

RESOLUTION 06-10-2016

DIGEST

Attorney-Client Privilege: Conservatees and Wards

Amends Evidence Code section 953 to clarify that represented wards and conservatees are the holders of attorney-client privilege when they have a legal dispute with their guardian or conservator.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 953 to read as follows:

§953

- 1 As used in this article, “holder of the privilege” means:
- 2 (a) The client, if the client has no guardian or conservator, except as provided in
- 3 subsection (e) herein.
- 4 (b) A guardian or conservator of the client, if the client has a guardian or conservator,
- 5 except as provided in subsection (e) herein.
- 6 (c) The personal representative of the client if the client is dead, including a personal
- 7 representative appointed pursuant to Section 12252 of the Probate Code.
- 8 (d) A successor, assign, trustee in dissolution, or any similar representative of a firm,
- 9 association, organization, partnership, business trust, corporation, or public entity that is no
- 10 longer in existence.
- 11 (e) In any case or controversy between a conservator and a conservatee, or a guardian
- 12 and ward, the conservatee or ward is the “holder of the privilege.”

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

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: Currently, pursuant to Evidence Code §953, a guardian or conservator is the “holder of the privilege” for purposes of asserting the attorney client privilege for a client who has a guardian or conservator. In a conservatorship or guardianship proceeding, the client may be in litigation against his conservator or guardian (for example in a proceeding to remove or surcharge a conservator or guardian).

The current rule allows a guardian or conservator, as the “holder of the privilege,” to disrupt the attorney client relationship between the client and his attorney. The client (who is under a conservatorship or guardianship) has the right to assert the attorney client privilege between himself and his attorney, even if it were to protect disclosure of confidential communication to the conservator or guardian.

Furthermore, Evidence Code §953, when applied to a dispute or litigation between a conservatee and a conservator, or a ward and a guardian, directly contradicts Rule 3-100 of the California Rules of Professional Conduct and CA Business and Professions Code §6068 which require that an attorney “maintain inviolate the confidence, and at every peril to himself or herself . . . preserve the secrets, of his or her client.”

The Solution: The attorney client relationship between a conservatee or ward and his attorney must be protected. The attorney’s duties should not be subject to the potential conflict present when the conservator or guardian, as the “holder of the privilege,” waives the attorney client privilege to gain a procedural and substantive advantage in a proceeding brought by the conservatee or ward against the conservator or guardian. Anything less would be a violation of the attorney’s duties and a violation of the right of the conservatee or ward to effective and meaningful representation and assistance from the attorney.

Evidence Code §953 should be amended to make it clear that a conservator or guardian is not the “holder of the privilege” in litigation or disputes between the client and his conservator or guardian. The statute needs to be clear that the holder of the attorney client privilege of a conservatee or ward is the client, and cannot be waived by the conservator or guardian when the conservator or guardian is the opposing party to the client in litigation or other dispute.

IMPACT STATEMENT:

The proposed law does not affect other laws, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code section 953 to clarify that represented wards and conservatees are the holders of attorney-client privilege when they have a legal dispute with their guardian or conservator. This resolution should be approved in principle because an attorney cannot properly represent a ward or conservatee in a legal dispute with a guardian or conservator

when the guardian or conservator has the right to access privileged communications even as an adverse party.

Currently, Evidence Code section 953, subdivision (b), states that when a ward or conservatee has an attorney, the holder of attorney-client privilege is the guardian or conservator. This is reasonable because the guardian or conservator owes a fiduciary duty to the ward or conservatee (see Prob. Code, § 2101), who lacks legal capacity to handle their own affairs, and presumes that the guardian or conservator's interests are aligned with the ward or conservatee's.

But in the event of a legal dispute between the guardian or conservator and ward or conservatee, such as removal proceedings (see Prob. Code, §§ 2650-2655), an attorney representing the ward or conservatee must be able to insure that any client communications are protected from discovery by the adverse party. "The attorney-client privilege is a hallmark of Anglo-American jurisprudence that furthers the public policy of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 586-587 (internal citations and quotations omitted).)

COUNTERARGUMENTS

TEXCOM

SUPPORT IN PRINCIPLE

RATIONALE

The proponents note that, in a conservatorship or guardianship proceeding, the conservatee/ward may be in litigation against his/her conservator or guardian, using the example of a proceeding to remove or surcharge a conservator or guardian. In that circumstance, the conservator or guardian has the ability to "disrupt" the attorney-client privilege between the conservatee/ward and the conservatee's/ward's attorney by depriving the conservatee/ward of the right to assert the privilege when the holder is the conservator/guardian. The proponents also argue that, when applied to a dispute between the conservatee/ward and the conservator/guardian, Evidence Code section 953 directly contradicts Rule 3-100 of the California Rules of Professional Conduct, and Business and Professions Code section 6068.

TEXCOM generally agrees with the arguments made in support of the resolution, and believes that a shift in the holder of the privilege under the articulated circumstances is warranted. However, TEXCOM also raises several issues and concerns, including:

- Whether "case or controversy" is adequate language to shift the burden. Initial consultations between conservatee and counsel may not yet have matured to a case or controversy, and there is some concern that those communications remain unprotected.
- The language of proposed subdivision (e) is ambiguous. Although implied that the communications referenced in the section are between the conservatee/ward and

counsel, one may argue under the proposed statute that the conservatee is also the holder of the privilege as to communications between conservator/guardian and counsel—(e) does not make any distinction.

TEXCOM is concerned there may be unintended consequences resulting from this proposal as drafted, and believes the issues should be studied further.

DISCLAIMER:

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