





### Rule 7.1101 General Qualifications

### (a) Scope

Establishes minimum qualifications, annual education requirements, and certification requirements that an attorney must meet as conditions of court appointment under Probate Code Section 1470 or 1471.

### (c) General qualifications

Requires that an attorney must: (1) be an active member in good standing; (2) had no professional discipline imposed in the 12 months immediately preceding the date of submitting initial or annual certification of compliance; (3) be covered by professional liability insurance; (4) met applicable qualifications and annual education requirements; and (5) satisfied any additional requirements established by local rules.

Rule 7.1102 Qualifications and Annual Education Required to Represent [Proposed] Ward

Except as provided in rule 7.1104(b) an attorney must have met the qualifications in either (a) or (b) and, in every year, must meet annual education requirements in (C). (a) Experience-based qualifications

An attorney is qualified for appointment if the attorney has met the experience requirements described in either (1) or (2).

(1) Within the five years immediately before appointment, has personally represented a petitioner, an objector, a respondent, a minor child, or a nonminor dependent in at least three of any combination of the following proceedings, at least one of which must have been a contested matter or trial: (A) probate guardianship proceeding; (B) juvenile court child welfare proceeding; or (C) family law child custody proceeding.

(2) Meets requirements in: (A) rule 5.660(d) for juvenile court child welfare proceeding; or (B) rule 5.242(f) for family law child custody proceeding.

#### (b) Alternative qualifications

An attorney who does not yet meet the experience-based qualifications in (a) may, until the attorney has gained the necessary experience, qualify for appointment if the attorney meets the requirements in (1) or (2).

(1) At the time of appointment, the attorney works for an attorney, a private law firm, or a legal services organization approved by the court for appointment under Probate Code Section 1470 to represent [proposed] wards, and is supervised by or working in close professional consultation with a qualified attorney; or

(2) In the 12 months immediately before first availability for appointment, the attorney has completed at least 3 hours of professional education approved by the State Bar for MCLE credit in the subjects listed in (d) and, at the time of appointment, is working in close professional consultation with a qualified attorney.

#### c) Annual education

Each calendar year after first availability for appointment, an attorney appointed by the court to represent a [proposed] ward must complete at least 3 hours of professional education approved by the State Bar for MCLE credit in the subjects listed in (d).

#### d) Subject matter and delivery of education

Education in the following subjects-delivered in person or by any State Bar approved method of distance learning may be used to satisfy this rule's education requirements: (1) State and federal statutes-including the federal Indian Child Welfare Act of 1978, rules of court, and case law governing probate guardianship proceedings and the legal rights of parents and children; (2) Child development, including techniques for communicating with a child client; and (3) Risk factors for child abuse and neglect and family violence.

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Rule 7.1103 Qualifications and Annual Education Required to Represent [Proposed] Conservatee

Except as provided in rule 7.1104(b), an attorney appointed to represent the interests of a [proposed] conservatee, or person alleged to lack legal capacity, must have met the qualifications in (a) or (b) and, in every calendar year after first availability for appointment, must meet the annual education requirements in (c).

### (a) Experience-based qualifications

An attorney is qualified for appointment if, within the five years immediately preceding first availability for appointment, has personally represented a petitioner, an objector, a [proposed] conservatee, a person alleged to lack legal capacity or be gravely disabled in at least three separate proceedings under either division 4 of the Probate Code or the LPS Act, including at least one contested matter or trial.

### (b) Alternative qualifications

An attorney who does not meet the experience-based qualifications may qualify for appointment if the attorney meets requirements in (1) or (2). (1) At the time of appointment, the attorney works for an attorney, private law firm, public defender's office, or legal services organization that is court approved for appointment, and is supervised or working closely with a qualified attorney; or

(2) Within 12 months prior to the attorney's first availability for appointment, completed at least 3 hours of State Bar approved MCLE credits in the subjects listed in (d), and works in close professional consultation with a qualified attorney.

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#### (c) Annual education

Each year after first availability for appointment, the attorney must complete at least 3 hours of professional education approved by the State Bar for MCLE credit in the subjects listed in (d).

#### (d) Subject matter and delivery of education

Education delivered in person or by State Bar approved method of distance learning in the following areas: (1) State and federal statutes-including the federal Americans with Disabilities Act, rules of court, and case law governing probate conservatorship proceedings, and related issues; (2) The attorney-client relationship and attorney ethics under California Rules of Professional Conduct and other applicable law; and (3) Special considerations in representation of elders or a person with a disability, including: (A) Communicating with elders and disabled persons; (B) Vulnerability of such persons to undue influence, abuse, and neglect; (C) Effects of aging, major neurocognitive disorders (including dementia), and intellectual and developmental disabilities in a person's ability to perform the activities of daily living; and (D) Less-restrictive alternatives to a conservatorship.

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### Rule 7.1104. Local administration

#### (a) Procedures

A court may (1) create and maintain lists or panels of certified attorneys for appointment under Probate Code sections 1470 and 1471; and (2) establish by local rule procedural requirements, including submission of an application, as conditions for approval for appointment or placement on a list or panel.

### (b) Exception to qualifications

A court may appoint an attorney who is not qualified under rule 7.1102 or 7.1103 on an express finding, on the record or in writing, of circumstances that make such an appointment necessary, which may include, but are not limited to, when: (1) No qualified attorney is available for appointment; or (2) The needs or interests of the person to be represented cannot be served without the appointment of an attorney who has other specific knowledge, skills, or experience.

### Rule 7.1105. Certification of attorney qualifications

### (a) Initial certification

An attorney must certify to the court that the attorney meets: (1) the licensing, disciplinary status, and insurance requirements in rule 7.1101(c)(1)-(3); and (2) the qualifications in rule 7.1102, or rule 7.1103, or both.

### (b) Annual certification

To remain eligible for appointment an attorney must certify to the court, no later than March 31 of each following year, that the attorney: (1) meets the licensing, disciplinary status, and insurance requirements in rule 7.1101(c)(1)-(3); and (2) has completed the applicable annual education in rule 7.1102, or rule 7.1103, or both for the previous calendar year.

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### (c) Notification of disciplinary action

Attorney must notify the court in writing within five court days of any disciplinary action taken against the attorney by the State Bar and must describe the charges, disposition, and terms of any reproof, probation, or suspension.

### (d) Documentation

A court to which an attorney has submitted a certification under this rule may require the attorney to submit documentation or other information in support of any statement in the certification.

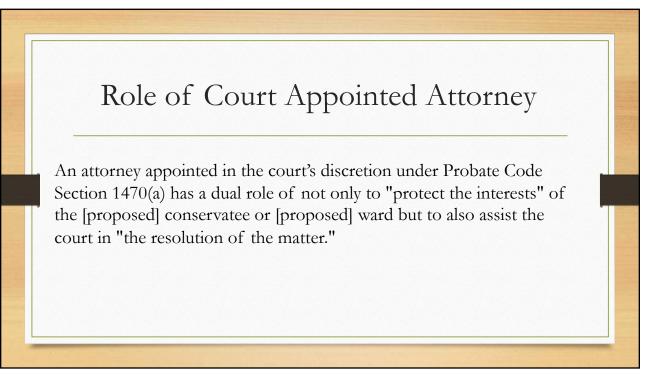
### (e) Confidentiality

The certifications required by this rule and any supporting documentation or information submitted to the court must be maintained confidentially by the court. They must not be filed or lodged in a case file.

## Discretionary Appointment

Probate Code Section 1470(a)

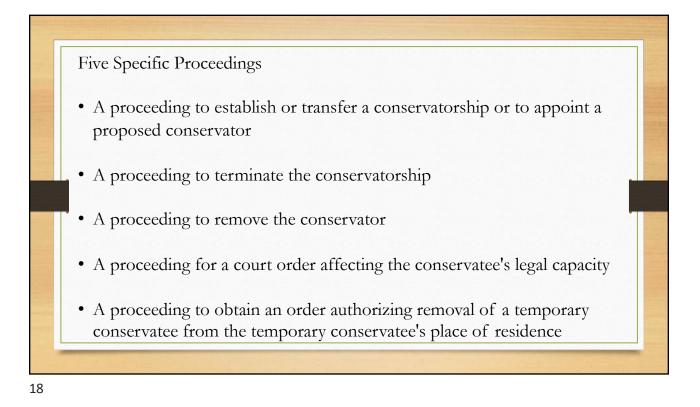
The court may appoint private legal counsel for a [proposed] ward or a [proposed] conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.



# Mandatory Appointment Attorney Requested

Probate Code Section 1471(a)

If a [proposed] conservatee or person alleged to lack legal capacity is unable to retain counsel and requests the appointment of 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 of five specific proceedings, which are the ones with the greatest long-term impact on the person.



The wording of Section 1471(a) suggests that an attorney appointed at the request of the [proposed] conservatee has the narrower role of "representing the interests" of the client since no mention is made of being "helpful to the resolution of the matter" as under Probate Code Section 1470(a). The distinction in the wording between Section 1470(a) and Section 1471(a) suggests that counsel appointed under Section 1471(a) has the single role of advocating the client's interests without regard to assisting the court in resolving the dispute.

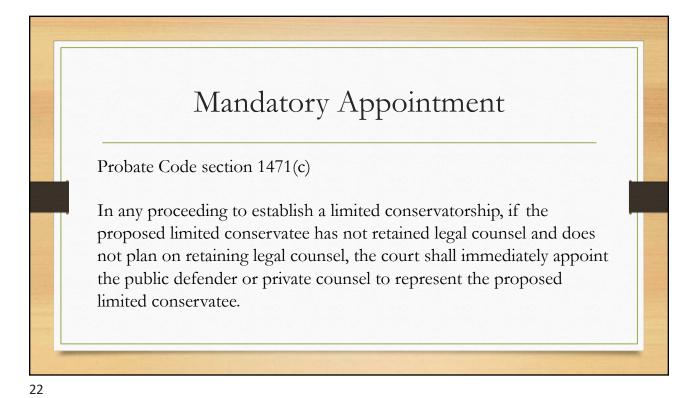
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# Mandatory Appointment Attorney Not Requested

Probate Code Section 1471(b)

Requires the court to appoint an attorney in the five proceedings specified in Section 1471(a) even if the [proposed] conservatee does not plan on retaining counsel and has not requested counsel if the court determines that, based on information contained in the court investigator's report or obtained from any other source, the appointment of counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the [proposed] conservatee.

As with Probate Code Section 1470(a) discretionary appointments, counsel appointed under Probate Code Section 1471(b) not only has the role of protecting the interests of the [proposed] conservatee, but also has the additional role of being helpful to the resolution of the matter.



Section 1471(c) provides that attorneys appointed for the proposed conservatee in limited conservatorship matters "represent the limited conservatee." Because there is no mention of either "representing the interests" of the client or being "helpful to the resolution of the matter" this suggests that a conventional attorney-client relationship exists. Also, many developmentally disabled individuals function at a very high level and, depending on the powers that are being requested, can retain a number of their rights. (See Probate Code Section 2351.5)

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# Probate Code Section 2356.5 If a conservator petitions for authority to (1) place a conservate with a major neurocognitive disorder in a secured-perimeter or locked facility, or (2) consent to the administration of medications (psychotropic drugs) appropriate for the care and treatment of a major neurocognitive disorder, Section 2356.5(f) requires that "The conservatee shall be represented by an attorney pursuant to Chapter 4 (commencing with Section 1470) of Part 1. Upon granting or denying authority to a conservator under this section, the court shall discharge the attorney or order the continuation of the legal representation, consistent with the standard set forth in subdivision (a) of Section 1470."

Because Probate Code Section 2356.5(f) requires that the court appoint an attorney to represent the conservatee in a petition under Section 2356.5, pursuant to Chapter 4, commencing with section 1470, counsel has the dual role of "protecting the interests of the conservatee" and being "helpful to the resolution of the matter."

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### Appointment as Guardian Ad Litem

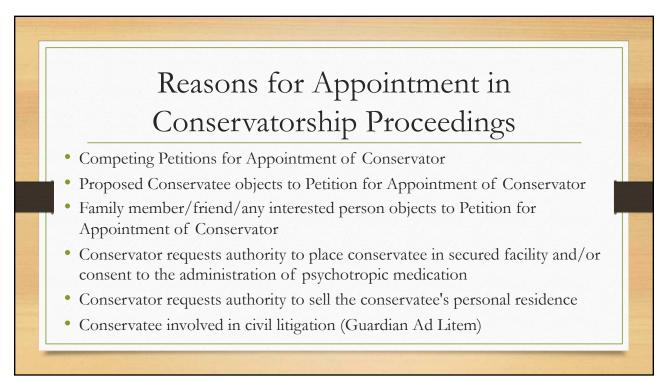
#### Probate Code Section 1003

(a) 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 under this code to represent the interests of any of the following persons, if the court determines that representation of the intere sts otherwise would be inadequate: (1) minor; (2) incapacitated person; (3) unborn person; (4) unascertained person; (5) person whose identity and address are unknown; (6) designated class of persons who are not ascertained or are not in being.



- Guardian Ad Litem's source of authority is the court
- Guardian Ad Litem has no client confidences and reports to the court
- Guardian Ad Litem more than an attorney, less than a party
- Guardian Ad Litem is to promote the best interest of the subject person

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# Reasons for Appointment in Guardianship Proceedings

- Competing Petitions
- Parent(s) Object to Establishment of Guardianship
- Petition to Terminate Guardianship
- Minor's Compromise Hearing

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# Reasons for Appointment in Probate Proceedings

Court can only appoint a Guardian Ad Litem in probate proceedings and appointment is usually for a beneficiary of the estate who is a minor, incapacitated person or unborn person. Guardian Ad Litem's role is to ensure that the interests of the beneficiary are being protected.

# Reasons for Appointment in Special Needs Trust Proceedings

- Court may appoint a Guardian Ad Litem to make sure that the establishment of a Special Needs Trust is in the beneficiary's best interests.
- To make sure the Special Needs Trust meets statutory requirements.

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# Local Rules Regarding Appointment

Local rule 20-1402(a) provides that appointment of counsel is personal and cannot be delegated to other attorneys and only appointed counsel can render legal services and appear at hearings. If counsel intends to delegate tasks to another attorney who is under their supervision, counsel must obtain an amendment to the appointment order to include the name of the supervised attorney.

# Practical Considerations

Before accepting any court appointment, the attorney should carefully consider several factors that may substantially affect his or her ability to handle the case:

- Conflict of Interests
- Time Constraints
- Expertise
- Complex Legal Issues
- Economics

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# Ethical Considerations for Court Appointed Attorney

Under normal circumstances, in order to establish and maintain the attorney-client relationship, an attorney must be satisfied that the client has the capacity to retain counsel.

The attorney representing a comatose, otherwise nonresponsive, or totally delusional client must be guided by their understanding of the client's best interests in taking positions or making recommendations to the court and the court permit and expect counsel to use his or her own best judgment in such a case.

If the client suffers no significant capacity impairment, the court appointed attorney should not disclose confidences or make recommendations in opposition to the client's position.

If the client is communicative but partially impaired, most courts take the "best interests" approach, which calls on court appointed attorney to present any recommendations the attorney may have in addition to stating the client's wishes, even if the two clash. (*See* <u>Conservatorship of Cornelius</u> (2011) 200 CA4th 1198 and <u>Conservatorship of Baber</u> (1984) 153 CA3d 542.)

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### Confidentiality

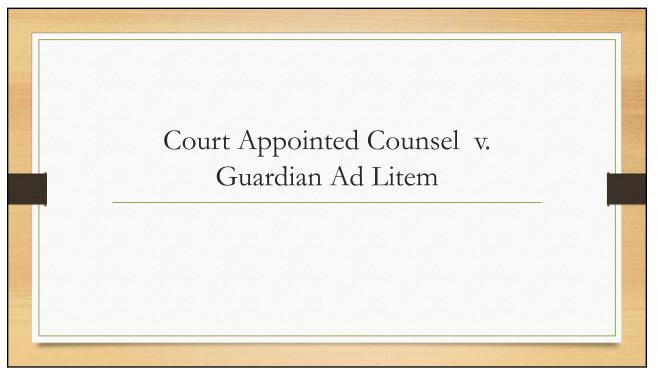
Business and Professions Code Section 6068(e) requires the attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Evidence Code Section 954 permits the client to refuse disclosure and to "prevent another" from disclosing "confidential communications between client and lawyer" as defined in Evidence Code Section 952.

The court appointed attorney is bound by these restrictions despite the dual ethical role provided in the statutes.

# Ethical Considerations for Guardian Ad Litem

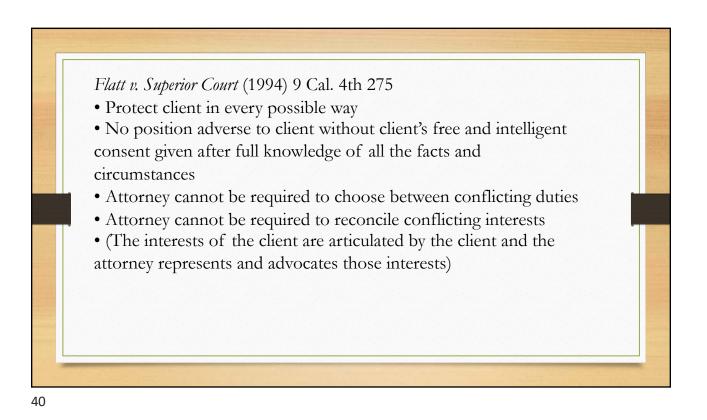
Before accepting appointment as a Guardian Ad Litem, an attorney should determine whether his or her errors and omissions insurance will cover this situation. Often, it does not. However, the court in <u>McClintock v. West (2013 219 CA4th 540</u>, ruled that a guardian ad litem holds "quasi-judicial immunity" for his or her actions because this function is intimately related to the judicial process.



### Role of Court Appointed Counsel in Conservatorships

• B & P Code Section 6068(e)

Requires the attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."



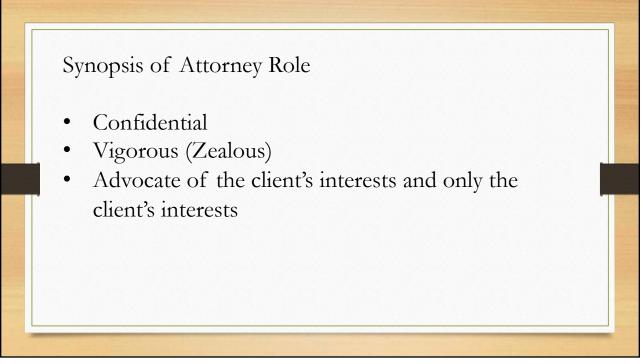
### Conservatorship of John L. (2010) 48 Cal. 4th 131, 151

•"[l]ike all lawyers, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf."

• In addition, the appointed attorney has a duty to "perform in an effective and professional manner."

### Hall v. Kalfayan (2010) 190 Cal.4th 927

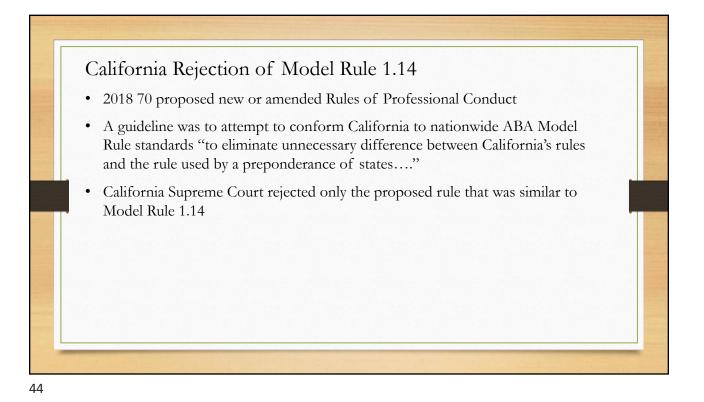
The court appointed attorney's only duty is to the conservatorship on behalf of the conservatee and, as a matter of law, the court appointed attorney does not have a duty to anyone other than the client.

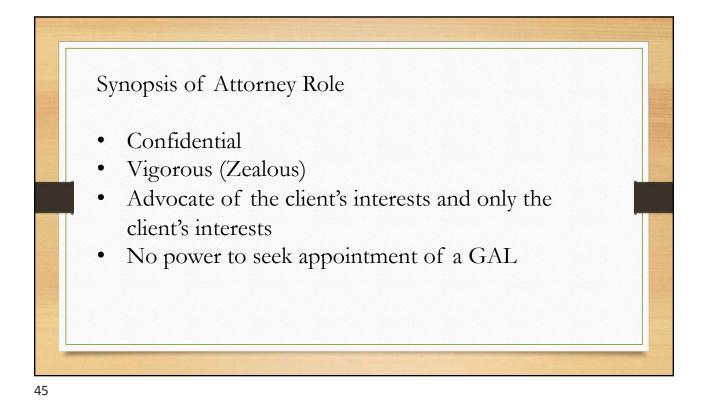


### Exceptions for Non-California Attorneys

• ABA Model Rule 1.14 (b)

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





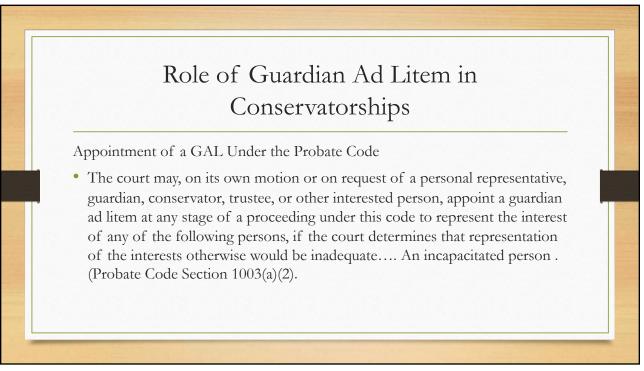
What about Probate Code 1470 (a)?
Appointed attorney has dual role:

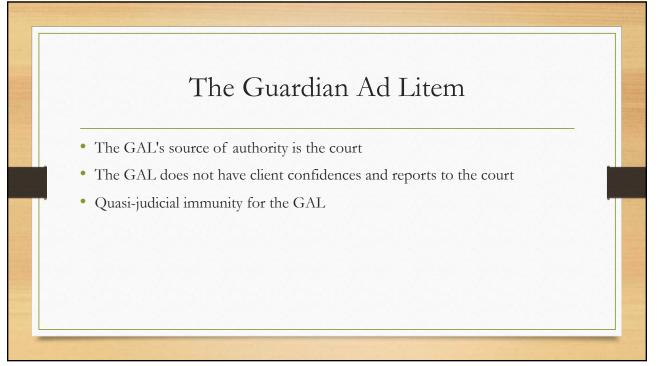
"Protect the interests" of the proposed conservatee
"Assist the court in the resolution of the matter"

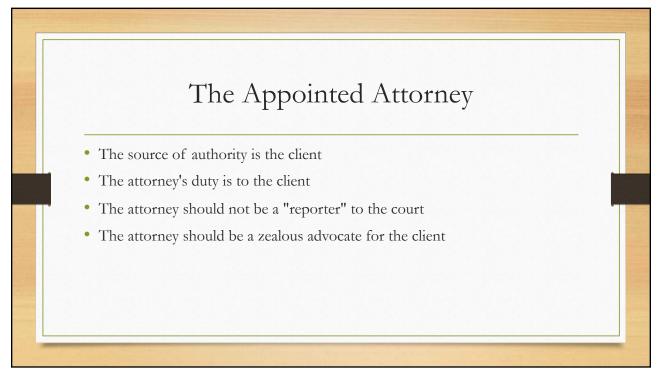
Probate Code Sections Do Not Negate an Attorney's Fundamental Duties

In re Greg F. (2012) 55 Cal.4th 393, 407

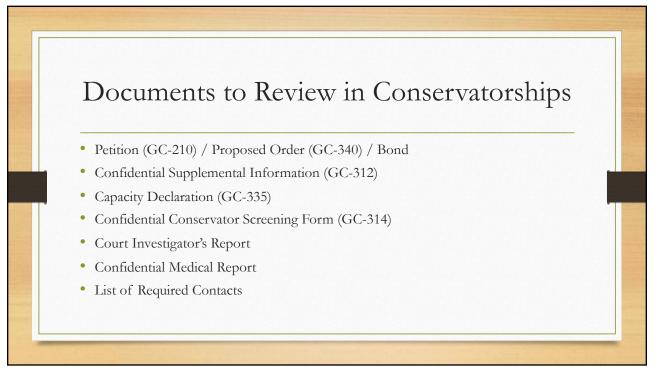
The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute and the failure of the Legislature to change the law when the subject is before it is indicative of an intent to leave the law as it stands.







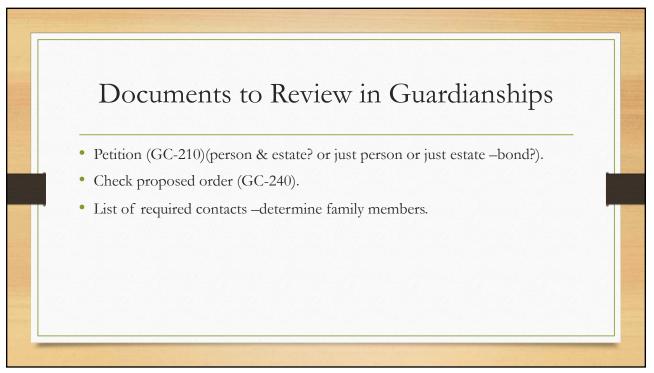


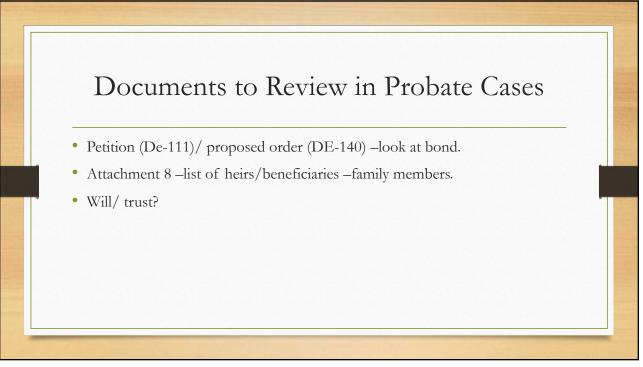


### Documents to Review in Limited Conservatorships

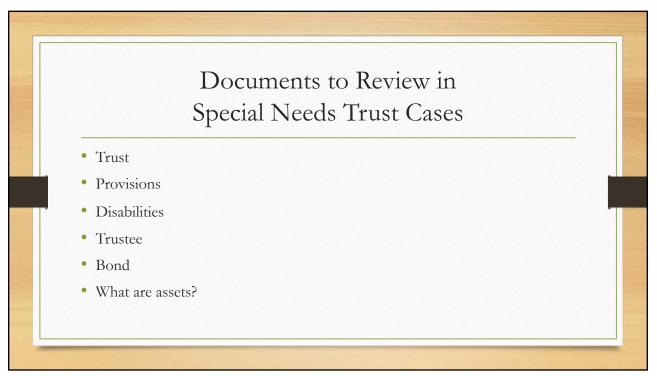
- Same as Conservatorship, plus:
- Look at powers being requested in petition/order.
- Report by Inland Regional Center.

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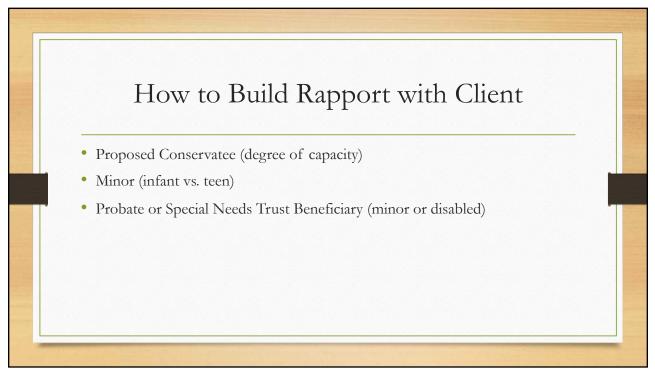








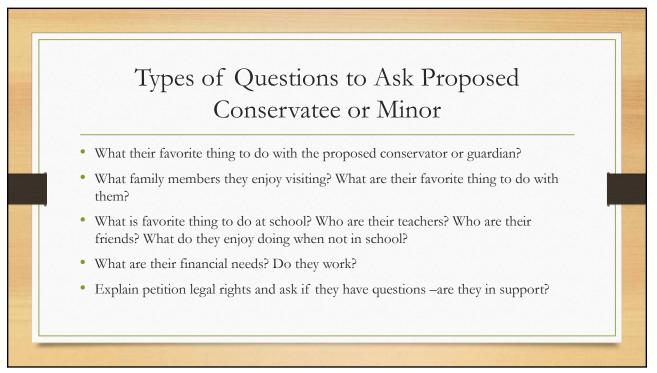


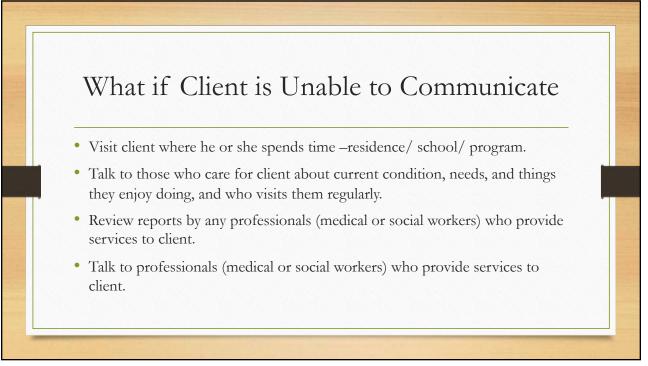


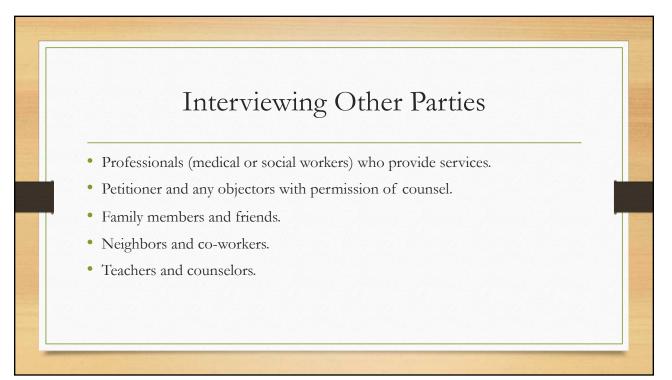
### Approaches to Take When Interviewing the Proposed Conservatee or Minor

- Environment where they are comfortable
- Allow them to show you around
- Allow them to show you or tell them about their interests
- Allow them to tell you about petitioner/family and relationships
- Allow them to tell you about their goals and passions

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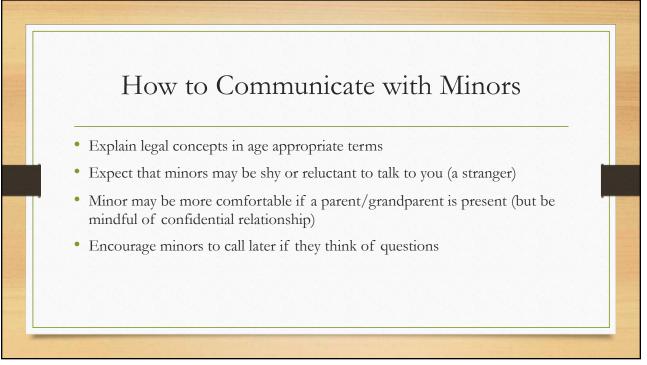


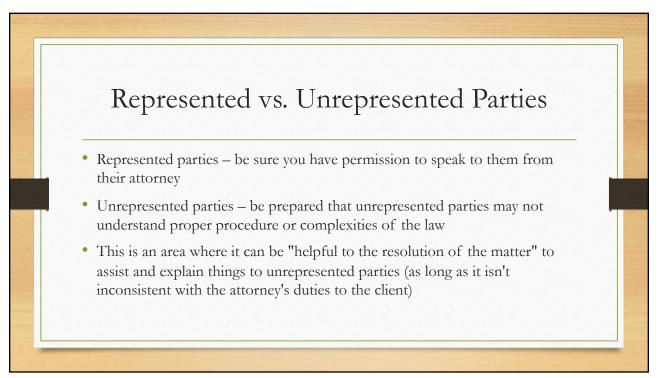


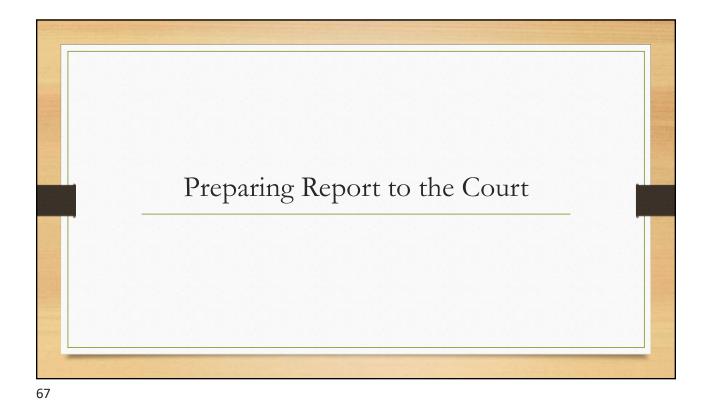












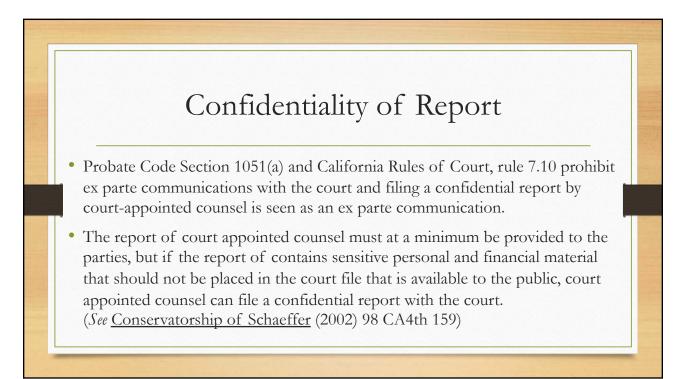
## Requirements of Report

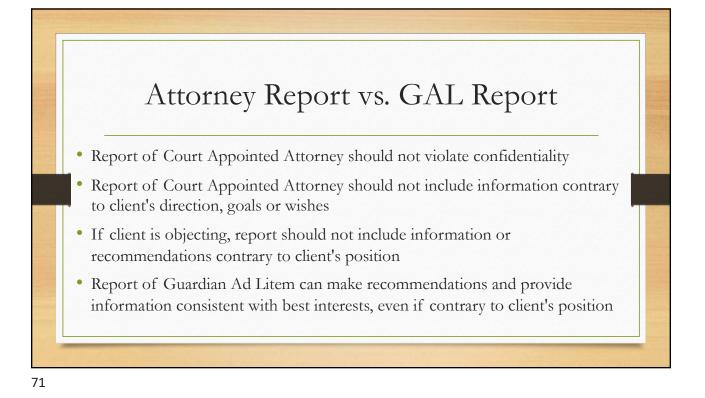
Local rule 20-106 requires that court appointed counsel must file a written report with the court with a verified statement that the attorney: (1) is an active member of the State Bar with no disciplinary actions pending and none filed within the past twelve months; (2) has professional liability coverage; (3) has not represented any other party to the proceeding; and (4) file the report with the court within a reasonable time prior to the hearing.

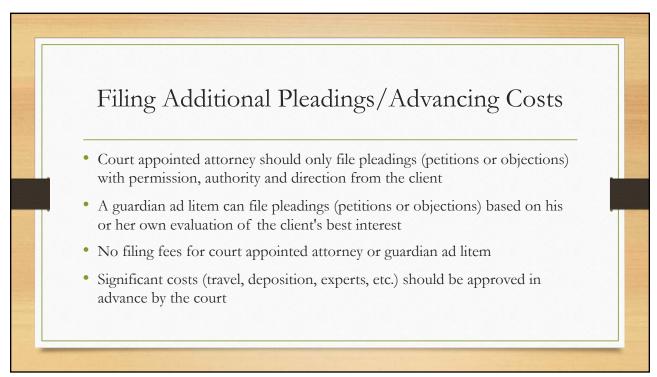
## Content of Report

- Procedural basis for appointment
- Documents counsel reviewed
- · Background facts (supportive of client's position)
- Persons counsel interviewed
- Condition of [proposed] conservatee or ward (supportive of client's position)
- [Proposed] conservatee's or ward's expressed wishes
- Recommendations of attorney to assist the court (consistent with client's wishes)

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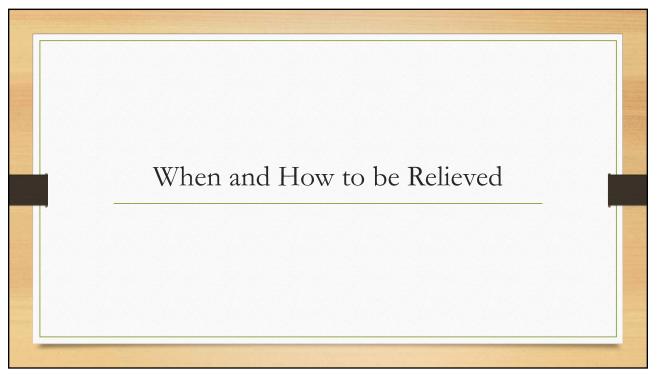








- Conservator appointed important to explain to the client what legal rights they will retain under the conservatorship, especially if the conservatee objected to the conservatorship. The Notice of Conservatee's Rights form contains a useful summary.
- Compliance documents. Court appointed counsel does not have a responsibility to assist the conservator with preparing the compliance documents, but can offer some assistance to ensure that the documents are completed and filed with the court.



# When and how to be relieved in conservatorships

- When -- if person, then after Compliance Review is Satisfied.
- When -- if estate, then normally, no earlier than after first accounting.
- How –if person, at Compliance Review Hearing, ask court to be relieved and submit voucher to court.
- How –if estate, at hearing on first accounting, ask court to be relieved and file a petition for fees.

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