

AB596: A Trojan Horse Bill Diminishes the Right to Counsel

By Thomas F. Coleman
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A measure relating to appointed legal counsel in probate conservatorships was recently introduced into the California Assembly. Assembly Bill 596 is authored by Assemblymember Janet Nguyen, a Republican legislator representing parts of Orange County.

The bill is sponsored by the California Lawyers Association on behalf of its Trusts and Estates Section. The CLA represents the business interests of some 7,000 members of that section who practice law in California's probate courts.

While CLA officials may believe the bill improves existing law, improvement is in the eye of the beholder. AB596 looks like a Trojan horse – attractive on the surface but hiding significant dangers.

The bill has two parts. Both are seriously flawed.

Under current law, appointment of a lawyer to represent conservatees and proposed conservatees is mandatory in three circumstances: in limited conservatorship proceedings involving adults with developmental disabilities; when “dementia powers” are requested; and when a petition would remove medical decision-making rights.

Furthermore, Probate Code Section 1471(b) states that the court *shall* appoint counsel if the court determines that it would be helpful to the resolution of the matter or is necessary to protect the interests of the litigant.

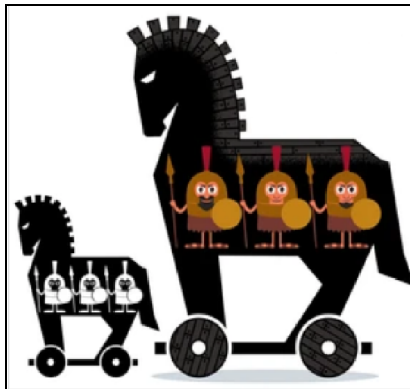
Section 1 of AB596 only comes into play if counsel has already been appointed by the court. In such a circumstance, the Legislature has previously determined that appointment of counsel is mandatory or a judge has previously determined that counsel is necessary.

Under Section 1 of this bill, an appointed attorney must advise the court of the attorney's opinion that

the client is unable to communicate. This is likely to result in the attorney being replaced by a guardian ad litem. In determining whether the allegation is true, the court need not conduct an evidentiary hearing.

The court's ruling can be made solely on the basis of affidavits or declarations. These sworn statements do not have to be made by qualified professionals. They can be made by lay people, including opposing parties who may have an incentive to distort the facts or omit information.

The bill does not define “unable to communicate.” The bill does not say “consistently unable to communicate” or require a finding that the absence of communication is permanent.



AB596 encourages disability discrimination. While American Bar Association Rule 1.14 allows attorneys to treat clients with diminished capacity differently than clients without such disabilities, the California Rules of Professional Conduct do not. The California Supreme Court

specifically refused to adopt a similar rule for California attorneys.

Thus, attorneys have the same ethical duties of loyalty and confidentiality to clients who have a disability that renders them unable to communicate as they do to clients whose communication abilities are intact. Despite this, AB596 authorizes attorneys to use work product information to initiate a proceeding that may result in the client losing the right to an advocacy attorney.

The California State Bar has advised attorneys that in addition to these ethical considerations, treating clients with disabilities less favorably than those without such conditions may violate the Americans with Disabilities Act. *State Bar Standing Committee on Professional Responsibility and Conduct: Formal Opinion Interim No. 13-0002, fn. 4.*

In fact, the ADA places an affirmative duty on attorneys and judges to investigate known communication disabili-

ties and to provide supports and services that may overcome or minimize their adverse effects. AB596 fails to recognize the conflict between its mandates and the requirements of state and federal nondiscrimination laws.

Another flaw is the bill's failure to acknowledge that communications from the client to the court and to the attorney may have been made in the past. A litigant may have previously executed a trust or durable powers of attorney for health care and finances. These legal instruments are intended to survive the mental incapacity of the person executing them.

An 80 year-old senior with dementia or a 30 year-old motorcycle accident victim may be unable to communicate during the conservatorship proceeding, but their previously-made statements are nonetheless important communications to be considered. These documents inform the appointed attorney what the client wanted to happen upon mental incapacity. The attorney should listen to these communications and defend these documents, not initiate a process that will result in the attorney being given judicial permission to abandon the client.

Once the court determines the individual is unable to communicate – perhaps without an ADA assessment, without a capacity evaluation by a qualified mental health practitioner, without the judge ever once laying eyes on the litigant, and without holding an evidentiary hearing – Section 1 says the court *shall* discharge the appointed attorney and replace him or her with a guardian ad litem.

Section 1 of the bill rests on a false assumption that there is no role for an advocacy attorney when a client in a conservatorship proceeding is presently unable to communicate.

An advocacy attorney has two distinct functions in a conservatorship proceeding. One is to protect the client's rights. The other is to advance the client's fundamental goals. *Conservatorship of Christopher A.*, 139 Cal.App.4th 604, 612 (2007); *Conservatorship of Tian L.*, 149 Cal.App.4th 1022, 1032 (2007).

If there are existing documents that express the client's wishes regarding the management of assets or who should be appointed as a conservator, an ap-

pointed attorney has a duty to protect the client's right to have those decisions respected by the court.

The role of protecting an individual's rights in conservatorship proceedings was explained by the Conference of State Court Administrators when it stated that appointed counsel should ensure that due process is followed, that the petitioner proves the allegations by the required quantum of proof, and the proposed conservator is qualified to serve. *The Demographic Imperative: Guardianships and Conservatorships*, Conference of State Court Administrators (Adopted December 2010). These duties are not dependent on the client's ability to communicate.

Section 2 of the bill is also deficient. While it aims to clarify the role of an appointed attorney in a probate conservatorship proceeding, omissions and ambiguities defeat that purpose.

The bill says that an appointed attorney "shall act as an advocate for the client." That statement does not go far enough. An attorney has duties "as a *zealous* advocate and as protector of his client's confidences." *California State Auto Association v. Bales*, 221 Cal.App.3d 227 (1990). (emphasis added.)

The term "zealous advocacy" is also associated with the California Rules of Professional Conduct. Referring to those rules, the Court of Appeal has spoken of "an attorney's duties of loyalty, confidentiality, and zealous advocacy." *In re Zamer G*, 153 Cal.App.4th 1253, 1267 (2007).

In explaining the advocacy role of appointed counsel, AB596 focuses exclusively on "the client's expressed interests," making no mention of the duty to advocate for the client's rights. The failure to define "expressed interests" is a major deficiency. Each client has an interest in having the right to due process protected. The same is true for the right to have the court follow statutory directives.

Because of these flaws, anyone with concern for the rights of seniors and people with disabilities should see that AB596 is not ready for prime time. This Trojan horse should not be let out of the legislative barn. ♦♦♦

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