

RESOLUTION 13-01-2019

DIGEST

Elder Abuse: Double Damages in Estate, Guardianship, Conservatorship, and Trust Actions
Amends Probate Code section 859 to clarify that punitive damages may be ordered in addition to actual damages in trust, estate, guardianship, and conservatorship actions.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolutions 03-14-2003, 06-04-2010, and 04-09-2012, all of which were approved in principle.

Reasons:

This resolution amends Probate Code section 859 to clarify that punitive damages may be ordered in addition to actual damages in trust, estate, guardianship, and conservatorship actions. This resolution should be approved in principle because it would increase protections for a vulnerable population.

Probate Code section 859 extends the double damages provisions of Probate Code section 4231.5 to a person who takes property by undue influence in bad faith, or through a commission of financial abuse of an elder or dependent adult. However, the current language of section 858 which states, “[t]he remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part,” has caused confusion in the interpretation and application of this section. This confusion has been exacerbated by contradictory unpublished opinions and a lack of any published opinion to use as a guideline. However, a recent published opinion, *Conservatorship of Ribal* (2019) 31 Cal.App.5th 519, reh'g denied (Jan. 31, 2019), review denied (Apr. 10, 2019), has finally set forth the parameters for determining damages.

Prior to *Ribal*, the courts had interpreted the language of Probate Code section 859 in two different ways. One interpretation called for treble damages calculated as follows: the injured party can recover not only the value of the property wrongfully taken (the actual damages), but also twice the value of that property as additional damages, a 1+2 = 3 approach. In some opinions, the Court of Appeal agreed with this interpretation, finding that any plaintiff who proves a wrongful taking is entitled to two awards: one under Probate Code section 856 (which authorizes the return of trust property) and another award under section 859 (authorizing double damages). (See *Estate of Kraus* (2010) 184 Cal.App.4th 103, 106, [affirming judgment ordering the return of \$197,402 to an estate as well as statutory double damages of \$394,804].) Other opinions (see *Kerley v. Weber* (2018) 27 Cal.App.5th 1187, 1198), argued for another interpretation, the 1+1=2 approach. This is the interpretation adopted in *Ribal*, which held:

“...[one party argues that] because the last sentence of [Probate Code section 859](#) states that the remedies in that section are ‘in addition to any other remedies,’ the amount due should be calculated by first assessing the amount of the damages, then doubling the damages and assessing that amount separately – essentially, 1 + 2 = 3. We find this contention unsupported by law. If the Legislature had intended damages to be tripled, it would have written something akin to “the person shall be liable for [*three times*] the value of the property recovered by an action under this part. In our experience, the Legislature knows how to distinguish between double damages and treble damages and has provided for each in numerous contexts.”

(*Conservatorship of Ribal, supra*, 31 Cal.App.5th at 525.) These damages apply to damages awards in trusts and estates cases as well as in conservatorships, and are statutory, not punitive, so the burden of proof required to establish punitive damages is not applicable. (See *Hill v. Superior Court* (2016) 244 Cal.App.4th 1281, 1291.)

This resolution attempts to reverse the holding in *Ribal* and codify the 1+2=3 approach by amending the statute so that damages equal twice the value of the property taken, would be awarded in addition to the value of the property taken. Many courts have already been applying this approach, and maintaining the pre-*Ribal* higher damages standard would continue to impose these higher damages as a disincentive proportionate to the risk to this vulnerable population of the elderly, the incapacitated and children.

This resolution is similar to 03-14-2003, which was approved in principle, and 06-04-2010, which passed as Assembly Bill no. 354 (2011-2012 Reg. Sess.) went into effect July 2011, and amended Probate Code section 859 to establish liability for a person who has taken, concealed, or disposed of property through undue influence or bad faith. This resolution is also similar to 04-09-2012, which was passed as Assembly Bill 381 (2013-2014 Reg. Sess.), and went into effect in August 2013. Assembly Bill 381 amended Probate Code sections 859 and 4231.5, which clarified and established that the penalty for a taking through undue influence or bad faith is twice the value of the property.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 859 to read as follows:

- 1 §859
- 2 If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of
- 3 property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of
- 4 a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in
- 5 bad faith or through the commission of elder or dependent adult financial abuse, as defined in
- 1

6 Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the
7 value of the property in addition to the property recovered by an action under this part. In
8 addition, except as otherwise required by law, including Section 15657.5 of the Welfare and
9 Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's
10 fees and costs. The remedies provided in this section shall be in addition to any other remedies
11 available in law to a person authorized to bring an action pursuant to this part.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: For many years the Court had the power to award double damages for wrongful taking in Trust, Estate, Guardianship and Conservatorship matters. There has been confusion by the Courts whether the double damages are to be added to the damage award or is the damage award only to be doubled. The Appellate Courts in published and unpublished decision have disagreed as to how Section 859 is to be applied. The most recent case is *Conservatorship of Ribal (Rogers v. Nguyen)* (January 18, 2019) 2018 DJDAR 561 the Court held that the damage award was to be doubled and not have double damages added to the damage award.

The Solution: The past application of Section 859 was treated in its application as if it was similar to an award of punitive damages. In cases involving punitive damages, punitive damages are added to the award of actual damages. Similar penalties (such as triple damages) in civil litigation are also added to the actual damage award. The *Ribal* case is the first published case that interprets a penalty provision to not be added to an actual damage award. This would reduce the protection as to the elderly and minors from those that attempt to wrongfully exploit them. The proposed amendment is to ensure that the purpose of the statute would be maintained and protect this vulnerable population.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE IN PRINCIPLE

TEXCOM acknowledges that the existing language of Probate Code section 859 is unclear whether it provides for double or treble damages, and that this ambiguity may give rise to conflicting interpretations. (See, *Conservatorship of Ribal (Rogers v. Nguyen)* (January 18, 2019) 2018 DJDAR 561 (damage award is only to be doubled); Cf., *Estate of Kraus* (2010) 184 Cal. App. 4th 103 (affirming award of treble damages).) Accordingly, TEXCOM is supportive of efforts to clarify this ambiguity in the statute.

TEXCOM, however, takes no position on the legal or policy questions of whether Probate Code section 859 *does* or *should* provide for double damages or whether Probate Code section 859 *does* or *should* provide for treble damages. One committee member suggested that the legislative history of Probate Code section 859 be researched to see if it sheds any light on these questions. Another committee member observed that, if the intent of this Resolution is to provide for treble damages, then the proposed language in the Resolution is still not entirely clear and would benefit from further refinement.

RESOLUTION 13-02-2019

DIGEST

Probate Code: Verified Electronic Bank Statements

Amends Probate Code section 2620 to allow verified electronic bank statements to be submitted in support of accountings.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 2620 to allow verified electronic bank statements to be submitted in support of accountings. This resolution should be approved in principle because it would streamline and modernize accounting requirements to be consistent with common banking practices without jeopardizing thorough court review of accountings.

Under existing law, the Probate Code requires that original account statements be submitted to the court for review of account balances and transactions in an accounting. (Prob. Code, § 2620, subd. (c)(2).) This requirement is outdated and does not reflect current common banking practices where statements are delivered electronically. This resolution updates the Probate Code to allow for filing of electronic statements, which will streamline the process and potentially reduce delays and additional expense

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2620, to read as follows:

- 1 §2620
- 2 (a) At the expiration of one year from the time of appointment and thereafter not less
- 3 frequently than biennially, unless otherwise ordered by the court to be more frequent, the
- 4 guardian or conservator shall present the accounting of the assets of the estate of the ward or
- 5 conservatee to the court for settlement and allowance in the manner provided in Chapter 4
- 6 (commencing with Section 1060) of Part 1 of Division 3. By January 1, 2008, the Judicial
- 7 Council, in consultation with the California Judges Association, the California Association of
- 8 Superior Court Investigators, the California State Association of Public Administrators, Public
- 9 Guardians, and Public Conservators, the State Bar of California, and the California Society of
- 10 Certified Public Accountants, shall develop a standard accounting form, a simplified accounting
- 11 form, and rules for when the simplified accounting form may be used. After January 1, 2008, all
- 12 accountings submitted pursuant to this section shall be submitted on the Judicial Council form.

13 (b) The final court accounting of the guardian or conservator following the death of the
14 ward or conservatee shall include a court accounting for the period that ended on the date of
15 death and a separate accounting for the period subsequent to the date of death.

16 (c) Along with each court accounting, the guardian or conservator shall file supporting
17 documents, as provided in this section.

18 (1) For purposes of this subdivision, the term “account statement” shall include any
19 original account statement, or verified electronic statement, from any institution, as defined in
20 Section 2890, or any financial institution, as defined in Section 2892, in which money or other
21 assets of the estate are held or deposited. A verification shall be executed pursuant to California
22 Code of Civil Procedure section 2015.5.

23 (2) The filing shall include all account statements showing the account balance as of the
24 closing date of the accounting period of the court accounting. If the court accounting is the first
25 court accounting of the guardianship or conservatorship, the guardian or conservator shall
26 provide to the court all account statements showing the account balance immediately preceding
27 the date the conservator or guardian was appointed and all account statements showing the
28 account balance as of the closing date of the first court accounting.

29 (3) If the guardian or conservator is a private professional or licensed guardian or
30 conservator, the guardian or conservator shall also file all original account statements, as
31 described above, or verified electronic statements showing the balance as of all periods covered
32 by the accounting.

33 (4) The filing shall include the original closing escrow statement received showing the
34 charges and credits for any sale of real property of the estate.

35 (5) If the ward or conservatee is in a residential care facility or a long-term care facility, the
36 filing shall include the original bill statements for the facility.

37 (6) This subdivision shall not apply to the public guardian if the money belonging to the
38 estate is pooled with money belonging to other estates pursuant to Section 2940 and Article 3
39 (commencing with Section 7640) of Chapter 4 of Part 1 of Division 7. Nothing in this section
40 shall affect any other duty or responsibility of the public guardian with regard to managing
41 money belonging to the estate or filing accountings with the court.

42 (7) If any document to be filed or lodged with the court under this section contains the
43 ward’s or conservatee’s social security number or any other personal information regarding the
44 ward or conservatee that would not ordinarily be disclosed in a court accounting, an inventory
45 and appraisal, or other nonconfidential pleadings filed in the action, the account statement or
46 other document shall be attached to a separate affidavit describing the character of the document,
47 captioned “CONFIDENTIAL FINANCIAL STATEMENT” in capital letters. Except as
48 otherwise ordered by the court, the clerk of the court shall keep the document confidential except
49 to the court and subject to disclosure only upon an order from the court. The guardian or
50 conservator may redact the ward’s or conservatee’s social security number from any document
51 lodged with the court under this section.

52 (8) Courts may provide by local rule that the court shall retain all documents lodged with it
53 under this subdivision until the court’s determination of the guardian’s or conservator’s account
54 has become final, at which time the supporting documents shall be returned to the deposing
55 guardian or conservator or delivered to any successor appointed by the court.

56 (d) Each accounting is subject to random or discretionary, full or partial review by the
57 court. The review may include consideration of any information necessary to determine the
58 accuracy of the accounting. If the accounting has any material error, the court shall make an

59 express finding as to the severity of the error and what further action is appropriate in response to
60 the error, if any. Among the actions available to the court is immediate suspension of the
61 guardian or conservator without further notice or proceedings and appointment of a temporary
62 guardian or conservator or removal of the guardian or conservator pursuant to Section 2650 and
63 appointment of a temporary guardian or conservator.

64 (e) The guardian or conservator shall make available for inspection and copying, upon
65 reasonable notice, to any person designated by the court to verify the accuracy of the accounting,
66 all books and records, including receipts for any expenditures, of the guardianship or
67 conservatorship.

68 (f) A superior court shall not be required to perform any duties imposed pursuant to the
69 amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature
70 makes an appropriation identified for this purpose.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: The current requirement to provide original bank statements is onerous and outdated. Electronic statements are now more common than paper statements. Requiring original statements can cause unnecessary expense and delay in guardianship and conservatorship administrations.

The Solution: Allowing the use of electronic statements and requiring the party submitting the electronic statements to verify authenticity of the same will reduce cost and increase efficiency in the administration of guardianship and conservatorship administrations. At least one county has addressed this issue with a local rule enabling a declaration of due diligence to be submitted by a party if a financial institution will not produce original records. (See, Super. Ct. County of San Diego Local Rules, rule 4.15.2.)

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE IN PRINCIPLE

TEXCOM supports modernizing this code section, recognizing that original account statements may not be available in this age of on-line banking and investing. However, TEXCOM recommends that (1) the term “verified electronic statement” be defined, and (2) the process by which a statement is to be verified be set forth with specificity.

RESOLUTION 13-03-2019

DIGEST

Conservatorships: Requires Investigations by Adult Protective Services.

Adds Probate Code section 1826.5 to require Adult Protective Services to investigate and file a report for all petitions for conservatorship.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution adds Probate Code section 1826.5 to require Adult Protective Services to investigate and file a report for all petitions for conservatorship. This resolution should be disapproved because the addition of this language would add unnecessary expense and an unfunded burden on a system that is already stretched beyond its limits.

In conservatorship matters, the court investigator prepares a report for the court after meeting with the parties involved. (Prob. Code, § 1826.) These investigators already have full access to the Adult Protective Services (APS) database. In limited conservatorships, the Regional Center is also required to make a report to the probate court. (Prob. Code, § 1822, subd. (e).) The Regional Center also is informed of any potential or past abuse. The probate courts are already overwhelmed and adding yet another layer to the reporting system will only serve to bog down the system further and cause unnecessary delay.

While this resolution would provide additional protections to the protected population, and information to the court similar to that which is already provided by Child Protective Services in a guardianship matter, given the confidential nature of reports created by APS, any reports prepared by APS for the probate court would not be available to counsel or parties in a probate action, though the report would be available to the court. In addition, many APS-type agencies are currently underfunded and do not have the resources to conduct the investigations they are already required to conduct. The adoption of this resolution would add unnecessary expense and burden on a system that is already stretched to the limits.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 1826.5 to read as follows:

- 1 §1826.5
- 2 Adult protective services; delivery of notice of hearing and copy of petition; screening of
- 3 conservators and proposed conservatees.
- 4 (a) In each case involving a petition for conservatorship of the person, the petitioner
- 5 shall deliver pursuant to Section 1215 a notice of the hearing and a copy of the petition, at least

6 15 days before the hearing, to the local agency designated by the board of supervisors to
7 investigate conservatorships for the court. The local social services agency providing adult
8 protection services shall screen the name of the proposed conservator and the proposed
9 conservatee for prior referrals of neglect or abuse of adults and shall file a report with the court
10 containing the results of the screening prior to the hearing on the petition. The report shall be
11 served on all parties in accordance with Section 1215.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: Currently the probate code does not provide for an agency responsible for protecting the elderly or a developmentally disabled adult to provide an opinion when a petition for conservatorship is filed. The Probate Code provides for such a report to be submitted by DPSS in guardianships, but there is not a similar requirement of a report in conservatorships. A person petitioning to become a conservator of a developmentally disabled adult or an elderly adult, may have a history with APS or a similar agency for allegations of abuse or neglect on the dependent adult that is the subject of the conservatorship. The petitioner may also have a history with APS for allegations regarding a different dependent adult that the Probate Court needs to be aware of when considering a petition for conservatorship.

The Solution: Adds Probate Code section 1826.5 to require that a petitioner for appointment as conservator provide notice to the local adult protective services agency, and would require APS to report to the court whether the proposed conservator or the proposed conservatee has any reported history with APS.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

TEXCOM opposes this Resolution as vague and against public policy.

Reports prepared by Adult Protective Services (APS) are confidential. This Resolution proposes that information held by APS be “served on all parties” -disclosure that clearly is contrary to current public policy. TEXCOM believes that preserving this confidentiality is important.

Further, the Resolution is ambiguous, as it refers to serving notice on one local agency, but states that the report is made by APS.

RESOLUTION 13-04-2019

DIGEST

Conservatorships: Notice of Hearing to Persons Nominated to Act as Conservator

Amends Probate Code section 1822 to require notice of a conservatorship action to be served on a conservator nominated by the conservatee.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1822 to require notice of a conservatorship action to be served on a conservator nominated by the conservatee. This resolution should be approved in principle because it would streamline the appointment process by requiring notice be served on a person nominated by the conservatee.

Currently parties are only required to provide a notice of a conservatorship hearing to spouses, domestic partners and second-degree relatives of a proposed conservatee. (Prob. Code, § 1460.) This resolution would expand the notice requirements to include a person nominated by the conservatee, thus protecting that person’s right to due process and streamlining the process of appointment by ensuring that this proposed conservator has notice of the proceedings. Requiring notice does not mean that the court must also appoint the proposed conservator, and this proposed resolution does not mandate the appointment of the nominated individual.

This resolution addresses a real-world problem that arises when an individual has nominated a proposed conservator but the nominated individual may not receive notice of conservatorship. When an individual has developed a care plan, the court should have the means to respect their wishes to the greatest extent possible by ensuring that notice is provided to the conservator of the individual’s choosing.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1822 to read as follows:

- 1 §1822
- 2 (a) At least 15 days before the hearing on the petition for appointment of a conservator,
- 3 notice of the time and place of the hearing shall be given as provided in this section. The notice
- 4 shall be accompanied by a copy of the petition. The court shall not shorten the time for giving
- 5 the notice of hearing under this section.
- 6 (b) Notice shall be delivered pursuant to Section 1215 to the following persons:
- 7 (1) The spouse, if any, or registered domestic partner, if any, of the proposed conservatee

8 at the address stated in the petition.

9 (2) The relatives named in the petition at their addresses stated in the petition.

10 (3) The persons nominated to act by the proposed conservatee in a writing signed before
11 the petition is filed.

12 (c) If notice is required by Section 1461 to be given to the Director of State Hospitals or
13 the Director of Developmental Services, notice shall be delivered pursuant to Section 1215 as
14 required.

15 (d) If the petition states that the proposed conservatee is receiving or is entitled to receive
16 benefits from the Veterans Administration, notice shall be mailed to the Office of the Veterans
17 Administration referred to in Section 1461.5.

18 (e) If the proposed conservatee is a person with developmental disabilities, at least 30
19 days before the day of the hearing on the petition, the petitioner shall deliver pursuant to Section
20 1215 a notice of the hearing and a copy of the petition to the regional center identified in Section
21 1827.5.

22 (f) If the petition states that the petitioner and the proposed conservator have no prior
23 relationship with the proposed conservatee and are not nominated by a family member, friend, or
24 other person with a relationship to the proposed conservatee, notice shall be delivered pursuant
25 to Section 1215 to the public guardian of the county in which the petition is filed.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under current law, only spouses, domestic partners and relatives named in a conservatorship petition are to be provided notice of a pending conservatorship hearing. However, pursuant to Probate Code section 1810, the person nominated by the proposed conservatee shall be appointed unless the court finds that the nominee is not in the best interest of the proposed conservatee. In the event that the nominated proposed conservator is not a spouse, domestic partner or relative named in a conservatorship petition, the nominated party is not provided notice of the action to advocate for the proposed conservatee or an opportunity to seek appointment.

The Solution: This resolution provides that if a person nominates a proposed conservator pursuant to Probate Code section 1810, then the nominated person will have notice of the petition for conservatorship to advocate for the proposed conservatee and/or for an opportunity to seek appointment.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE IN PRINCIPLE

While TEXCOM supports the concept of notifying persons nominated by a proposed conservatee to serve as the conservatee's conservator, TEXCOM suggests that "prior nominees" be clarified. Would it be only the current nominee? Or, would it include all prior nominees? What if the current nominee is a "bad actor" who forced that nomination by unduly influencing the proposed conservatee?

Also, TEXCOM is concerned that the proposed conservatee's privacy rights would be an issue if the proposed conservatee did not want prior nominees to know that they had been nominated (and their nomination revoked).

Finally, TEXCOM is concerned that unnecessary litigation might result if an individual named in a document several years ago attempts to assert rights.

RESOLUTION 13-05-2019

DIGEST

Sanctions: Conservatorship Proceeding Brought in Bad Faith

Adds Probate Code section 1832 to allow the court to sanction a person where the court determines that the conservatorship petition was filed without reasonable cause and in bad faith.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Probate Code section 1832 to allow the court to sanction a person where the court determines that the conservatorship petition was filed without reasonable cause and in bad faith. This resolution should be approved in principle because it would deter a person who might otherwise file a conservatorship petition without reasonable cause or in bad faith.

There are several statutes that provide for the award of attorney fees when actions are brought without reasonable cause and/or in bad faith. Probate Code sections 2622.5 (conservatorships), 11003 (estates), and 17211 (trusts), provide that if a court determines objections to an accounting were brought without reasonable cause and in bad faith, then the court may order the objector to pay reasonable attorney fees and costs incurred in defending the accounting to the conservator, personal representative or trustee. The code sections also provide that if the conservator, personal representative or trustee oppose the contest to the accounting without reasonable cause, then the court may order that they pay the attorney fees and costs that the objector incurred in contesting the accounting.

Code of Civil Procedure section 128.7, subdivision (b), provides that a party presenting a pleading to the court is certifying that to the best of their knowledge, based on information and belief, formed after a reasonable inquiry under the circumstances, all of the following conditions are met: (1) the pleading is not being presented for improper purpose; (2) claims or defenses or other legal contentions are warranted by existing law; (3) the allegations have evidentiary support; and (4) the denials of factual contentions are warranted based on the evidence. Subdivision (c) provides that after notice and reasonable opportunity to respond, if a court determines that subdivision (b) has been violated, the court may impose an appropriate sanction upon a motion for sanctions.

Further, long established case law has held that if a petition for conservatorship is sought and denied, and the proposed conservatee did not benefit from the conservatorship proceedings, then the petitioner is not entitled to reimbursement from the proposed conservatee's estate. (See *Estate of Moore* (1968) 258 Cal.App.2d 458; *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310; *Conservatorship of Cornelius* (2011) 200 Cal.App.4th 1198.) However, the proposed conservatee can still incur tens of thousands of dollars objecting to the conservatorship

petition that was deemed unnecessary by the court, which they will have to pay out of their own pocket.

The purpose of sanctions is to make a person stop and think before they file a pleading or objection. Because a petition for conservatorship discloses confidential medical information and financial information of the proposed conservatee in various court pleadings, and can strip away their constitutional rights and cost them tens of thousands of dollars to oppose the petition, there should be a deterrent to the frivolous filing of a petition for conservatorship. Further, a conservatorship is supposed to be used as a “shield” to protect an elderly person or dependent adult from neglect or abuse and not as a “sword” to get the proposed conservatee “in-line” with what the petitioner wants. The proposed resolution would make a person stop and think twice before using a conservatorship as a “sword” if they had to pay not only for their own attorney fees and costs incurred for filing a petition, but also the opposing party’s attorney fees and costs if the court determined that the elderly or dependent adult did not benefit from the unsuccessful petition and that it was brought without reasonable cause and in bad faith.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 1832 to read as follows:

1 §1832
2 If a petition for conservatorship is denied and the court determines that the petition was
3 made without reasonable cause and in bad faith, the court may award the proposed conservatee
4 and any other objector to the petition costs of the objection(s) and other expenses and costs of
5 litigation, including attorney’s fees, incurred to object to the petition.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: A conservatorship strips a person of their Constitutional rights and should be used sparingly. Unfortunately, they are being utilized in greater frequency as threats to force seniors to act or refrain from acting against their children or other family members’ wishes. Additionally, the conservatorship process puts the confidential medical and financial information of the proposed conservatee in a public forum and requires great effort and financial resources to defend. The only person who is harmed by a failed conservatorship filing is the proposed conservatee.

The Solution: This resolution provides a deterrent to the filing of meritless conservatorship actions. It mirrors Probate Code section 17211 which provides for costs of litigation, including attorney’s fee, for the bad faith filing of a contest of a trust accounting or opposition to a contest of a trust accounting. It will not deter any unsuccessful good faith filings as it requires the court

to make a finding that it was brought without reasonable cause and in bad faith.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR RELATED LEGISLATION

None known

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

TEXCOM is concerned that this Resolution would discourage legitimate conservatorship petitions. Since other remedies exist to address bad faith petitions (including CCP 128.7), TEXCOM suggests that this risk outweighs the benefits this proposed law would confer.

TEXCOM suggests that the Resolution is too limited if adopted. For example, do bad faith objections to a legitimate conservatorship petition give rise to sanctions?

RESOLUTION 13-06-2019

DIGEST

Probate: Adds Conservator of the Estate and Nominated Executor to Small Estate Affidavits.
Amends Probate Code section 13051 to allow conservators and nominated executors to sign a small estate affidavit.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 13051 to allow conservators and nominated executors to sign a small estate affidavit. This resolution should be disapproved because the changes proposed could lead to instances of beneficiaries' rights and distributions being negatively affected without the benefit of due process.

When a person dies with an estate of less than \$150,000, the Probate Code provides a procedure for the collection of assets without formal administration. (Prob. Code, § 13100 et. seq.) In order to take advantage of this procedure, all of the beneficiaries entitled to a share of the assets are required to sign the required affidavit. (Prob. Code, § 13501.) This resolution would allow a conservator or executor to sign such an affidavit instead of all the beneficiaries.

Under current law, problems can arise when a beneficiary refuses or fails to sign off on the small estates affidavit, or if all beneficiaries cannot be located. The solution, however, disregards the intent of the statute, which is to protect the beneficiaries and ensure that they have been properly noticed. Unlike every other part of Probate Code section 13051, the amendments do not vest power in the beneficiary's agents but places it in the hands of the nominated executor or a conservator of the decedent.

If this amendment is adopted, then subdivisions (a) - (e) become unnecessary so long as a conservator or a nominated executor exists to sign off on the affidavit. This could lead to instances of beneficiaries' rights and distributions being negatively affected. A beneficiary may have legitimate reasons for wanting formal administration and those beneficiaries' rights should not be waivable by an executor or a conservator for reasons of expediency. Finally, the opportunities for fraudulent transfers increase exponentially in that an executor could easily present the affidavit to an asset holder and then abscond with the assets of the estate long before the rightful beneficiaries even knew the assets existed. In small estates there is often a reality that named executors are essentially judgment proof, thus the rightful beneficiaries would simply be left without any viable recourse.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 13051 to read as follows:

- 1 §13051
2 Guardian or conservator; trustee; custodian; sister state personal representative; durable power of
3 attorney; nominated executor
4 For the purposes of this part:
5 (a) The guardian or conservator of the estate of a person entitled to any of the decedent's
6 property may act on behalf of the person without authorization or approval of the court in which
7 the guardianship or conservatorship proceeding is pending.
8 (b) The trustee of a trust may act on behalf of the trust. In the case of a trust that is subject
9 to continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300)
10 of Part 5 of Division 9, the trustee may act on behalf of the trust without the need to obtain
11 approval of the court.
12 (c) If the decedent's will authorizes a custodian under the Uniform Gifts to Minors Act or
13 the Uniform Transfers to Minors Act of any state to receive a devise to a beneficiary, the
14 custodian may act on behalf of the beneficiary until such time as the custodianship terminates.
15 (d) A sister state personal representative may act on behalf of the beneficiaries as
16 provided in Chapter 3 (commencing with Section 12570) of Part 13 of Division 7.
17 (e) The attorney in fact authorized under a durable power of attorney may act on behalf of
18 the beneficiary giving the power of attorney.
19 (f) The person nominated in decedent's will to act as executor may act on behalf of the
20 beneficiary or all of the beneficiaries as provided by the terms of decedent's will.
21 (g) The conservator of the estate of the decedent may act on behalf of sole person or all of
22 the persons who succeeded to the particular item of property of the decedent under Sections 6401
23 and 6402 or, if the law of a sister state or foreign nation governs succession to the particular item
24 of property, under the law of the sister state or foreign nation.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: When a person dies with less than \$150,000, the Probate Code provides for collection of assets without administration. However, to collect the decedent's assets, a small estate affidavit must be executed by all of the beneficiaries entitled to receive the property. In situations where a beneficiary refuses to execute the small estate affidavit, a probate must be initiated to collect the small sum. As the sum is small, attorneys are unlikely to accept the representation since their fee is limited to a percentage of the estate and the asset is likely dissipated through bank fees before the asset can be collected.

The Solution: This Resolution provides for alternatives to requiring the beneficiaries of an estate to cooperate if there was a conservator of the estate appointed during decedent's life or if the

decedent nominated an executor in a will. The small estate affidavit will still require the name(s) of the decedent's beneficiaries to ensure accurate distribution of decedent's estate but would not require each one of the beneficiaries to execute the affidavit. In situations where there is conservator of the estate, the small estate affidavit could be utilized to distribute the assets as part of the final accounting without the need for the beneficiaries to execute the small estate affidavit to avoid a probate. Additionally, if there were assets held outside of the conservatorship estate which were discovered after decedent's death, this addition would allow the conservator to marshal it and distribute it as part of the final accounting to the court.

IMPACT STATEMENT

This resolution affects Probate Code section 13101 as it expands who can execute the small estate affidavit.

CURRENT OR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

Probate Code section 13051 constitutes a list of fiduciaries who have authority to act to sign a small estate affidavit to claim property of an estate on behalf of a particular successor in interest of the decedent. For example, under this section, a guardian or conservator is authorized to act on behalf of a person entitled to property from a decedent's estate, a trustee is authorized to act on behalf of a trust entitled to property from a decedent's estate, an attorney in fact is authorized to act on behalf of his or her principal entitled to property from a decedent's estate, and a named custodian is authorized to act on behalf of the designated minor entitled to property from a decedent's estate under CUTMA.

In all of the above instances, the successor in interest of the decedent is either (1) legally unable to execute a small estate affidavit to claim directly their own interest in the decedent's estate because of incapacity (conservatees, wards and minors), or (2) the fiduciary has the independent legal authority to act for the successor in interest (trustees and attorneys in fact). These fiduciaries have independent legal relationships and continuing legal duties to the successors in interest of the decedent beyond the act of executing a small estate affidavit. Accordingly, it makes sense to vest those fiduciaries with the authority to execute a small estate affidavit.

By contrast, a nominated executor under a decedent's will has not been appointed and, therefore, has no independent legal authority to act for the successors in interest of the deceased testator to claim property. The legal authority of a conservator terminates with the conservatee's death. Therefore, a conservator of a deceased conservatee's estate has no direct, independent legal authority to act on behalf of the successors in interest of the deceased conservatee.

Further, adding a nominated executor or conservator of a deceased conservatee's estate to the list of "fiduciaries" who may execute a small estate affidavit would allow a third party, legally unrelated to the decedent's successor in interest, to make a claim on behalf of a successor who (1) is not suffering any form of incapacity, and (2) has not authorized the nominated executor or conservator to act on his or her behalf. If a successor in interest fails to act, that is the right of that successor in interest. No third party should be with the right to make a claim for a successor in interest who has capacity to act on their own.

In addition, a third party who signs a small estate affidavit might subject the successor involuntarily or unknowingly to liability, including potential income taxes and claims by the decedent's creditors up to the value of the property received. In the case of property with toxic contamination, this liability could exceed the value of estate property received. It also might preclude the execution of a disclaimer.

A successor in interest may simply want to refuse to accept the interest. Whatever the reason for the successor in interest's lack of action, it simply seems inappropriate to create an avenue for a nominated executor or a decedent's conservator to sign a small estate affidavit on behalf of persons who can otherwise sign the document themselves.

RESOLUTION 13-07-2019

DIGEST

Elder or Dependent Adult Abuse: Release of Information to Counsel

Amends Welfare and Institutions Code section 15633.5 to provide that counsel for the victim of elder abuse or dependent adult abuse may obtain information relevant to the reported abuse.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Welfare and Institutions Code section 15633.5 to provide that counsel for the victim of elder abuse or dependent adult abuse may obtain information relevant to the reported abuse. This resolution should be disapproved because there may be instances in which information contained in the report should be protected.

Under current law, when allegations of elder abuse or dependent adult abuse are made to Adult Protective Services, the subject of the allegations – the elder or dependent adult – does not have the right to receive a copy of the documentation related to the allegations, investigation and findings absent a court order. (See Welf. & Inst. Code, § 15633.5.)

The resolution makes the blanket representation that the responding agency will never oppose a motion for the release of the report. However, there may be some circumstances in which it would be appropriate for confidential or sensitive information to be withheld and this resolution provides no safeguard if that is the case. For example, the proposed language could require the disclosure of the home address of a family member who has also been subject to abuse by the accused, potentially placing that person in danger. If the adult in question is the victim of elder abuse or other abuse and this adult then receives sensitive information about the abuse, there is the possibility the adult in question will disclose it to their abuser. This is particularly true when the accused may be the person who retained counsel for the proposed dependent adult. To make matters worse, even if there are compelling reasons to not provide the report to the dependent adult, there is no allowance for a protective order. As a result, the resolution is overbroad and may make worse the situation it sought to alleviate.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code section 15633.5, to read as follows:

- 1 §15633.5
- 2 (a) Information relevant to the incident of elder or dependent adult abuse may be given to
- 3 an investigator from an adult protective services agency, a local law enforcement agency, the

4 office of the district attorney, the office of the public guardian, the probate court, the bureau, or
5 an investigator of the Department of Consumer Affairs, Division of Investigation who is
6 investigating a known or suspected case of elder or dependent adult abuse-, or to counsel
7 representing the elder or dependent adult who is the subject of the reported information.

8 (b) The identity of any person who reports under this chapter shall be confidential and
9 disclosed only among the following agencies or persons representing an agency:

- 10 (1) An adult protective services agency.
- 11 (2) A long-term care ombudsperson program.
- 12 (3) A licensing agency.
- 13 (4) A local law enforcement agency.
- 14 (5) The office of the district attorney.
- 15 (6) The office of the public guardian.
- 16 (7) The probate court.
- 17 (8) The bureau.
- 18 (9) The Department of Consumer Affairs, Division of Investigation.
- 19 (10) Counsel representing an adult protective services agency.

20 (c) The identity of a person who reports under this chapter may also be disclosed under
21 the following circumstances:

- 22 (1) To the district attorney in a criminal prosecution.
- 23 (2) When a person reporting waives confidentiality.
- 24 (3) By court order.
- 25 (d) Notwithstanding subdivisions (a), (b), and (c), any person reporting pursuant to
26 Section 15631 shall not be required to include his or her name in the report.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Currently, when allegations of elder abuse or dependent adult abuse are made to Adult Protective Services, the subject of the allegations – the elder or dependent adult – has no ability to simply request a copy of the documentation related to the allegations, investigation and findings. This is a problem when a conservatorship or other protective action is pending before the court and the proposed conservatee objects to the imposition of a conservatorship. Evidence that the allegations are unfounded and/or made in bad faith is critical in opposing the petition for conservatorship. The process for obtaining the information requires counsel for the proposed conservatee to first serve a subpoena duces tecum and/or a subpoena for the deposition of the investigator. The agency will then refuse to comply, citing the restrictions contained in Welfare and Institutions Code 15633.5. The next step is to file a motion to compel, which the agency won't oppose because their goal is to obtain the court order required by the code. Ultimately, when the court issues an order to the agency, they will comply with the discovery requests. This procedure is wasteful of the financial resources of the proposed conservatee as well as court resources.

The Solution: This resolution provides for the lawful release of the information without the need for unnecessary expense and without the court's intervention by including counsel for the subject of the allegations as an authorized recipient. This resolution does not require the agency to release the identity of the reporting party, thus preserving their right to privacy and promoting the confidentiality that encourages reporting of elder or dependent adult abuse. A court order would still be required to obtain the reporting party's identity.

IMPACT STATEMENT

The impact of this resolution is uncertain. Implementation of this resolution may affect the internal procedures followed by agencies charged with investigating allegations of elder or dependent adult abuse.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

Currently, reports made to Adult Protective Services may be released only to those individuals or agencies named in Welfare and Institutions Code section 15633.5: investigator with Adult Protective Services, local law enforcement agency, the office of the district attorney, the office of the public guardian, the probate court, the bureau, or an investigator with the Department of Consumer Affairs investigating a known or suspected case of elder abuse. The proposed amendment would add counsel representing the elder or dependent adult.

While some members of TEXCOM acknowledge that it would be helpful to have access to the confidential report concerning a proposed conservatee (especially if they were representing a conservatee who was against establishing a conservatorship), the majority (by a small margin) prefer keeping the report confidential because there are adequate procedures in place which would allow proposed conservatee's counsel to obtain a copy of the APS report.

TEXCOM members opposing this Resolution also are concerned that "counsel representing the elder" is limited to court-appointed counsel or retained counsel. They do not think a distinction between court appointed counsel and counsel retained by the conservatee or a family member is appropriate.

Finally, all TEXCOM members share a concern that counsel who obtained the report would need to understand that a court order would be required to disclose any of the report in a responsive pleading or open court.

RESOLUTION 13-08-2019

DIGEST

Probate Code: Clarify Persons Entitled to Compensation/Reimbursement for Conservatorship Petition
Amends Probate Code section 2640.1 to clarify who can seek compensation and reimbursement of costs on a successful petition for appointment of a conservator.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 2640.1 to clarify who can seek compensation and reimbursement of costs on a successful petition for appointment of a conservator. This resolution should be approved in principle because it allows a successful petitioner for appointment of a conservator who is not the petitioner and her attorney to seek compensation for fees and costs in connection with the appointment process.

Presently, under Probate Code section 2640.1, if a person has petitioned the court for appointment and another person was appointed, the unsuccessful petitioner may petition the court for fees and costs provided that the court determines that the petition was filed in the best interests of the conservatee.

While the court in *Estate of Moore* (1968) 258 Cal.App.2d 460, effectively resolved the issue in favor of successful petitioners of third party-conservators, there is no clear statutory provision for the reimbursement of fees and costs to a petitioner who was successful in seeking the appointment of a third party as a conservator, such as a private professional fiduciary or a corporate conservator. This resolution codifies the holding in *Moore* and would allow the petitioner to seek just and reasonable compensation reimbursement of costs for a successful petition.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2640.1 to read as follows:

- 1 §2640.1
- 2 (a) If a person has petitioned for the appointment of a particular conservator
- 3 who is not the petitioner and the conservator is appointed, but not before the expiration of 90
- 4 days from the issuance of letters, the person who petitioned for the appointment of the
- 5 conservator and that person's attorney may petition the court for an order fixing and allowing
- 6 compensation and reimbursement of costs.
- 7 ~~(a)~~(b) If a person has petitioned for the appointment of a particular conservator

8 and another conservator was appointed while the petition was pending, but not before the
9 expiration of 90 days from the issuance of letters, the person who petitioned for the appointment
10 of the conservator but was not appointed and that person's attorney may petition the court for an
11 order fixing and allowing compensation and reimbursement of costs, provided that the court
12 determines that the petition was filed in the interests of the conservatee.

13 ~~(b)~~(c) Notice of the hearing shall be given for the period and in the manner
14 provided in Chapter 3 (commencing with Section 1460) of Part 1.

15 ~~(e)~~(d) Upon the hearing, the court shall make an order to allow both of the
16 following:

17 (1) Any compensation or costs requested in the petition the court determines
18 is just and reasonable to the person who either petitioned for the appointment of a particular
19 conservator who was not the petitioner and the conservator was appointed, or who petitioned for
20 the appointment of a conservator but was not appointed, for his or her services rendered in
21 connection with and to facilitate the appointment of the conservator, and costs incurred in
22 connection therewith.

23 (2) Any compensation or costs requested in the petition the court determines
24 is just and reasonable to the attorney for the person, for his or her services rendered in connection
25 with and to facilitate the appointment of a conservator, and costs incurred in connection
26 therewith.

27 Any compensation and costs allowed shall be charged to the estate of the conservatee. If
28 a conservator of the estate is not appointed, but a conservator of the person is appointed, the
29 compensation and costs allowed shall be ordered by the court to be paid from property belonging
30 to the conservatee, whether held outright, in trust, or otherwise.

31 ~~(d)~~(e) It is the intent of the Legislature for this section to have retroactive effect.
32

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Probate Code sections 2640 and 2641 provide authority for a conservator of the estate or a conservator of the person to seek an award of fees to an appointed conservator and his or her attorney, including for services rendered before the date of appointment (e.g., in relation to the petition). And Probate Code § 2640.1 provides that if a person petitions for appointment of a particular conservator and that person is ultimately not appointed and another conservator is ultimately appointed by the court, the person can still seek compensation for fees, provided that the court concludes that the petition was filed in the conservatee's best interest.

But neither of these provisions apply to the situation where a petitioner seeks the appointment of a conservator who is not the petitioner, and the proposed conservator is indeed appointed—even though it is obvious and equitable that such petitioner should also be able to seek compensation and reimbursement for fees and costs incurred in connection with that successful effort to have the conservator appointed.

The Solution: Despite the void of statutory authority, the court in *Estate of Moore* ((1968) 258 Cal.App.2nd 460, resolved the issue of whether a court has equitable authority to award attorney’s fees for a party who successfully petitions for appointment of a conservator who is not the petitioner. In *Moore*, the court awarded fees to the person who successfully petitioned for the appointment of Bank of America as conservator. The court stated: “[o]ur question then becomes whether in the absence of statutory authorization, one who in good faith initiates caretaker proceedings in which a guardian or conservator other than the initiator is appointed may be awarded his costs and counsel fees. We think he may.” The *Moore* court focused on whether the services benefitted the conservatee and concluded that “[c]learly, it was as a consequence of [petitioner’s] initiative that a conservator was appointed for the person and the estate of Mrs. Moore.” The court further noted that if compensation were not available, parties might be discouraged from initiating effective action and becoming parties to conservatorship proceedings for the benefit of other persons. Thus, *Moore* provides direct support for an award of fees/reimbursement to a petitioner who successfully seeks appointment of a third-party conservator. Moreover, the lack of a statutory basis for a fee award under such circumstances appears to be an anomaly, as there is no reason why fees could be awarded to an unsuccessful petitioner (Prob. Code, § 2640.1, subd. (a)) and also to a person who successfully petitions for their own appointment (*Id.* at §§ 2640, 2641)—but not to a petitioner who successfully seeks the appointment of a third party. Thus, this Resolution simply amends Probate Code section 2640.1 to clarify that where a person successfully petitions for the appointment of a third-party conservator, that person may seek compensation and reimbursement---effectively codifying the holding in *Moore*.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 13-09-2019

DIGEST

Attorneys: Confidential Information of Diminished Capacity Clients.

Amends Business and Professions Code section 6068 to allow an attorney to reveal an incapacitated client's confidential information if substantial harm is a risk.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Business and Professions Code section 6068 to allow an attorney to reveal an incapacitated client's confidential information if substantial harm is a risk. This resolution should be approved in principle because it allows attorneys to take limited action to protect clients whose capacity may be limited.

Currently, Business and Professions Code section 6068 does not allow an attorney to reveal confidential information "unless 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." This resolution seeks to expand this permissive disclosure in instances where the attorney believes his or her client may suffer injury due to decreased capacity, or if a client may suffer injury to themselves if no protective action is undertaken. California Rule of Professional Conduct, rule 1.6, restates the current language of section 6068, but this resolution does not propose a similar modification to rule 1.6.

The language of this resolution is modeled after the language recently proposed by the California Commission for the Revision of the Rules of Professional Conduct in 2017 and ABA Model Rule 1.14. Almost all of the language in this resolution, except for a few key phrases, is exactly the same as the applicable language in the Commission's proposed rule. The Commission and the California Supreme Court considered this proposed change for well over three years before rejecting it without explanation.

This resolution does not require disclosure of confidential information but rather allows an attorney to act in the best interests of his or her client should the attorney become aware of a client's incapacity to protect themselves due to diminished capacity, and as such, allowing such a disclosure would be helpful in instances where such a situation arises.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6068 to read as follows:

- 1 §6068
- 2 It is the duty of an attorney to do all of the following:
- 3 (a) To support the Constitution and laws of the United States and of this state.
- 4 (b) To maintain the respect due to the courts of justice and judicial officers.

5 (c) To counsel or maintain those actions, proceedings, or defenses only as appear to
6 him or her legal or just, except the defense of a person charged with a public offense.

7 (d) To employ, for the purpose of maintaining the causes confided to him or her those
8 means only as are consistent with truth, and never to seek to mislead the judge or any judicial
9 officer by an artifice or false statement of fact or law.

10 (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to
11 preserve the secrets, of his or her client.

12 (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal
13 confidential information relating to the representation of a client to the extent that the
14 attorney reasonably believes the disclosure is necessary to prevent a criminal act that the
15 attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an
16 individual.

17 (3) Notwithstanding paragraph (1), except where the attorney represents a minor, a
18 client in a criminal matter, or a client who is the subject of a conservatorship proceeding or
19 who has a guardian ad litem, an attorney may, but is not required to, take protective action,
20 provided the attorney reasonably believes that: (i) there is a significant risk that the client will
21 suffer substantial physical, psychological, or financial harm unless protective action is taken,
22 and (ii) the client has significantly diminished capacity, in accordance with the factors in
23 Probate Code §§ 811 and 812, such that the client is unable to understand and make
24 adequately considered decisions regarding the potential harm, and (iii) the client cannot
25 adequately act in the client's own interest. In taking protective action, the attorney must act in
26 the client's best interest and disclose no more information than is reasonably necessary to
27 protect the client from substantial physical, psychological or financial harm. For purposes of
28 this section, protective action means to take action to protect the client's interests by
29 notifying an individual or organization that has the ability to take action to protect the client
30 or seeking to have a conservator or guardian ad litem appointed.

31 (f) To advance no fact prejudicial to the honor or reputation of a party or witness,
32 unless required by the justice of the cause with which he or she is charged.

33 (g) Not to encourage either the commencement or the continuance of an action or
34 proceeding from any corrupt motive of passion or interest.

35 (h) Never to reject, for any consideration personal to himself or herself, the cause of
36 the defenseless or the oppressed.

37 (i) To cooperate and participate in any disciplinary investigation or other regulatory or
38 disciplinary proceeding pending against himself or herself. However, this subdivision shall
39 not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment
40 to the Constitution of the United States, or any other constitutional or statutory privileges.
41 This subdivision shall not be construed to require an attorney to cooperate with a request that
42 requires him or her to waive any constitutional or statutory privilege or to comply with a
43 request for information or other matters within an unreasonable period of time in light of the
44 time constraints of the attorney's practice. Any exercise by an attorney of any constitutional
45 or statutory privilege shall not be used against the attorney in a regulatory or disciplinary
46 proceeding against him or her.

47 (j) To comply with the requirements of Section 6002.1.

48 (k) To comply with all conditions attached to any disciplinary probation, including a
49 probation imposed with the concurrence of the attorney.

50 (l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

51 (m) To respond promptly to reasonable status inquiries of clients and to keep clients
52 reasonably informed of significant developments in matters with regard to which the attorney
53 has agreed to provide legal services.

- 54 (n) To provide copies to the client of certain documents under time limits and as
55 prescribed in a rule of professional conduct which the board shall adopt.
- 56 (o) To report to the State Bar, in writing, within 30 days of the time the attorney has
57 knowledge of any of the following:
- 58 (1) The filing of three or more lawsuits in a 12-month period against the attorney for
59 malpractice or other wrongful conduct committed in a professional capacity.
- 60 (2) The entry of judgment against the attorney in a civil action for fraud,
61 misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional
62 capacity.
- 63 (3) The imposition of judicial sanctions against the attorney, except for sanctions for
64 failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
- 65 (4) The bringing of an indictment or information charging a felony against the
66 attorney.
- 67 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or
68 no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in
69 a manner in which a client of the attorney was the victim, or a necessary element of which, as
70 determined by the statutory or common law definition of the misdemeanor, involves
71 improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt
72 or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
- 73 (6) The imposition of discipline against the attorney by a professional or occupational
74 disciplinary agency or licensing board, whether in California or elsewhere.
- 75 (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct,
76 grossly incompetent representation, or willful misrepresentation by an attorney.
- 77 (8) As used in this subdivision, “against the attorney” includes claims and proceedings
78 against any firm of attorneys for the practice of law in which the attorney was a partner at the
79 time of the conduct complained of and any law corporation in which the attorney was a
80 shareholder at the time of the conduct complained of unless the matter has to the attorney’s
81 knowledge already been reported by the law firm or corporation.
- 82 (9) The State Bar may develop a prescribed form for the making of reports required
83 by this section, usage of which it may require by rule or regulation.
- 84 (10) This subdivision is only intended to provide that the failure to report as required
85 herein may serve as a basis of discipline.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: As California’s elderly population continues to grow, with it projected to double from the 2000 figure by 2025 (<https://oag.ca.gov/bmfea/elder>), more elderly individuals will be in vulnerable positions and at risk for abuse. According to the National Center on Elder Abuse, approximately 1 in 10 Americans experience some form of elder abuse, such as physical, psychological, verbal or sexual abuse, financial exploitation, and neglect. (<https://ncea.acl.gov/whatwedo/research/statistics.html#14>). Through representation of elderly clients and clients who otherwise have diminished capacity, an attorney is in a position to witness the capacities of his or her clients disintegrate and note signs of abuse. However, because of the strict attorney-client confidentiality requirements under Business and Professions Code § 6068(e), in most circumstances attorneys are powerless to stop any abuse they suspect without violating the duty of confidentiality. Under the current law, if the abuse does not rise to the level of causing death or substantial bodily harm due to a criminal act, attorneys are unable to

contact Adult Protective Services or other entities that might be able to provide the elder or incapacitated person with necessary protection and assistance.

The Solution: This resolution amends Business and Professions Code § 6068(e) to allow attorneys to disclose a client's confidential information in the limited instance where the client has significantly diminished capacity, the client is at risk of substantial harm and the client is powerless to stop that harm. To ensure that attorney-client confidentiality is not eroded more than necessary, the attorney may divulge only the confidential information that is reasonably necessary to protect the client from harm. The resolution does not require attorneys to disclose the confidential information of a client with diminished capacity and instead makes such disclosure permissive. This exemption gives attorneys an avenue to stop or prevent abuse when they suspect it might be happening and by so doing, protect their elderly and otherwise incapacitated clients.

The language in this resolution is modeled after the language proposed by the California Commission for the Revision of the Rules of Professional Conduct in 2017 and ABA Model Rule 1.14. Almost all of the language in this resolution, except for a few key phrases, is exactly the same as the applicable language in the Commission's proposed rule. The proposed rule was not adopted by the California Supreme Court, without an explanation, despite the Commission undertaking an extensive review process that included collecting and considering public comment. The Commission's proposed rule and related report may be found at https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.14-all.pdf.

IMPACT STATEMENT

This resolution affects California Rule of Professional Conduct 1.6 by requiring an additional exemption.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

TEXCOM believes the proposed change requires further study, and would be pleased to work with the proponents and other interested stakeholders to attempt to draft legislation that would deal with the issues addressed but not raise any concerns. Among other issues, TEXCOM (1) strongly believes that any action inconsistent with the expressed desires of the client is problematic, (2) is concerned about any change that would result in attorneys becoming "mandated reporters," (3) is concerned with any legislation that would stifle disclosure by an elder to the elder's attorney, and (4) believes that any exception, if enacted, should not permit the attorney to take any action, such as seeking to have a conservator or guardian ad litem appointed for the attorney's client.