

1 DRAFT # 26: Submitted for April 16, 2020 Meeting

2
3

4 *Bundy
5 Carr
6 Inlender
7 Koss
8 Roche

9 **THE STATE BAR OF CALIFORNIA**
10 **STANDING COMMITTEE ON**
11 **PROFESSIONAL RESPONSIBILITY AND CONDUCT**
12 **DRAFT FORMAL OPINION INTERIM NO. 13-0002**

13
14 **ISSUES:**

15
16 **DIGEST:**

17
18 **AUTHORITY**
19 **INTERPRETED:**

20
21

22 **INTRODUCTION AND SCOPE**

23 Few problems in the law of professional responsibility are more difficult than the issue of the
24 lawyer’s obligations to a client whose diminished capacity prevents the client from making
25 adequately considered decisions relating to the lawyer’s representation of the client. Many
26 American jurisdictions have sought to clarify those obligations by enacting a version of
27 American Bar Association Rule 1.14. As part of California’s recent effort to revise its Rules of
28 Professional Conduct, the Second Commission on the Revision of the Rules of Professional
29 Conduct (“Second Commission”) prepared and submitted to the California Supreme Court a
30 proposed California version of Rule 1.14 (“Proposed Rule 1.14”) that was intended to reconcile
31 the approach of the ABA Rule with unique features of California law, including California’s
32 rules of attorney-client confidentiality. Without explanation, the Supreme Court declined to
33 adopt that Rule. The Supreme Court’s rejection of Proposed Rule 1.14 creates a need for
34 guidance concerning the effect of rejection of the Rule, and the ethical obligations of attorney for
35 clients with diminished capacity under other provisions of the Professional Rules, the State Bar
36 Act and the law of lawyering.

37 This opinion focuses on the ethical obligations of privately retained lawyers for persons with
38 diminished capacity in civil litigation, transactional and estate planning matters. It does not
39 extend to representation of a minor, to criminal matters, or to situations where the putative client
40 already has a guardian ad litem or other person empowered to act for them—though the
41 principles discussed here may also apply in those cases. Often compliance with the relevant
42 rules will call for difficult judgments under the applicable standard of care. This Committee
43 does not opine on such issues. Accordingly, in discussing these issues we assume that the
44 lawyer’s conduct as described meets the applicable standard of care.

CLEAN

45 In dealing with these issues, the opinion takes as given that California's failure to enact a
46 proposed disciplinary rule specifically dealing with the issue of diminished client capacity does
47 not mean that California has no law on the subject. Instead, those obligations arise under more
48 generally applicable Rules of Professional Conduct and other related law, including the law of
49 capacity and the law of agency. Nor does the rejection of the Rule, in its entirety and without
50 explanation, provide any ground for rejecting specific concepts or approaches endorsed in the
51 Proposed Rule, if those concepts or approaches are otherwise reflected in California law.
52 Because the Court did not explain its decision, it is not possible to determine whether the
53 Proposed Rule was rejected: (1) because its approach, which was largely permissive, rather than
54 mandatory, was thought to be inappropriate for a disciplinary rule, (2) because its provisions
55 were simply declarative of existing law, and hence unnecessary, (3) because the Court disagreed
56 with some or all of the Rule's specific provisions; or (4) for some combination of those or other
57 reasons. Given that uncertainty, the fact that a concept or approach otherwise supported by
58 California law was also contained in Proposed Rule 1.14 cannot be regarded as a ground for
59 rejecting it.

60

61

STATEMENT OF FACTS

62

63 Lawyer represents a Client in a recently settled personal injury matter, involving a large
64 recovery, and has now been asked by the Client to assist in making a loan to Client's nephew.
65 Lawyer knows that Client suffered a head trauma in the accident, but had no reason to doubt
66 client's capacity during the course of the personal injury case. When Client meets with Lawyer
67 to discuss the loan, however, Lawyer notices a sharp deterioration in Client's apparent
68 competence. Lawyer also has significant concerns about the proposed loan, whose terms are
69 highly favorable to nephew, and about nephew himself, who has a criminal conviction for
70 securities fraud and does not appear to have Client's welfare at heart. With Client's consent,
71 Lawyer retains a physician as a consultant to assess Client's competence. After examining the
72 Client, the consultant reports that Client's condition has deteriorated quickly and dramatically,
73 and that in the consultant's opinion Client is now completely incapacitated. Based upon that
74 advice, Lawyer has reasonably concluded that the Client lacks legal capacity to enter into the
75 Loan transaction. Lawyer seeks to contact Client, but the phone is answered by nephew, who
76 tells Lawyer that Client has given Nephew a power of attorney and that he will pass the
77 information on to Client. Based upon that information, Lawyer reasonably believes that Client is
78 exposed to a substantial threat of financial harm at nephew's hands and that the cognitive deficits
79 identified by the consultant have substantially impaired Client's ability to recognize and protect
80 against that harm. Lawyer knows that Client has other relatives who, if aware of the situation,
81 would take steps to protect Client's interest. Lawyer wants to know what, if any, measures
82 Lawyer may take to protect the Client's interest.

83

84

DISCUSSION AND ANALYSIS

85

86 **General Principles**

87 In the practice settings at issue here, the lawyer-client relationship is one of principal and agent,
88 created by express or implied contract. Consistent with that relationship, the professional

CLEAN

89 rules—like the law of agency—expressly allocate to the client all decisions concerning the
90 objectives of the representation, including all decisions concerning the client’s substantive rights.
91 Rule 1.2; *Blanton v. Womancare* [cite]. This allocation of authority cannot be changed except
92 with the client’s consent, and that consent may not be implied from the fact of representation
93 itself. *Id.* Comment 1. The client’s power of decision is supported, by among others, the
94 lawyer’s duties of competence, communication, confidentiality, loyalty, and independent
95 judgment.

96 The duty of competence calls for the lawyer to exercise “(i) the learning and skill and (b) the
97 mental, emotional and physical skilled reasonable necessary to provide” the legal services called
98 for. Rule 1.1 (b). A violation of Rule 1.1 requires intentional, reckless, grossly negligent or
99 repeated violations of this standard. Thus, for most lawyers, the most important determinant of
100 competent performance is the standard of care that would apply in a professional negligence
101 action, on which we do not opine. Accordingly, in our discussion, we will assume that at all
102 points, the lawyer’s decision satisfies the applicable standard of care.

103 The duty of communication requires that the lawyer, among other things, must “explain a matter
104 to the extent reasonably necessary to permit the client to make informed decisions regarding the
105 representation.” Rule 1.4 (b)

106 The duty of confidentiality forbids the lawyer from disclosing any information relating to the
107 representation whose disclosure would be harmful or embarrassing to the client, unless the client
108 has given informed consent to the disclosure. Business & Professions Code Section 6068 (e);
109 Rule 1.6 (a). The Rules define informed consent as “agreement to a proposed course of conduct
110 after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the
111 material risks, including any actual and reasonably foreseeable adverse consequences of the
112 proposed course of conduct.” RPC 1.0.1 (e). This is in contrast to the law in most other
113 American jurisdictions, which treat a lawyer as having implied authority to disclose confidential
114 information, without express authorization from the client, where the lawyer reasonably believes
115 that disclosure is necessary to accomplish the purpose of the representation. Model Rule 1.6 (a).

116 The duty of loyalty requires that the lawyer act solely in the client’s interest, and “protect [the]
117 client in every possible way,” while avoiding any “relation which would prevent [the lawyer]
118 from devoting [the lawyer’s] entire energies to the client’s interest.” *Moore v. Anderson, Zeigler,*
119 *Disharoon, Gallagher & Gray, PC* (2003) 109 Cal. App. 4th 1287, ____ (internal citations and
120 quotations omitted).

121 Consistent with the duties of competence, communication and loyalty, a lawyer acting as an
122 advisor is required to “exercise independent professional judgment,” uninfluenced by the
123 lawyer’s own interests or those of third parties, and to “render candid advice. Rule 2.1. A
124 lawyer may, but is not required to refer to considerations other than the law, including relevant
125 moral, economic, social and political factors. *Id.* Comment [2].

126 **The Client with Diminished Capacity [NOTE: this section should probably be substantially**
127 **reduced in next revision; included in this one for clarity of exposition and to seek advice on**
128 **which portions may be important to include]**

129 The Rules of Professional Conduct do not define the level of client competence required to make
130 the decisions that the rules reserve to the client. Accordingly, one has to look outside the

131 Rules—and outside the law of lawyering—to the law that defines the client’s capacity to make
132 the relevant decision.

133 For decisions other than those concerning testamentary matters and consent to health care, in
134 order to make a legally effective decision, a person must have “the ability to communicate
135 verbally, or by another other means, the decision, and to understand and appreciate, to the extent
136 relevant, all of the following:

- 137 (a) “The rights duties and responsibilities created by or affected by the decision.
- 138 (b) “The probable consequences for the decisionmaker, and where appropriate, the
139 persons affected by the decision.
- 140 (c) “The significant risks, benefits and reasonable alternatives involved in the decision.”

141 Probate Code Section 812.

142 A person’s capacity to make a decision is presumed; the presumption goes to the burden of
143 proof, and thus must be overcome by affirmative evidence showing lack of capacity. Probate
144 Code Section 810 (a). The presumption of competence is not overcome by evidence of a mental
145 or physical disorder. Instead, there must be evidence of a deficit in one or more of the person’s
146 mental functions. *Id.* subsection (c).¹ A deficit in mental function tends to show incapacity only
147 if the deficit, by itself or in combination with others, “significantly impairs the person’s ability to
148 understand and appreciate the consequences of his or her actions with regard to the type of act or
149 decision in question.” *Id.* subsection (b). In determining whether a person suffers from a deficit
150 that is substantial enough to warrant a finding of lack of capacity to do a particular act, the court
151 may take into consideration, the “frequency, severity and duration of periods of impairment.”
152 Probate Code Section 810 (c).

153 Testamentary capacity is determined by a different, and lower standard. Under Probate Code
154 6100.5, a person lacks the capacity to make a will if at the time of making either:
155

- 156 (1) The individual does not have sufficient mental capacity to be able to (A)
157 understand the nature of the testamentary act, (B) understand and recollect the
158 nature and situation of the individual's property, or (C) remember and understand
159 the individual's relations to living descendants, spouse, and parents, and those
160 whose interests are affected by the will.
- 161 (2) The individual suffers from a mental disorder with symptoms including delusions
162 or hallucinations, which delusions or hallucinations result in the individual's
163 devising property in a way which, except for the existence of the delusions or
164 hallucinations, the individual would not have done.”
165
166
167

¹ The statute identifies a non-inclusive list of mental functions and factors, broadly grouped under four headings: alertness and attention; information processing; thought processes; ability to modulate mood and affect. Section 811 (a) (1)-(4).

168 Like the more general standard of capacity, capacity to make a will is presumed, and must be
169 rebutted by evidence that the testator’s lack of mental capacity or mental disorder existed at the
170 time of making the will. *See Anderson v. Hunt* (2011) 196 Cal.App.4th 722, 726-28.

171
172 Both general capacity and testamentary capacity are legal concepts. But their application
173 depends heavily on facts and judgments concerning the client’s mental functioning and deficits
174 therein that a lawyer may not be competent to make without professional assistance.
175 Accordingly, a lawyer who reasonably believes that a client may be incapacitated or that the
176 client’s capacity is likely to be challenged, will often find it necessary or desirable to retain
177 persons with relevant expertise who can assist the lawyer in investigating, evaluating, and where
178 appropriate, establishing the client’s capacity.

179
180 This brief survey indicates that a client may suffer from diminished capacity in several different
181 ways. First, the client may be wholly incapacitated, which as we will see raises grave questions
182 about the existence of an attorney client relationship. Second, the client may have the capacity to
183 make some decisions and not others. For example, the client may have testamentary capacity,
184 but may lack the capacity to conduct ordinary financial business. *See Anderson v. Hunt*. 196
185 Cal.App.4th at ___ (client lacked contractual capacity but had testamentary capacity). Third, a
186 client may have the capacity to make the relevant decisions, but still suffer from functional
187 deficits that impair the client’s ability to appreciate threatened harm or injury relating to the
188 representation.

189
190 **The Impact of Diminished Capacity on the Professional Relationship**

191
192 A client’s diminished capacity has several impacts on the attorney client relationship and the
193 attorney’s professional obligations.

194
1951. Incapacity can render the client unable to form or continue an attorney-client relationship. To
196 form or continue an agency relationship, a client must have the capacity to contract. Civil Code
197 Sections 2356, 2296. If the client is determined to be totally incapacitated after the lawyer’s
198 retention, and the lawyer knows of that determination, it terminates the lawyer’s authority.
199 *Sullivan v. Dunne* (1926) 198 Cal. 183, 192. Where the client’s incapacity is less complete or
200 less certain, however, there may be serious problems in concluding that a lawyer is powerless to
201 act, as highlighted in Restatement (Third) of the Law Governing Lawyers, Section 31, comment
202 e:

203 “The general rule of agency law that insanity or incompetence of a principal...terminates
204 an agent’s authority...may be inappropriate as applied to a lawyer’s beneficial efforts to
205 protect the rights of a client with diminished capacity. Such a client continues to have
206 rights requiring protection and often will be able to participate to some extent in the
207 representation (see §24). If representation were terminated automatically, no one could
208 act for the client until a guardian is appointed, even in pressing situations. Even if the
209 client has been adjudicated to be incompetent, it might still be desirable for the
210 representation to continue, for example to challenge the adjudication on appeal or to
211 represent the client in other matters.”

CLEAN

212 In other jurisdictions, this problem has been addressed through the adoption of Model Rule 1.14,
213 which expressly gives the lawyer residual authority to protect a client with diminished capacity
214 consistent with the lawyer’s understanding of the client’s best interest and hence “permits the
215 lawyer client relationship to continue even in the face of the client’s incapacity.” ABA Formal
216 Opinion 94-404. Obviously, in California there is no comparable Rule of Professional Conduct.

217 The client’s lack of capacity may also prevent the client from giving the kinds of informed
218 consent required to modify or structure the attorney client relationship, such as those required to
219 limit the scope of the representation, authorize the disclosure of confidential information or
220 consent to a potential conflict of interest. Formal Opinion 1989-112.

221
222 The client’s diminished capacity also triggers issues that may need to be addressed under the
223 duty of competence. Most obviously, potential incapacity creates a risk that the client’s
224 proposed actions may subsequently be found to be legally ineffective, frustrating the client’s
225 purpose and the aims of the representation. Diminished capacity may also expose the client to
226 new or enhanced threats of harm, while reducing the client’s ability to understand or protect
227 against those risks.

228
229 A client’s diminished capacity may also impact how the lawyer must fulfill the duty
230 communicate with the client. Diminished capacity may make it more difficult for the client to
231 communicate her goals and desires. It may also make it more difficult for the client to
232 understand or deliberate over the lawyer’s advice. For example, the explanation that is
233 “reasonably necessary to permit the client to make informed decisions regarding the
234 representation” under Rule 1.4 (b) may be different for a client with diminished capacity,
235 depending on the nature and effect of the relevant functional deficit. To deal with these issues, a
236 lawyer may find it necessary or desirable to involve experts, therapists, family members or others
237 in the process of communication in order to ensure effective communication to the extent
238 reasonably possible. [Note: add fn. re duty to protect privilege where possible]

239
240 The duties of confidentiality and loyalty inform and limit the lawyer’s ability to respond to a
241 client’s diminished capacity. Information about the client’s diminished capacity, whether or not
242 subject to the attorney client privilege, is protected from disclosure under Business and
243 Professions Code Section 6068 (e) (1) and rule 1.6 because it is “information gained in the
244 professional relationship that the client has requested be kept secret or the disclosure of which
245 would likely be harmful or embarrassing to the client.” *See, e.g.*, Formal Opinion 1989-112 at p.
246 2; OCBA Formal Opinion 95-002 at IID-034; LACBA Formal Opinion 450 (1988); SDCBA
247 Ethics Opinion 1978-1.² Accordingly, the lawyer must have the client’s informed consent to
248 disclose such information, even to experts or family members whose involvement the lawyer
249 reasonably believes would benefit the client and even when the lawyer believes that such
250 disclosure is necessary to protect the client from harm. Formal Opinion 1989-112. If the client
251 lacks the capacity to give such consent, is unavailable, or declines to give such consent, the
252 lawyer may not make protective disclosures.

² San Francisco Formal Opinion 1999-2 reaches a different conclusion, but does not reconcile its conclusion with the Rule’s express requirement forbidding disclosure of confidential information without informed consent. The Second Commission, after careful review, concluded that California law did not grant implied authority to disclose.

253
254 In this respect California law differs from the majority of American jurisdictions. Under the
255 ABA Model Rule a lawyer who reasonably believes that the client is suffering from diminished
256 capacity, is at risk of harm and cannot act to protect him or herself, may take necessary
257 protective action, including notifying persons or entities who can act to protect the client or
258 instituting proceeding for the appointment of a guardian ad litem, conservator, or guardian.
259 Model Rule 1.14 (b). In taking such action, the lawyer is also impliedly authorized to disclose
260 confidential information concerning the client’s condition. Model Rule 1.14 (c).

261
262 When a client’s capacity is in doubt, the lawyer’s duty of loyalty continues to operate. Courts
263 have emphasized that in such cases, the duty requires the lawyer to continue to focus on the
264 lawyer’s “primary responsibility to ensure that [the course of conduct chosen] effectuates the
265 client’s wishes and that the client understands the available options and the legal and practical
266 implications of whatever course of action is ultimately chosen.” *Moore*, 109 Cal. App. 4th at
267 1298 (citations and quotations omitted). Though others may have strong interests in the outcome
268 of the client’s decisions, the lawyer should consider those interests only insofar as they matter to
269 the client. *Id.* Keeping that primary obligation in mind is particularly important when the client
270 requests or consents to the involvement of persons who may have an interest in the matter in
271 communications or deliberations relevant to client decision making. *Moore; ACTEC.*³ This
272 focus on the client’s interest also ensures that clients’ are not unjustifiably denied their rights to
273 exercise whatever remaining capacity they have under the substantive law.

274
275 On the other hand, the duty of loyalty, in combination with the duty of confidentiality, may
276 prevent a lawyer from taking action that the lawyer reasonably believes would advance the
277 client’s interest and protect the client from harm. Thus, it is settled that a lawyer may not act to
278 initiate a conservatorship proceeding against a client without the client’s informed written
279 consent, even if the lawyer reasonably believes that the standard for a conservatorship has been
280 met, because doing so would be “directly adverse” to the client and would necessarily result in
281 the use or disclosure of the client’s confidential information. Formal Opinion 1989-112; LA
282 County No. 450.

283 **Application of the Law to the Stated Facts**

284. An initial question raised by the stated facts is whether Lawyer continues to represent Client and
285 has any authority to take protective measures on Client’s behalf. Client had capacity when
286 Lawyer was retained. The Lawyer’s retained consultant has now opined that Client does not
287 have that capacity. There is, therefore, an argument that under the *Sullivan* case, Client’s
288 subsequent incapacity deprives the lawyer of any authority to act. We do not think that *Sullivan*
289 can be read so broadly. The lawyer in that case claimed authority to oppose a guardianship on
290 behalf of a client who the lawyer knew was incapacitated, even though his relatives were also
291 fully aware of that incapacity, and even though there was no indication that the client had
292 retained him for that purpose. Here, in contrast, the consultant’s opinion, though important, is

³ In *Moore* the court held that the lawyer did not owe a duty to the beneficiaries of a new or previous will to assess the client’s capacity to make the new will. The Court reasoned that imposing such a duty in favor of the interested beneficiaries would be inconsistent with the lawyer’s duty of loyalty to the testator and could lead to lawyers being unwilling to prepare wills for testators whose capacity was doubtful.

293 does not establish Client’s compete incapacity definitively. It cannot be read to terminate
294 Lawyer’s authority to seek protection for the Client in connection with the matter for which the
295 Lawyer was retained, at least if there is no one else in a position to take such protective action.
296

297 The harder question is what the lawyer may do with that residual authority. Lawyer may not
298 disclose information about Client’s activities. The Lawyer may not disclose information about
299 the Client’s condition to third parties without Client’s informed consent and may not seek to
300 initiate conservatorship proceedings without the Client’s informed written consent. If Lawyer
301 can get past nephew to speak to Client, and if Client, notwithstanding the cognitive deficits
302 identified by the consultant, and give informed consent, the Lawyer may be able to inform
303 concerned relatives or other authorities. If not, then the Lawyer may not go further.
304

305 **Advanced Planning to Permit the Lawyer to Take Protection Action in the Event of**
306 **Diminished Capacity**
307

308 Because of the features of California law just discussed, lawyers for competent clients who face
309 a future risk of diminished capacity may want to make available to their clients options by which
310 the client can ensure that, in the event of incapacity that threatens the client with harm, the
311 lawyer will be able to take protective action.
312

313 A power of attorney is the classic way of ensuring that the client’s incapacity does not leave the
314 client’s interests unprotected. Clients can specify that the power will not be terminated by
315 incapacity. Alternatively, the effectiveness of such a power can be made contingent on the
316 client’s incapacity, and may even specify a person whose determination of incapacity will be
317 viewed as definitive. [CITES TK.] A limited power of attorney, granted to the attorney, could
318 authorize the lawyer to take action, including if necessary disclosure of confidential information,
319 in the event that the lawyer reasonably concludes that the client is suffering from diminished
320 capacity, and that as a result of the incapacity, the client is threatened with harm that the client
321 cannot recognize or act to prevent.
322

323 Alternatively, a client may simply wish to give an advance consent to the disclosure of
324 confidential information where the lawyer reasonably determines that the conditions justifying
325 protective action have been met. Because client’s can give informed consent to actions by their
326 lawyer that follow the termination of representation (such as representation of an adverse party in
327 a substantially related matter), such a consent should survive the termination of the
328 representation due to a client’s incapacity.
329

330 Both of these solutions depend on the validity of an advance consent by the client to a future
331 disclosure of confidential information. Rule 1.6 does not by its own terms require that informed
332 consent to disclosure be contemporaneous with the disclosure. Formal Opinion 1989-115 states
333 that “an advance waiver of...confidentiality protections is not, *per se*, invalid. *Id.* at 3. Rather, it
334 depends on two basic requirements. First, the client must be “adequately informed of the
335 information and communications which may be disclosed and the uses to which they may be
336 put.” Second, the disclosures proposed must be consistent with the lawyer’s duties of
337 competence and loyalty. *Id.*

338 These requirements are also reflected in *Maxwell v. Superior Court*, 30 Cal. 3d 606 (1982), upon
 339 which Opinion 1989-115 relied. One question presented in *Maxwell* was whether a criminal
 340 defendant who paid for his lawyer’s services by giving up the rights to his life story could give
 341 advance consent to the disclosure of confidential information required for counsel to monetize
 342 those rights. The contract contained two provisions prospectively waiving confidentiality rights.
 343 In one the defendant agreed to waive, on counsel’s future demand, his attorney-client privilege
 344 and “any and all other privileges and rights which would prevent the full and complete exercise”
 345 of counsel’s interests. 30 Cal. 3d 610 n.1. The Court noted, with apparent agreement, counsel’s
 346 concession in oral argument that this provision was so broad as to constitute an “overreach” and
 347 could not be enforced as written. *Id.* In the other, the client promised to (1) give counsel all
 348 materials pertaining to his life and experiences, (2) use his best efforts to gather such information
 349 in the hands of others, and (3) to confer with counsel as often as they reasonably require to
 350 enable them to elicit all the details of his life. The Court held that this provision could not be
 351 validly invoked by the lawyer until after all criminal proceedings had become final. Though the
 352 contract of retention provided that the lawyer’s representation extended only through trial, the
 353 Court held that any reading of this provision that would allow the lawyer to disclose prejudicial,
 354 confidential material at any time during the pendency of criminal proceedings would place the
 355 lawyer in violation of duties of fairness, undivided loyalty and diligent defense arising under the
 356 Professional Rules and the contract of retention. *Id.* Subject to those limitations, however, the
 357 Court held that the consent was adequately informed. *Id.* at 621-22.⁴ *Maxwell* thus supports the
 358 proposition that an informed consent to future disclosure can be enforced if it sufficiently
 359 narrowly drawn and otherwise consistent with the lawyer’s performance of the lawyer’s
 360 professional duties.

361 Though not controlling, the standards governing advance consent to a conflict of interest are also
 362 relevant here. Consistent with Opinion 1989-115 and *Maxwell*, Comment [9] to Rule 1.7
 363 expressly states that Rule 1.7 “does not preclude an informed written consent to a future conflict
 364 in compliance with applicable case law.” The central issue with an advance consent is “the
 365 extent to which the client reasonably understands the material risks that the consent entails. The
 366 more comprehensive the explanation of the types of future representations that might arise and
 367 the actual and reasonably foreseeable adverse consequences to the client of those representations,
 368 the greater the likelihood that the client will have the requisite understanding.” Rule 1.7 Comment
 369 [9]. The experience and sophistication of the client, and whether the client is independently
 370 represented, are also relevant in determining whether the client reasonably understands the risks
 371 involved. *Id.*⁵ Even with full information, however, a client may not give prospective consent to

⁴ The record showed that the contract urged the defendant to seek independent legal advice and that counsel had provided the defendant with names of lawyers whom he could consult. It also established that the defendant was literate, had read the entire contract, had initialed many critical paragraphs, knew he could hire an independent attorney and had chosen not to do so, and that the trial judge had called his attention to the conflict provisions of agreement. *Id.* at 611. This procedure, the Court held, sufficiently established the defendant’s informed consent to the waivers involved. .

⁵ Another frequently cited list of relevant factors reads as follows:

Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.

CLEAN

372 a conflict that would be nonconsentable under Rule 1.7 (d) or that would result in incompetent
373 representation. *Id.*

374 The cases in which California courts have found advance consent to a conflict to be sufficiently
375 informed fall into two categories. First, such consents have been upheld when a joint client
376 agrees that if the joint relationship ends it will not seek to exercise its right to prevent counsel
377 from proceeding adversely to it on behalf of the other joint client or clients. *See, e.g., Zador*
378 *Corp. v. Kwan*, (1995) 31 Cal. App. 4th 1285. Second, in some circumstances, courts have
379 upheld advance consents to concurrent adverse representation in unrelated matters. Thus, in *Visa*
380 *U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003), the consenting client
381 agreed that the law firm could in the future act adversely to the consenting client on behalf of
382 another identified existing client of the firm in unrelated matters, provided that the lawyers
383 involved in representing the consenting client were screened.⁶

384 These authorities indicate that a competent client should be able to agree in advance to authorize
385 the client’s lawyer to take protective action in the limited circumstance where the client’s
386 diminished capacity gives rise to threat of harm to which the client cannot effectively respond,
387 provided that the Lawyer takes steps to ensure that the Client’s consent is informed within the
388 meaning of RPC 1.0.1 (e). This is so for several reasons. First, the consent is narrow, and clearly
389 identifies the type of information to be disclosed and the specific circumstances in which it
390 would be disclosed. This is precisely the kind of situationally focused consent that California
391 courts have uniformly approved. Second, the consent does not authorize any disclosure that
392 would violate the lawyer’s duty of competence or loyalty. Instead, disclosure is authorized only
393 if the lawyer reasonably believes that it is in the client’s interest and would protect the client
394 from harm. Thus, unlike the advance consents upheld in the decided cases, which expand the
395 lawyer’s power to act adversely to the client, this advance consent empowers the lawyer to take
396 actions that serve the client’s interest and that, but for the consent, the lawyer might be unable to
397 take.⁷ To hold that such an express consent could not be given would limit an informed,
398 competent client’s right to enlist the client’s lawyer as part of a coherent strategy to protect
399 against future harm. Third, any residual risk that the consent will result in frustration of the
400 Client’s aims is further mitigated by the fact that the Client can revoke the consent at any time,
401 provided that the Client still has the capacity to do so.

402 To ensure that the consent is informed, Lawyer’s communication and explanation of the
403 circumstances and the material risks should identify for the client, to the extent possible, the risk
404 to the Client of becoming incapacitated, and the kinds of harm that could result from such
405 incapacity. The Lawyer should also explain the limited circumstances in which protective
406 disclosure would be authorized, the kinds of information that would be disclosed, and the

Visa U.S.A, Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003); *Simpson Strong-Tie Company, Inc. v. Ox-Post International, LLC*, 2018 WL 3956430, *13 (N. D. Cal. 2018).

⁶ The validity of more generally framed advance consents to adverse representation in unrelated matters is contested and this opinion takes no view on that issue. *Compare, Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal. 5th 59, 86 (2018).

⁷ This opinion does not consider the question of whether a competent client could give informed written consent to the lawyer’s taking action directly adverse to the client, for example, by initiating proceedings for the appointment a conservator.

CLEAN

407 benefits and risks of such disclosure, including the prevention of harm and the broader exposure
408 of sensitive confidential information about the client's mental and physical condition. The
409 lawyer should also explain the advantages and disadvantages of advance consent, including the
410 risk that an incapacitated client may be unable to give effective contemporaneous consent to
411 protective disclosure. Finally, Lawyer should explain that so long as the Client retains capacity
412 to do so, Client can revoke the consent at any time and for any reason.

413 Rule 1.6 does not require that informed consent to disclosure of confidential information be in
414 writing. It is evident, however, that it would be both prudent and the better practice to obtain any
415 such consent in writing. The Client's interest is in having the consent be enforceable, unless
416 revoked, and enforceability depends on proof of exactly was consented to, and of what the
417 Lawyer did to ensure that the consent was informed. Given that any dispute about enforceability
418 is likely to arise in the future, and only after the Client's capacity is in serious doubt,
419 documenting the terms of the consent and the lawyer's disclosures in writing is likely to be
420 critical to ensuring that the consent will be enforced. The Client has a further interest in the
421 Lawyer feeling on solid professional ground in taking protective action pursuant to the consent
422 when such action is warranted. That interest is also served by putting the consent in writing,
423 since without such a writing no lawyer can be confident that the evidentiary record in a
424 subsequent dispute concerning the lawyer's conduct would show that the lawyer had acted
425 properly. For all these reasons, a lawyer whose client gives informed consent to the proposed
426 disclosures should document that consent in writing.

427

428

429

CONCLUSION

430

431

432