JUDICIAL COUNCIL OF CALIFORNIA
GOVERNMENTAL AFFAIRS
770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

June 22, 2017

Hon. Hannah-Beth Jackson, Chair
Senate Judiciary Committee
State Capitol, Room 2032
Sacramento, California 95814

Subject: AB 1290 (Obernolte) as amended June 19, 2017 - Concerns
Hearing: Senate Judiciary Committee – June 27, 2017

Dear Senator Jackson:

The Judicial Council does not yet have a formal position on AB 1290. However, the Legislative Subcommittee of the council's Probate and Mental Health Advisory Committee (the subcommittee) has spent considerable time and effort in attempting to work cooperatively with the author's staff, sponsor, policy committee staff, and other stakeholders to address significant concerns the subcommittee has identified with the bill. Unfortunately, we were unable to reach agreement and the subcommittee continues to have serious concerns with the provisions in Section 1 of the bill, as explained below.

As a preliminary matter, the subcommittee believes that the underlying issue presented by the bill -- who should hold the attorney-client privilege when the client is a conservatee or ward -- is highly complex and not amenable to an easy legislative fix. The assumptions underlying the proposed amendments to Evidence Code section 953 in AB 1290 presuppose answers to complex questions of law and policy regarding the nature of the attorney-client relationship, the appropriate effect on legal capacity of the establishment of a conservatorship, and the authority of the privilege holder who is neither the client nor privy to the confidential communication. The subcommittee believes that deeper examination of these complex issues is needed before

substantive legislation is enacted. That is why the subcommittee supports, consistent with its earlier recommendations, Section 2 of the bill (as proposed to be amended), which would require the California Law Revision Commission (CLRC) to conduct a study and report on the question of who should hold the lawyer-client privilege if the client is a conservatee or ward.

According to the author, the problem that AB 1290 is intended to address is that "[w]hen there is a legal dispute between the conservatee and conservator, such as proceedings to remove the conservator from this role, the interests of the conservatee and the conservator diverge. In those cases, designating the conservator as the holder of the privilege and giving him or her authority to waive the privilege and force disclosure of confidential lawyer/client information is antithetical to the spirit and intent of the statute, and against the best interests of the client. Additionally, the attorney's duties should not be subject to the potential conflict present when the conservator, 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 against the conservator." The sponsor's underlying resolution contains similar statements in support of the need for the legislation.

Under existing law, confidential communications between a lawyer and a client are "privileged" from disclosure in a legal proceeding in which their disclosure could otherwise be compelled. (See Evid. Code, §§ 910, 954.) This means that, if the "holder of the privilege," typically the client, claims or asserts the privilege, the client may refuse to disclose and prevent another person from disclosing the communication in the proceeding. (*Id.*, §§ 953, 954.) When the client has a conservator, the client does not hold the attorney-client privilege; instead, the client's conservator is the holder of the privilege on the client's behalf. (*Id.*, § 953(a) & (b).)

The holder of the privilege is authorized, and in some circumstances may be required, to assert or claim the privilege on behalf of the client in a proceeding. (*Id.*, § 954.) The holder of the privilege may also waive the privilege by disclosing, or permitting the disclosure of, confidential communications between the client and the lawyer. (*Id.*, § 912(a).) Failure of the holder to claim the privilege in any proceeding in which the holder has standing and the opportunity to claim it is a manifestation of consent to disclosure and, therefore, a waiver. (*Ibid.*)

The general rule disabling a conserved client from acting as the holder of the attorney-client privilege on his or her own behalf and making the conservator the sole holder of the privilege may have made sense under earlier understandings of legal mental capacity as an all or nothing proposition. For example, section 40 of the Civil Code deems the establishment of a conservatorship to be a blanket judicial determination of incapacity to make any conveyance or other contract, delegate any power, or waive any right. (Civ. Code, § 40(a) & (b).) Under the Probate Code, however, the establishment of a conservatorship is not necessarily a determination of a conservatee's global incapacity. The Probate Code distinguishes between, and requires different showings to establish, types of conservatorships along axes not captured by Civil Code

section 40. The probate court may establish a conservatorship of the person on one showing, a conservatorship of the estate on a separate showing, or both. (Prob. Code, § 1801(a)–(c).) In addition, the court may establish either a general or a limited conservatorship of the person, the estate, or both for a developmentally disabled adult. (*Id.,* § 1801(d); see *id.,* § 1872).)

The Probate Code also requires that a judicial determination of a person's lack of capacity to make a decision or perform a certain act be supported by evidence of a deficit in one or more specific mental functions and a correlation between the deficit and the decision or act. (Prob. Code, § 811(a).) If the capacity to exercise a fundamental right is at issue, the law provides even more narrowly tailored standards and heightened procedural protections. (See *id.,* § 1910 (disqualification from voting); see also Elec. Code, §§ 2208–2210.)

These considerations make clear the need for a comprehensive consideration of how the law addresses the determination of a conservatee's capacity to hold the attorney-client privilege and, specifically, whether a more fine-grained approach to the determination might be appropriate.

Unnecessarily depriving a conserved client of the authority to hold and exercise the attorney-client privilege seems especially likely to disadvantage the client proceedings internal to a conservatorship, in which the court is typically required to determine whether the conservator's proposed or past acts are consistent with her duties to the conservatee and, if not, to act to protect the conservatee's legal rights and interests.[1] Giving that authority to the conservator in such proceedings may compound the problem. But these adverse consequences are not certain, and, furthermore, existing law may provide the conservatee with adequate protection.

The author's statement assumes that the holder of a privilege may waive the privilege and *force* the disclosure of a confidential attorney-client communication in a proceeding. First, it is not at all clear from the statutory scheme that a privilege holder is authorized to force disclosure. Section 912(a) of the Evidence Code provides for waiver by disclosure or consent to disclosure. If the holder is not the client, but was privy to a confidential communication for any of the reasons specified in section 952 of the Evidence Code, the holder might disclose the communication and thereby waive the privilege under section 912(a) of the code. If the non-client holder was not privy to the confidential communication, however, the law does not provide the holder with any clear authority to compel either the lawyer or the client to disclose the communication.

[1] It is important to note that nothing in existing law or AB 1290 addresses any aspect of an attorney-client relationship between a conservator and the conservator's own personal attorney. However, the subcommittee would not object to adding an amendment to this bill to clarify this point, should the Senate Judiciary Committee feel the need to do so.

Even if the holder could compel disclosure, that authority would be subject to the attorney's assessment of his or her independent duty of client confidentiality. An attorney's duty of confidentiality under rule 3-100 of the Rules of Professional Conduct and section 6068(e) of the Business and Professions Code runs to the client and only the client. The law of privilege is generally consistent with this duty. Section 954(a) of the Evidence Code emphasizes that the *client* has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication. The lawyer is required to assert the privilege on behalf of the client. However, a person authorized to permit disclosure, including a holder of the privilege, may instruct the attorney not to claim the privilege. (Evid. Code, § 955; see also *id.*, §§ 912(a), 954(c).) But the scope of the attorney's duty of confidentiality is much broader than the privilege, which applies only in a proceeding in which the attorney may be compelled to provide evidence. (See Rules Prof. Conduct, rule 3-100, cmt. 2.) Rule 3-100(A) also requires the attorney to obtain the client's informed consent before disclosing confidential information. It does not provide for substituted consent. The subcommittee believes that the attorney's duty of confidentiality would prevail over the holder's instruction.

Assuming that existing law does cause the asserted problem, AB 1290's proposed solution creates a general exception to the conservator privilege holder rule by providing in new subdivision (e) that "[i]f the conservatee or ward has appointed counsel or the conservatee has retained counsel to represent him or her in the conservatorship proceeding, the conservatee or ward is the holder of the privilege with respect to communications with that counsel."
The subcommittee has a number of concerns with the current subdivision (e) language. First, in a manner similar to existing law, it does not address the critical issue of the capacity of the individual conservatee or ward to exercise the privilege. In the type of conflict situations described by the author and sponsor, nothing in the bill would appear to prevent a conservatee or ward with either appointed or retained counsel from unwittingly waiving the attorney-client privilege, which could result through disclosing or consenting to disclosure as a result of manipulation or other unscrupulous behavior by the conservator or guardian or others. This is why the subcommittee initially offered the following alternative proposed subdivision (e) language:

> "If the guardian or conservator has an actual or apparent conflict of interest with the client, then the guardian or conservator does not hold the privilege. In those circumstances, the court may take any appropriate action to protect the interests of the client, including appointing a guardian ad litem as holder of the privilege."

The subcommittee's suggested amendments were intended to protect a ward or conservatee from improper invocation of the privilege by a guardian or conservator to protect himself or herself when he or she has a conflict of interest with the ward or conservatee. The subcommittee noted that these suggested amendments do not address the important broader issue of whether precluding every ward or conservatee from holding the privilege is justified without an

independent judicial determination of the ward's or conservatee's lack of specific capacity to hold this privilege. As noted above, the subcommittee members believe that CLRC should conduct a study to determine whether further amendments to section 953 of the Evidence Code, as well as any applicable provisions of the Probate Code, are needed to tailor the circumstances in which a conservatee or ward may not hold the privilege more narrowly to the conservatee's lack of specific capacity to claim or waive it.

After the above-suggested amendments were rejected by the author and sponsor, the subcommittee continued to pursue its cooperative efforts. Following a conference call we had with the author's staff, sponsor and other interested stakeholders, we attempted to respond to the concern raised by the proponents that current law could be construed to allow a conservator or guardian who holds the privilege to force an attorney to divulge confidential client communications. Notwithstanding the fact that no one on the call was able to give us a concrete example of this having actually happened, the subcommittee offered the following alternative subdivision (e) language:

> "Nothing in this section authorizes an attorney to disclose a confidential client communication over the client's objection."

There was some initial receptivity to this alternative approach on the part of some of the participants on the call. In this vein, the sponsor's lobbyist offered the following alternative version for the group's consideration:

> "This section shall not be construed to require or permit disclosure of, or waiver of privilege regarding, any information protected by subdivision (e) of Section 6068 of the Business and Professions Code."

The subcommittee was comfortable with either of these narrower alternative approaches, but unfortunately, both versions were subsequently rejected by the author and sponsor.

Lastly, current law makes a guardian the holder of the attorney-client privilege if the client is a ward. As noted above, the bill would also make the ward the holder in cases where the ward has appointed counsel. A minor typically lacks the capacity to form an attorney-client relationship except through a guardian, including a guardian ad litem. Yet the proposed amendments impose the same limit on a guardian as they do on a conservator. And the minor ward would likely be subject to the same type of undue influence to waive the privilege in cases where the guardian is seeking a procedural or substantive advantage.

Given all of the complexities described above and the significant potential for unintended consequences that could result from the current language in Section 1 of the bill, the

subcommittee respectfully requests removing it from AB 1290 and limiting the measure to the CLRC study language (as proposed to be amended).

Please feel free to contact me at (916) 323-3121 or daniel.pone@jud.ca.gov if you have any questions.

Sincerely,

Mailed June 22, 2017

Daniel Pone
Attorney

DP/jh

cc: Members, Senate Judiciary Committee
Hon. Jay Obernolte, Member of the Assembly
Ms. Marisa Shea, Counsel, Senate Judiciary Committee
Mr. Mike Petersen, Consultant, Senate Republican Office of Policy
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

JUDICIAL COUNCIL OF CALIFORNIA
GOVERNMENTAL AFFAIRS
770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

June 29, 2017

Hon. Jay Obernolte
Member of the Assembly
State Capitol, Room 4116
Sacramento, California 95814

Dear Assembly Member Obernolte:

The Judicial Council regrets to inform you of its opposition to AB 1290, as amended June 19, 2017. The current version of AB 1290 provides that if a conservatee or ward has appointed counsel or the conservatee has retained counsel to represent him or her in a conservatorship proceeding, the conservatee or ward is the holder of the attorney-client privilege with respect to communications with that counsel. The bill would also require the California Law Revision Commission (CLRC) to conduct a study and prepare a report addressing who holds[1] the lawyer-client privilege if a client is a conservatee or ward.

As a preliminary matter, the Judicial Council believes that the underlying issue presented by the bill -- who should hold the attorney-client privilege when the client is a conservatee or ward -- is highly complex. Although the existing statute's blanket transfer of that authority to a guardian or conservator presents problems, these are not easy to isolate, let alone amenable to an easy legislative fix. The proposed amendments to Evidence Code section 953 in AB 1290 presuppose answers to unresolved questions of law and policy regarding the attorney-client relationship, the conservatee's legal capacity, and the authority of a privilege holder who is not also the client.

[1] According to your staff, the study language in Section 2 of the bill will be amended to read: "The California Law Revision Commission shall conduct a study and prepare a report addressing who *should hold* the lawyer-client privilege if a client is a conservatee or ward." With that amendment, the council would be in support of Section 2, and its remaining concerns are limited to Section 1, as set forth in this letter.

The Judicial Council believes that deeper examination of these issues should precede the enactment of substantive legislation in this area. That is why the council supports Section 2 of the bill (as proposed to be amended), which would require the CLRC to conduct a study and report on the question of who should hold the lawyer-client privilege if the client is a conservatee or ward.

You have explained that the problem that AB 1290 is intended to address is that "[w]hen there is a legal dispute between the conservatee and conservator, such as proceedings to remove the conservator from this role, the interests of the conservatee and the conservator diverge. In those cases, designating the conservator as the holder of the privilege and giving him or her authority to waive the privilege and force disclosure of confidential lawyer/client information is antithetical to the spirit and intent of the statute, and against the best interests of the client. Additionally, the attorney's duties should not be subject to the potential conflict present when the conservator, 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 against the conservator." The sponsor's underlying resolution contains similar statements in support of the need for the legislation.

There is no question that assigning the authority to exercise the lawyer-client privilege to a conservator entails the risk that the conservator will exercise that privilege against the conservatee's interests in a legal proceeding. But it is not at all clear that the risk extends as far as suggested. Several factors circumscribe the risk. First, the privilege applies only in a proceeding in which testimony may be compelled. (Evid. Code, §§ 901, 910.) Outside the context of such a proceeding, the attorney's duty to maintain client confidences would apply without qualification.

Second, nothing in existing law authorizes a privilege holder to *force* disclosure of a confidential communication. The law assumes that the privilege holder already knows the content of the communication; in the typical case, the client herself holds the privilege. (*Id.*, § 953(a).) Section 912(a) of the Evidence Code describes only two ways for a holder to waive a privilege: uncoerced disclosure of the communication or consent to its disclosure by another. A non-client holder who was privy to a confidential communication might waive the privilege by disclosing the communication. A non-client holder, whether privy to the communication or not, might also waive the privilege by consenting to its disclosure, though consenting to disclosure of an unknown communication presents separate problems. But there appears to be no mechanism outside the judicial process for a non-client holder to force a lawyer or a client to disclose a confidential communication.

Even if the holder had the authority to force disclosure, that authority would be subject to the attorney's assessment of his or her independent duty of client confidentiality. Under rule 3-100 of the Rules of Professional Conduct and section 6068(e) of the Business and Professions Code,

that duty runs to the client alone. Moreover, the scope of the duty of confidentiality is much broader than the privilege, which applies only in a proceeding in which the attorney may be compelled to provide evidence. (See Rules Prof. Conduct, rule 3-100, cmt. 2.) Even so, the existing law of privilege generally reinforces the duty. For example, section 954(a) of the Evidence Code emphasizes that the privilege belongs to the *client* and, subject to certain limits, requires the lawyer to claim the privilege on the client's behalf. (Evid. Code, § 955; see also *id.*, §§ 912(a), 954(c).) The Judicial Council believes that the attorney's duty of confidentiality would prevail over the holder's instruction.

Assuming that the identified problem exists under current law, the Judicial Council has a number of concerns with AB 1290's proposed solution in Section 1 of the bill. First, the bill fails to address the critical question of the *capacity* of the individual conservatee or ward to exercise the privilege. Granting a conservatee without the actual ability to understand and meaningfully invoke the privilege the *legal* capacity (and responsibility) to claim it does not solve the problem and subjects the conservatee to an unnecessary risk of harm. It is also important to note that a minor typically lacks the legal capacity to form an attorney-client relationship except through a guardian, including a guardian ad litem. In the absence of such a relationship, it is not clear how the privilege could exist.

In either scenario, the current version of AB 1290 would leave many, if not most, wards and conservatees defenseless against the very harm the bill is designed to address. Nothing in the bill would protect a conservatee or ward with counsel from unwittingly waiving the privilege. By definition, conservatees are a vulnerable population. Conservators with improper motives could easily obtain disclosure or consent from conservatees through manipulation or other unscrupulous behavior. Minor wards would also likely be subject to the same type of undue influence to waive the privilege in cases where the guardian is seeking a procedural or substantive advantage.

This is why we initially offered the following proposed alternative subdivision (e) language:

> "If the guardian or conservator has an actual or apparent conflict of interest with the client, then the guardian or conservator does not hold the privilege. In those circumstances, the court may take any appropriate action to protect the interests of the client, including appointing a guardian ad litem as holder of the privilege."

The intent of the council's above-suggested language is to protect a ward or conservatee from improper invocation of the privilege by a guardian or conservator seeking to protect himself or herself when he or she has a conflict of interest with the ward or conservatee. Importantly, the above language allows the court to make a determination, on a case-by-case basis, of how best to protect the individual conservatee or ward where such a conflict may exist. The Judicial Council also notes that these suggested amendments do not address the important broader issue of

whether precluding every ward or conservatee from holding the privilege is justified without an independent judicial determination of the ward's or conservatee's lack of specific capacity to hold this privilege, which the CLRC study should address.

Despite your rejection of the above-suggested amendments, we continued to explore other possible alternative approaches in an effort to reach agreement on how best to address this complex and vexing public policy issue. Following a conference call with your staff, the sponsor and other interested stakeholders, we attempted to respond to the concern voiced by the bill's proponents that current law could allow a conservator or guardian who holds the privilege to force an attorney to divulge confidential client communications. Notwithstanding the fact that no one on that call was able to provide a concrete example of this having actually happened, we offered the following alternative subdivision (e) language:

> "Nothing in this section authorizes an attorney to disclose a confidential client communication over the client's objection."

There was some initial receptivity to this alternative approach on the part of some of the participants on the call. In this vein, the sponsor's lobbyist offered the following alternative version for the group's consideration:

> "This section shall not be construed to require or permit disclosure of, or waiver of privilege regarding, any information protected by subdivision (e) of Section 6068 of the Business and Professions Code."[2]

The Judicial Council was comfortable with either of these narrower alternative approaches. However, your office subsequently informed me that both versions were not acceptable to you.

In light of the complexities described above, the lack of documented evidence of the underlying problem, and the significant potential for unintended adverse consequences that could result from AB 1290's current language, the Judicial Council is opposed to Section 1 of the bill. The council would remove its opposition to AB 1290 if it were amended to either replace the current Section 1 language with any of the alternatives described above or limited to the Section 2 CLRC study language (as proposed to be amended).

---

[2] This language was adapted from Welfare and Institutions Code section 15637, a provision that governs privileged information under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), which provides: "In any court proceeding or administrative hearing, neither the physician-patient privilege nor the psychotherapist-patient privilege applies to the specific information required to be reported pursuant to this chapter. *Nothing in this chapter shall be interpreted as requiring an attorney to violate his or her oath and duties pursuant to Section 6067 or subdivision (e) of Section 6068 of the Business and Professions Code, and Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code*." (Italics added)

Please feel free to contact me at (916) 323-3121 or daniel.pone@jud.ca.gov if you have any questions.

Sincerely,

Mailed June 29, 2017

Daniel Pone
Attorney

DP/jh

cc: Mr. Larry Doyle, Lobbyist, Conference of California Bar Associations
Ms. Marisa Shea, Counsel, Senate Judiciary Committee
Mr. Mike Petersen, Consultant, Senate Republican Office of Policy
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

JUDICIAL COUNCIL OF CALIFORNIA

520 Capitol Mall, Suite 600 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

August 22, 2018

Hon. Jay Obernolte
Member of the Assembly
State Capitol, Room 4116
Sacramento, California 95814

Dear Assembly Member Obernolte:

The Judicial Council is pleased to inform you of the removal of its opposition to AB 1290. The August 20, 2018 version of AB 1290 would amend the law governing the holder of the attorney-client privilege in conservator and guardianship cases by specifying that if the guardian or conservator has an actual or apparent conflict of interest with the client, then the guardian or conservator does not hold the privilege. The council appreciates your agreeing to take these amendments, which are generally consistent with one of the proposed alternatives the council had offered last year in its letter of opposition to the June 19, 2017 version of the bill. As we explained, the intent of the council's suggested language was to protect a ward or conservatee from improper invocation of the privilege by a guardian or conservator seeking to protect themselves when they have a conflict of interest with the ward or conservatee.

The Judicial Council also notes that the current version of AB 1290 does not address the important broader issue of whether precluding every ward or conservatee from holding the privilege is justified without an independent judicial determination of the ward's or conservatee's lack of specific capacity to hold this privilege, which the council believes merits further study. However, the council very much appreciates your cooperative efforts in addressing the narrower conflict issue, and withdraws its prior opposition to the measure.

Please feel free to contact me at (916) 323-3121 or daniel.pone@jud.ca.gov if you have any questions.

Sincerely,

Mailed August 22, 2018

Daniel Pone
Attorney

DP/jh

cc: Mr. Josh Tosney, Counsel, Senate Judiciary Committee
Mr. Mike Petersen, Consultant, Senate Republican Office of Policy
Ms. Leora Gershenzon, Deputy Chief Counsel, Assembly Judiciary Committee
Mr. Paul Dress, Consultant, Assembly Republican Caucus
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California
Mr. Larry Doyle, Lobbyist, Conference of California Bar Associations