the parties (isn't protected by privilege e.g. a non-favorable medical evaluation) – CAC and GAL and conservator and Court Investigator?

Is there a role for a GAL in mediation?

Who signs a settlement agreement?

What is the role of Court Investigator or GAL in trial?

When is the GAL done? When is CAC done? When is the CI done?

What if the CAC fights the appointment of a GAL? Or GAL gets dismissed because there isn't a finding of incapacity?

Hypothetical #2

Case of Connie Conservatee

Connie Conservatee is 92 years old, and has two children, Bob Bossy and Louise Leach. Connie is showing signs of moderate dementia, but has never been diagnosed.

Connie lives in her own home with Louise, who provides caregiving services to Connie, including food prep and driving. Bob lives out of state. Connie has an estate plan that names Louise as the agent under the DPOA and AHCD, executor and trustee.

Connie's house is in the trust, with an equity line. Bob found out that Louise has put herself on her Connie's accounts and believes she is using Connie's money to feed her gambling habit.

Bob retains counsel to petition for conservatorship with Fred Fiduciary appointed as conservator of the person and estate, alleging undue influence and incapacity. The Court grants a temporary conservatorship and appoints Angela Attorney as counsel for Connie .

Connie is outraged. She cuts off all communications with Bob. She adamantly denies having any capacity issues, and contends she is perfectly capable of managing her own health and financial decisions. She trusts Louise completely.

She has hired her own attorney, a friend of Louise's that does real estate law who is also helping Louise. Connie does not want to meet with Angela Attorney. She refuses to get a medical examination. Louise files an objection to the conservatorship.

Discussion of Hypothetical #2 Case of Connie Conservatee

Is a Guardian ad litem necessary or appropriate? Who asks for the appointment?

How does the Court Investigator see his role?

How is the issue of who gets to be Connie's counsel decided? What happens if Connie is completely uncooperative?

What is the scope of the GAL's role?

Questions: Does GAL have a role? CAC? Can Louise hire whatever attorney she wants if there hasn't been a determination of incapacity?

Questions: What if Connie wants to file motions or oppositions that have no merit?

What if the PPF doesn't want to get into the family drama? Or

What if the PPF filed a Petition for Substituted Judgment on behalf of Connie to disinherit Bob?

Questions: Should the PPF be getting medical reports, taking a position at all?

Hypothetical #3

Lily's Limited Conservatorship

Mary Mother and Fred Father are the limited co-conservators of daughter Lily, a non-verbal, non-ambulatory 28-year-old with **Sanfilippo syndrome**, a rare genetic metabolism **disorder** that causes cognitive impairment and severe health issues. Frank Father filed a petition to remove Mary as co-conservator after Mary and Frank split up (they weren't married, but co-parented Lily for the first 20 years of her life.)

Frank owns the house where Mary and Lily lived, and had made it wheelchair accessible for Lily. He never wanted Mary and Lily to leave, and misses Lily wants her home. Frank and Mary's split was very contentious. Mary is Lily's IHSS worker, and she and Lily are now living in a small studio apartment.

Frank alleges that Mary has been withholding visitation between Lily and Frank. Mary alleges that she withholds visits because Sally Stepmother has been abusive to Lily. During a recent visitation, police were called to Frank's house because Lily had a health crisis and Mary, Sally and Frank were all arguing over how to care for Lily, and Lily became noticeably agitated. The police let Mary leave with Lily to resolve the dispute.

Mary has asked Frank to pay dependent adult support, but he claims to have no liquid assets. Frank has hired an aggressive lawyer at a prestigious trust and estate firm, and Mary is pro per. Mary claims she has been unable to find respite IHSS workers to help her care for Lily, but Frank's work schedule is unpredictable so he won't commit to regular parenting time/visitation with Lily. Frank says Sally can care for Lily if he is unavailable during Frank's parenting time.

Courtney Court Appointed Counsel was appointed for Lily ten years ago, and was never relieved.

Discussion of Hypothetical #3

Lily's Limited Conservatorship

Courtney Counsel is not sure how to proceed.

How can the CI help with this case? Should a GAL be appointed? Who requests the GAL?

How much investigation should CAC conduct if her client can't express a preference between her parents? How much investigation should the GAL undertake?