



GAL and CAC: *The Intersection of Differing Methods to Effect Adequate Representation in the Courthouse*

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What's This All About?

The rights and interest of minors, incompetents, and those who lack the ability to adequately represent themselves in adversarial proceedings in the courthouse may be protected by the appointment of a Guardian ad litem (*GAL*), by an attorney (a.k.a. Court-appointed Counsel, or *CAC*), or both.



What's This All About?

The roles, duties, and obligations of lawyers (CAC) and representatives (GAL) often overlap. It is important for everyone involved in a court proceeding to ensure that all necessary and indispensable parties are adequately represented in the courthouse.

What's This All About?

Why should we worry about this? Is it the job of the attorneys involved to assure that all necessary parties are adequately represented in court proceedings?

What happens if you don't...



What's This All About?

Judgments taken against a minor or a person who lacks legal capacity to make decisions, not represented by a guardian or a Guardian ad litem, may be disaffirmed and vacated.

In re Charles T. (2002) 102 Cal.App.4th 869

Guardian ad litem (GAL) - Appointment

Guardian ad litem (GAL)



Guardian ad litem (GAL) - Appointment

In California, the appointment of a GAL is governed by statutory principles.

- Code of Civil Procedure (CCP) §§372-373.5
- Probate Code (Prob. Code) §1003 *for proceedings arising under the Probate Code*

Guardian ad litem (GAL) - Appointment

CCP §372 provides:

When a minor, a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed is a party to a civil action, he or she must appear either by a guardian or conservator of his or her estate, or by a guardian ad litem appointed by the court in which the action is pending.

Guardian ad litem (GAL) - Appointment

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Guardian ad litem (GAL) - Appointment

Other basis for appointment of a GAL:

- Designated class of persons, not ascertained, not in being, or unknown, who are or may become legally or equitably interested in any property, real or personal.
 - CCP §373.5

- Determining parent-child relationships.
 - Family Code (Fam. Code) §7635

Guardian ad litem (GAL) - Appointment

For the appointment of a GAL in proceedings arising under the Probate Code, Prob. Code §1003(a) provides:

The court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding under this code to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate...

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Guardian ad litem (GAL) - Appointment

The interests of what persons? Prob. Code §1003(a) states:

- (1) A minor.
- (2) A person who lacks legal capacity to make decisions.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

Guardian ad litem (GAL) - Appointment

- Also, the Court may appoint a GAL to represent interest of spouse whose legal capacity for a proposed transaction is to be determined or who lacks legal capacity for a proposed transaction.
 - Prob. Code §§3112 & 3140
- Section 1003 is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person.
 - Official Comment to Prob. Code §1003

Guardian ad litem (GAL) - Appointment

- **For civil actions:** CCP §372 provides that a GAL may be appointed in any case when the court ***deems it expedient to appoint a guardian ad litem.***
- **For probate proceedings:** Prob. Code §1003 provides that a GAL may be appointed in any case ***if the court determines that representation of the interest of the ward would otherwise be inadequate.***
 - *Such discretion is to be guided by the court's determination regarding the adequacy of the representation of the minor's interest in the absence of a GAL.*
 - *Chui v. Chui (2022) 75 Cal.App.5th 873, mod. 2022 Cal.App.LEXIS 252 (Mar. 28, 2022)*

Guardian ad litem (GAL) - Appointment

- As to both civil actions and probate proceedings, appointment may be made notwithstanding the fact that the ward may have a guardian or conservator of the estate.

CCP §372(a)(1) and Prob. Code §1003(a)

- ***HOWEVER*** → The court does **not** have a duty to appoint a GAL for a person who is not a party to the action.

In re Emily R. (2000) 80 Cal. App. 4th 1344.

Guardian ad litem (GAL) - Appointment

- ***When do we NOT need appointment?***
 - Protective Proceedings (TRO, Civil/Family Law, Workplace Violence, Etc.)
 - CCP §372
 - Fam. Code §§6200 et seq., 7710-7720
 - The court is still authorized to appoint a GAL in these types of protective order cases and proceedings.
 - Subject to certain guidelines stated in CCP § 372(b)(1).
 - **However**, although a minor under 12 years of age must appear through a GAL in these types of cases, CCP § 374 provides that the minor and any appointed GAL may appear in the court ***without*** the requirement of an attorney.

Guardian ad litem (GAL) - Who To Appoint?

Discretion:

- The selection of the GAL is within the court's discretion.
- With respect to a minor, the selection is not subject to any parental or other preference.

D.G. v. Superior Court (1979) 100 Cal.App.3d 535

Estate of Trego (1978) 81 Cal.App.3d 530

Guardian ad litem (GAL) - Who To Appoint?

General Principles:

- Regardless of how appointed (civil CCP §372 or probate PC §1003):
 - **WARNING – Both statutes are changing as of January 1, 2023 with new “Conflict of Interest” provisions.**
 - The court must consider whether the guardian and the minor or person who lacks legal capacity to make decisions have **divergent interests**.
- CCP §§372(b)(1) & 374
- An **adverse interest** is grounds for removal of a GAL - it is improper to appoint a GAL who, however well intentioned, inevitably is in an adverse position to the ward for whom he or she purports to act.

Estate of Lacy (1975) 54 Cal. App. 3d 172

Guardian ad litem (GAL) - Role & Authority

General Principles applicable to both civil CCP §372 and probate PC §1003 appointments:

- “The essential difference between a general guardian and a guardian ad litem is that the former is usually appointed to ‘take care of the person or property of a minor, not for the purpose of prosecuting a lawsuit,’ while a guardian ad litem is appointed specifically to ‘prosecute or defend’ a suit, and may be appointed even though there is a general guardian. Subject to fiduciary duties owed to the ward and the requirement that court approval be obtained for certain acts, the guardian ad litem has the power to assent to procedural steps that will facilitate a determination of the minor's case. Thus, a guardian ad litem represents the interests of a person in legal proceedings who lacks capacity to represent himself or herself in those proceedings.”

J.W. v. Superior Court (1993) 17 Cal.App.4th 958 [internal citations omitted]

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Guardian ad litem (GAL) - Role & Authority

General Principles applicable to both civil CCP §372 and probate PC §1003 appointments:

- The role of a GAL, who is appointed by the Court only for purposes of the pending litigation, is solely to protect and defend the ward's interest in that action, suit, or proceeding.
- In so doing, the GAL's role is that of a court-appointed officer, who, under the appointment of and under the supervision of the trial court, **must act in the ward's best interests.**



McClintock v. West (2013) 219 Cal.App.4th 540

J.W. v. Superior Court (1993) 17 Cal.App.4th 958

Guardian ad litem (GAL) - Role & Authority

- The trial court has the duty to ensure the ward's rights are protected by the GAL.

Berry v. Chaplin (1946) 74 Cal.App.2d 652

- While a GAL's role is as a representative of the ward, he or she does not act as an advocate, and does not simply represent the ward's wishes. The court is, in effect, the guardian of the ward and the GAL is but an officer and representative of the court.

Serway v. Galentine (1946) 75 Cal.App.2d 86

McClintock v. West (2013) 219 Cal.App.4th 540

Guardian ad litem (GAL) - Role & Authority

- In an *adversarial proceeding*, the GAL's function is to protect the rights of the ward by controlling the litigation and the procedural steps incident to the conduct of the litigation, including compromise or settlement.

- A person appointed to look out for another person's best interests during a court proceeding.
- ***With the court's approval***, the GAL is authorized to make stipulations or concessions that bind the ward so long as such stipulations or concessions are not prejudicial to the ward's interests.

De Santos v. Superior Court (1980) 27 Cal.3d 677

In re Christina B. (1993) 19 Cal.App.4th 1441

CCP §372.

- A settlement of a dispute or claim is not final or binding on the ward until the settlement agreement is approved by the court.

Scruton v. Korean Air Lines Co. (1995) 39 Cal.App.4th 1596

Guardian ad litem (GAL) - Role & Authority

- Nevertheless, the GAL may bind the ward as to procedural steps not affecting the ward's rights, such as, for example, jury trial waivers.

Cloud v. Market S. R. Co. (1946) 74 Cal.App 2d 92

De Los Santos v. Superior Court (1980) 27 Cal.3d 677

- This includes compliance with the Civil Discovery Act (CCP §§2016 et seq.) because ensuring that discovery is properly and timely answered by the litigant parties is the duty of an appointed GAL.

Regency Health Services, Inc. v. Superior Court (1998) 64 Cal.App.4th 1496

Court-Appointed Counsel (CAC)

Lawyer / CAC



Court-Appointed Counsel (CAC)

- A **lawyer** (also called **attorney**, counsel, or counselor) is a licensed professional who advises and represents others in legal matters.

- A lawyer has two primary, concurrent duties:
 1. To uphold the law; and
 2. To protect a client's rights.

Source: ABA "What is a Lawyer" (Sept. 10, 2019)

https://www.americanbar.org/groups/public_education/resources/public-information/what-is-a-lawyer/

Court-Appointed Counsel (CAC) - Appointment

Basis for Appointment of a Lawyer (CAC) by Judge in Probate Court:

- **Discretionary** appointment (Prob. Code §1470) for any protective proceeding under the Probate Code where person is not represented by counsel and appointment would be helpful to resolution of the matter or necessary to protect their interests.
- **Mandatory** appointment (Prob. Code §1471) to establish or terminate a conservatorship, remove a conservator, or other enumerated proceedings where person unable to retain counsel and requests it, or person has not and does not plan to retain counsel.
 - Appointment is required whether or not the person lacks or appears to lack capacity.

Court-Appointed Counsel (CAC) – Who to appoint?

- Court has discretion to appoint (Local Rule 4.126, CRC Rules 7.1101 and 7.1104).
- Appointment a privilege and CAC may be removed with or without cause (Local Rule 4.125(e)).
- Court selects counsel (Prob. Code §§1470, 1471).

Court-Appointed Counsel (CAC) – Role and Authority

- Role of the CAC is to be a “***zealous, independent advocate representing the wishes of their client***” (Prob. Code §1471(e)).
- Must act consistent with Bus. & Profs. Code §6068 re: attorney-client relationships and the California Rules of Professional Conduct (Prob. Code §1471(e)).
 - Example: maintain confidences, keep client reasonably informed.
- LASC Standing Order with conditions of appointment (Local Rule 4.126)
 - Cannot delegate appointment or assign it to other lawyers
- Serves at pleasure of Court; represent interests of client (Local Rule 4.125(a)).
 - Must if practical afford client opportunity to address Court directly.

Court-Appointed Counsel (CAC) – Role and Authority

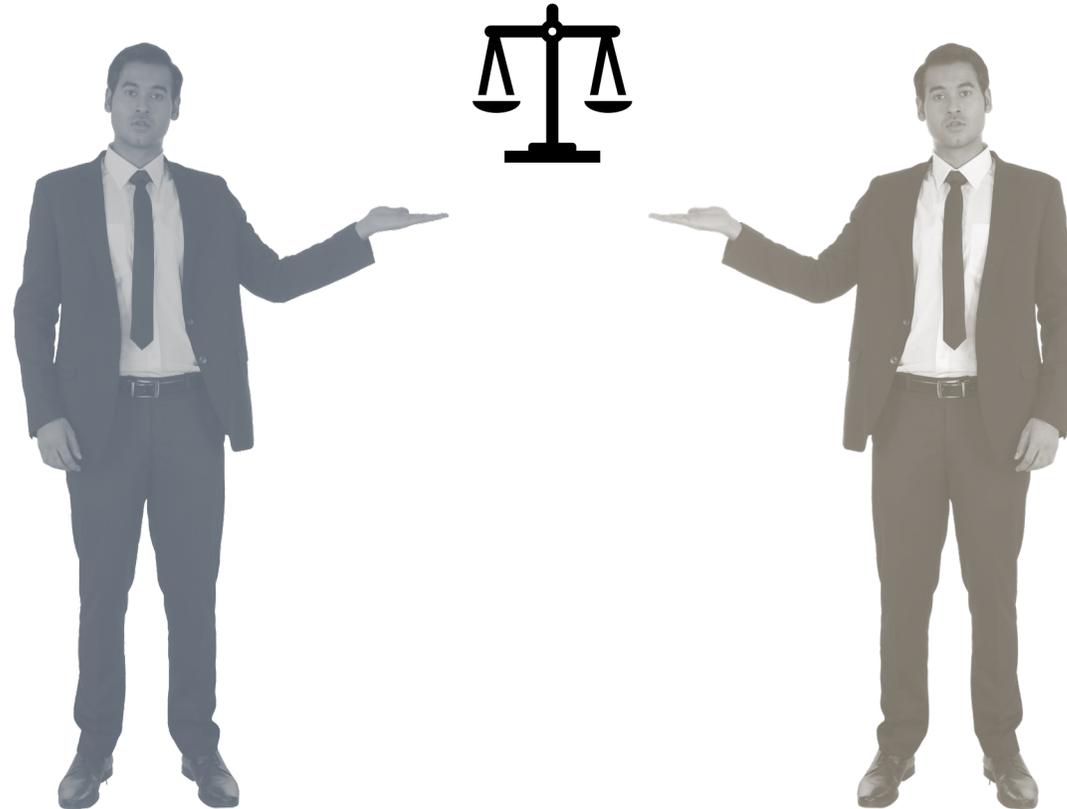
- Local Rule 4.125(b):
 - Must represent client in accordance with applicable laws and due diligence
 - Bus. & Profs. Code §6068
 - Rules of Prof. Conduct 1.1 to 1.8.1, 2.1, etc.
 - Duly and timely appear at hearings
 - Timely communicating with client regarding developments
 - Timely submitting reports that are complete, thorough and clear

Court-Appointed Counsel (CAC) – Role and Authority

- Local Rule 4.125(b):
 - Comply with ethical requirements and cost effectiveness
 - Bus. & Profs. Code §6068; Rules of Prof. Conduct 1.1 to 1.8.1, 2.1, etc.
 - Completing purpose of assignment
 - Consider benefit vs. expense and initial allocation of hours
 - Ethical duty to advise Court when client eligible for County payment of all or part of counsel's fee (CRC Appendix E, Guidelines for Determining Financial Eligibility for County for the Payment of Cost of Counsel https://www.courts.ca.gov/documents/appendix_e.pdf)

The Intersection: CAC and GAL

CAC



GAL

The Intersection: CAC and GAL

Overlapping but Differing Roles:

▪ **Guardian ad litem (GAL):**

- GAL serves to protect the rights of the ward by controlling the litigation and the procedural steps incident to the conduct of the litigation, including compromise or settlement.
- The GAL is a representative of the ward, i.e., a person appointed to look out for another person's best interests during a court proceeding. ***HOWEVER, the GAL does not act as an advocate and does not simply represent the ward's wishes.***

▪ **Court-Appointed Counsel (CAC):**

- CAC, like any attorney involved in an adversarial court proceeding, is to be a zealous, independent advocate representing the wishes of their client.
- ***Required to follow client's instructions and directions.***

The Intersection: CAC and GAL

- Consider the Problem of **Dual Appointments** (where one person is appointed as CAC and one person is appointed as GAL, either in the same or different cases):
 - When would there likely be **both** a GAL and CAC serving at same time?
 - ❖ When there are conservatorship proceedings existing/in progress, AND:
 - Trust/Estate administration and/or litigation
 - Civil litigation
 - **CONCERN:** Overlapping roles...even if not appointed in same case?
 - *Do you consult with each other? Why? About what? How?*
 - **CONCERN:** Privileges (i.e., Attorney-Client Communication, etc.)
 - *The attorney-client relationship exists with the minor or incompetent person, not the GAL, even though the GAL may communicate and make decisions.*

Evid. Code §951: As used in this article, “client” means a person who, **directly or through an authorized representative**, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

The Intersection: CAC and GAL

- Consider the Problem of Sequential Appointments:
 - May a **CAC** subsequently serve as **GAL** for the client?
 - ❖ Do the conditions on subsequent representation apply (Item 9, *PRO 058 Annual Compliance Certification for CAC*)?

“I understand that I may not represent any other party in cases in which I have been appointed as counsel, or in cases that are related to cases in which I was appointed as counsel (for example, representation of an executor after the death of a conservatee whom I was appointed to represent).”

The Intersection: CAC and GAL

- Consider the Problem of Sequential Appointments:

- ❖ What is the purpose of CAC subsequently being appointed as GAL?

- *Appointed in the same case or a different case?*

- *If appointed in a different case, does the subject matter of the case relate to the subject matter of the other case?*

- ❖ **CONCERNS:**

- Will your position **contradict** your former client's/ward's position?

- Will you need to use or disclose **secrets/confidential information**?

The Intersection: CAC and GAL

- Consider the Problem of Sequential Appointments:
 - REVERSE – May a GAL thereafter serve as CAC for the ward?
 - ❖ Does your interest as former GAL conflict with your interest as CAC for the client?
(e.g., best interests vs. your client’s wishes)
 - ❖ Are you subsequently appointed in the same case or a different case?
 - If the same case, does your former position *contradict your earlier position*?
 - ❖ What is the purpose/scope of your subsequent appointment?
 - **CONCERN:** Privileges (i.e., Attorney-Client Communication, etc.)
 - **CONCERN:** Privacy

The Intersection: CAC and GAL

- CAN THE SAME PERSON BE **BOTH** GAL AND CAC **CONCURRENTLY**?
 - **CONCERN:** Is there a conflict between your role as GAL and CAC?
 - ❖ Rules of Prof. Cond. Rule 1.7(b) forbids a lawyer from representing a client in any matter (a) that is directly adverse to or (b) that would present a significant risk that the representation would be “materially limited” by the lawyer’s responsibilities or relationship with another client, a former client, a third party, or the lawyer’s own interests.
 - Does this Rule apply to your role as GAL?
 - ❖ Could informed written consent ever be obtained?
 - **CONCERN:** Is the ward opposed to the actions of the GAL?
 - ❖ If so, the GAL’s interest may conflict with the client’s interest.
 - ❖ Informed written consent would not waive an actual current conflict of interest.

The Intersection: CAC and GAL

- **CAN THE SAME PERSON BE BOTH GAL AND CAC CONCURRENTLY?**
 - ❖ Are you appointed in the same case or a different case?
 - Can the same person be CAC and GAL in a conservatorship case?
 - How? Why?
 - Are there different petitions?
 - ❖ What is the purpose of your dual appointment?
 - Will your position **contradict** your former client's/ward's position?
 - Will you need to use or disclose **secrets/confidential information**?

What's It All Mean?



The rights and interest of minors, incompetents, and those who lack the ability to adequately represent themselves in adversarial proceedings in the courthouse may be protected by the appointment of a Guardian ad litem (*GAL*), by an attorney (a.k.a. Court-appointed Counsel, or *CAC*), or both.

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It is important for everyone involved in a court proceeding to ensure that all necessary and indispensable parties are adequately represented in the courthouse.

Thank you!



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