

Memorandum

From: Steve Bundy

To: COPRAC Members

Re: Opinion 13-0002; Attorney with a Vulnerable Client; Next Steps

Date: July 13, 2019

The above opinion has been in the works for six years and has gone through 24 drafts and three lead draftspersons, of which I am the third.

I think the existing draft is not very good. If we are to move forward, we need to decide what issue or issues warrant issuing an opinion and what the basic shape of that opinion should be, or, if no opinion is warranted, whether COPRAC wants to join with the estates and trusts/probate bar in proposing legislation to address the problems described here. If you want to skip to the bottom line, go to part 5 below

1. The Basic Framework

A lawyer has prepared an estate plan for an elderly client. At the time that the client approves the plan and executes the relevant documents, the client has the legal capacity to do so. At a later time, the client suffers from diminished capacity. The client is now threatened with harm, from a malign relative, and the lawyer reasonably believes that because of diminished capacity, the client is not capable of recognizing the threatened harm or acting to prevent it. The question—what steps may or must the lawyer take to protect the client from harm?

2. ABA Model Rule 1.14 and Implied Consent to Disclose Confidential Information

ABA Model Rule 1.14 sets the national standard—it says that the lawyer should try, as much as possible, to maintain a normal lawyer client relationship with a client with diminished capacity. In the normal situation, that would involve seeking to counsel the client about the prospective harm and obtaining the client's consent to take protective measures, potentially including disclosure to third persons of both the client's incapacity and the threat. The problem is that the client may not be available for consultation or that the client's incapacity may make it impossible for the client to appreciate the issues or to give effective consent to protective measures. To address that problem, Model Rule 1.14 permits, but does not require, the lawyer to take protective measures, including both disclosure to persons in a position to protect the client and the initiation of proceedings for appointment of a guardian or conservator.

The Rule expressly states that such measures do not raise confidentiality issues under ABA Model Rule 1.6. Rather because the disclosures are necessary to protect the client from harm they fall within the implied authority of the lawyer to disclose information relating to the representation when it is in the client's interest to do so. Indeed, the Comments to the Model Rule suggest that such disclosures may be made even when the client directs the lawyer to the contrary. The basis for allowing the lawyer to ignore the client's instruction is not stated, but presumably it is that the client lacks the capacity to make the decision in question.

3. Proposed California Rule 1.14: Express Consent: Present and Advance

The Second Commission determined that the ABA Model Rule 1.14 approach would not work in California, because California's confidentiality rules do not have an implied exception for disclosures that are in the client's interest. Instead, they require informed consent. So the Commission crafted a modified version, with two approaches. The first permitted, but did not require, the lawyer to take protective action with the client's *current* informed consent, and allowed the lawyer to involve third persons, including professionals, in the process of counseling the client. If the client was unavailable, refused to give informed consent, or lacked the capacity to do so, the lawyer could not go further.

In the alternative, the proposed Rule allowed a lawyer to obtain advance informed written consent (which is a defined term of art in the revised Rules) to disclosure provided (1) that the consent was limited to the situation of diminished client capacity, threatened harm and client inability to recognize or protect against the harm and (2) that the client was free to revoke the consent at any time. The rule did not discuss whether/why a client with diminished capacity would have the capacity to revoke an informed written consent to disclosure of confidential information given when she had the capacity give that consent.

The Comments on the proposed rule were generally favorable, with strong praise for the Commission's artful compromise between absolute confidentiality and implied authority to disclose. The California Supreme Court, however, declined to adopt Proposed Rule 1.14. It gave no reason for its decision.

4. Potential Questions for an Ethics Opinion

The failure to enact Proposed Rule 1.14 leaves at least the following issues for potential discussion. In my judgment, the most important questions and the most fertile area for a possible opinion are numbers 5 and 6.

First, what is the standard of capacity for a client seeking to hire, fire, give informed written consent to, obtain advice from or instruct a lawyer? California has a sliding scale for capacity: at the low end is marital capacity, above that is testamentary capacity; the high end is capacity to contract. Capacity is presumed, but the presumption may be overcome. Capacity is also not necessarily a unitary concept, because California law ties a finding of incapacity to proof of specific deficits in mental function which may not affect all decisions in the same way. That leaves open the possibility that a client who lacks capacity to appreciate the consequences of threatened harm might still have the capacity to give informed consent to disclosure of confidential information—a possibility expressly noted by the Second Commission. My instinct is that the capacity for hiring, firing and giving informed consent to the action of a lawyer is contractual capacity. One might argue, however, the answer should vary depending on the substantive question concerning which advice is being given. These issues are not at all obvious, and there is little authority. Because of that lack of authority, and because the answer depends so strongly on concepts outside of the conventional law of lawyering, I don't think that it's a strong candidate for an opinion.

Second, what is the lawyer's obligation to make an assessment of capacity? Common sense suggests that the lawyer's duties of competence and loyalty to the client require the lawyer to be alert to evidence of the client's incapacity. In a leading case, the Court of Appeal cited a number of secondary authorities holding that the lawyer does have such an obligation, at least in the case of testamentary capacity, though the court declined to allow disappointed beneficiaries to bring a malpractice action to enforce that obligation. *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Grey* (2003) 109 Cal. App. 4th 1287.

Third, when a lawyer reasonably believes that a client has diminished capacity and, as a consequence is threatened with harm that the lawyer's intervention could remedy, does a lawyer have an ethical obligation to take some form of action? Both the ABA and Proposed California versions of Rule 1.14 declined to impose such a duty, making protective measures optional. But are all such measures optional if one considers the entire law of lawyering, and not just the rules governing professional discipline? Wouldn't the duties of competence and loyalty sometimes require the lawyer to respond to evidence of client incapacity and threatened harm, if only by counseling the client and seeking client consent to take protective measures?

Fourth, was the Second Commission correct that the Business and Professions Code and Rule 1.6 effectively rule out an implied consent exception to confidentiality? To me that conclusion seems pretty clearly correct, and our Committee's opinions are also consistent with that view.

Fifth, is advanced informed written consent to protective disclosure still permissible under the remaining Rules and the State Bar Act, notwithstanding the rejection of Proposed Rule 1.14? On the pro side, one can note:

- The concept of informed consent in Rule 1.6 can be read to encompass advance informed consent. Indeed, if informed consent is the law, and California lawyers are complying with that law, then it must be the case that many, if not most, informed consents to the disclosure of information have a forward looking element. A trial lawyer does not get informed consent from a client at the moment of disclosure for every utterance that discloses confidential information. Instead, trial lawyers operate under an advance consent, in all likelihood one agreed upon at the outset of the case and framed in the most general terms.
- The concept of advance consent to deal with the specific situation of incapacity is also recognized in California law, notably in the law allowing persons who have the capacity to do so to create powers of attorney that spring into effect when the person is incapacitated.
- If there is no possibility for a client who has the capacity to do so to give advance authorization for protective measures in the event of incapacity, then a prudent client with capacity is powerless to take advantage of the lawyer's competence, loyalty and knowledge of the case to protect against foreseeable future harm stemming from the risk that the client will become incapacitated. Instead, the only person who has the power to authorize protective action by the lawyer is the future client, whose incapacity may

prevent them from recognizing the problem or giving effective authorization for a solution.

- The rejection of Proposed Rule 1.14 cannot be read as barring every idea or approach within the Rule, because there are so many potential reasons for that rejection, including the notion that creation of a permissive safe harbor is not a sufficient basis for a disciplinary rule, the notion that the issues are adequately dealt with in other law, and the potential that other portions of the Rule may have been deemed at fault.

On the con side, one could argue:

- Confidentiality is an especially important right, and, unlike most ethical principles, it is a matter of statute as well as rule. Accordingly, exceptions to confidentiality, including informed consent, should be narrowly construed. When in doubt, legislative change is the preferred approach.
- Advance consents have been controversial in the conflict arena, so much so that the drafters of new Rule 1.7 specifically included a comment making clear that they are permissible. There is no comparable comment or provision allowing an advanced consent to disclosure of confidential information. The issue was sufficiently unclear that the Second Commission proposed a specific safe harbor to deal with it. The elimination of the safe harbor by the Supreme Court leaves the issue very much in doubt.
- Not allowing advanced consent to disclosure is not such a big problem because some or all of the following are true: (a) the standards for capacity are so low that the need to take protective action will not arise frequently; (b) when risks arise, clients will often have the capacity to give current consent; (c) other forms of advanced planning, such as durable powers of attorney can eliminate most of the risks.

Sixth, if advance consent is permissible, does its validity depend on the limitations imposed in Proposed Rule 1.14? There is older authority that a blanket advance waiver of confidentiality is simply unlawful. Some specificity is required both so that the consent can be informed and so that one can be confident that the conditions that trigger permissive disclosure describe a situation where disclosure is in the client's best interest. This suggests that at a minimum, the stated conditions for the effectiveness of a waiver should include client incapacity, threatened harm to the client as a consequence of that incapacity, and disclosure limited to what is reasonably necessary to prevent the harm. The idea that the consent must meet the requirements for informed written consent is not strictly required by the language of the relevant provisions, but it reinforces the case for enforcing the consent, by making it clearer that the consent was actually given and actually informed. It may therefore help to meet the potential objection that advanced consent is not what the current law of confidentiality had in mind. Finally the idea that the consent can be revoked at any time seems consistent with contract law principles, at least if the client still has the capacity to revoke.

5. Discussion at the Meeting

At the July 26 meeting, I hope we can discuss the following questions:

- a. Is there value in an opinion on this topic and if so, what issues should it consider? My own sense is that there is little value in an opinion unless we can achieve consensus on the advance consent issue and conclude persuasively that advance consents are still permitted. Such an opinion might give practicing lawyers and their clients what they need to deal with the problems created by California's restrictive confidentiality rules. I am strongly interested, however, in hearing other views.
- b. If an opinion would simply conclude that the confidentiality rules stand in the way, then I think a more productive idea would be to meet with the elements of the bar who work in this area to explore whether they want to seek legislative change, as they did a number of years ago—and to consider whether and how we might usefully support that effort.

I look forward to our discussion of these issues.

DRAFT # 24: Submitted for April 7, 2018 Meeting

Dietz
*Bundy
Solomon
Spencer

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

ISSUES:

DIGEST:

AUTHORITY

INTERPRETED: Business & Professions Code §§ 6068(e), 6068(m), 6152; Rules of Professional Conduct 2-100, 3-100, 3-700(A)(2), 3-700(D)

STATEMENT OF FACTS:

Attorney prepared an estate plan for Client many years ago and updated it three years ago. Although Client does not have children of her own, she has a favorite Niece. Client also has a Stepson whom she has said ignores her, except to request money he believes is “his,” since Client’s estate was largely acquired during her marriage to Stepson’s father. Client has little contact with Stepson, but consistent with her late husband’s wishes, Client plans to leave half her estate to Stepson in a spendthrift trust. The other half Client plans to leave outright to Niece. Niece, at Client’s request, has been part of the planning discussions between Client and Attorney. Client expressed a wish that Niece manage her affairs in the event she became incapacitated, but, while the basic testamentary plan is in place, Client did not follow Attorney’s advice to plan for possible incapacitation.

For client relations reasons, Attorney typically does not formally terminate her attorney-client relationships, and touches base with her estate planning clients periodically to explore whether their needs have changed. Following this practice, Attorney reasonably believes that Client remains a current, although dormant, client.¹

¹ The concept of a dormant attorney client relationship is well-established in estate planning practice. See, American College of Trusts and Estate Counsel (ACTEC) notes to the comment of Rule 1.9 to Model Rules of Professional Conduct (“The execution of estate planning documents and implementation of the client’s estate plan may, or may not, terminate the lawyer’s representation of the client with respect to estate planning matters. In such a case, unless otherwise indicated by the lawyer or client, the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive.”).

CLEAN

When Attorney prepared and updated the estate plan, Client was in relatively good health, and appeared to be fully competent. Recently, however, Attorney ran into Niece. In response to Attorney's inquiry, Niece said that her aunt was no longer "all there" mentally but still enjoyed seeing people from time to time. Niece also stated that despite Client's condition, Stepson continues to pester her for money.

Shortly thereafter, Attorney is contacted by New Counsel, who tells Attorney that he has been retained by Client at the request of Stepson. New Counsel also provides Attorney with a written request for Client's file purportedly signed by Client. However, the signature is shaky and barely legible and Attorney is not confident it is actually the Client's signature.

New Counsel refuses to discuss the circumstances of his retention, but says he needs the file to assist Client in making changes to her estate plan. He asks if information about her financial accounts is in the file. New Counsel instructs Attorney not to reveal to anyone that he has been retained, asserting his retention is confidential information and also warns Attorney she is not to attempt to speak to Client.

DISCUSSION AND ANALYSIS

Attorneys for elderly clients frequently face situations where it appears that a present or former client is becoming, or has become, incapable of managing his or her own affairs and vulnerable to manipulation and exploitation by those around her.

In this situation, Attorney owes the Client duties of competence, loyalty, communication, and confidentiality.

Based upon her last direct communication with the Client—and on the content of the estate plan that the Client approved and executed—attorney understands that Client's intention was to divide her estate equally between Niece and Stepson and that her stated wish was that in the event of her incapacitation, she wanted Niece to administer her estate. As a matter of competence and loyalty, Attorney has a duty not to act in a manner which would prejudice those stated objectives of the representation unless she reasonably believes that the Client no longer has them or has released her from her from that obligation. That duty does not depend on whether the attorney-client relationship is continuing. Rather it continues to apply following the termination of the attorney's employment. *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 819020 (2011); *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 572 (1932); *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150,155-56 (1981).

Further, until her representation of Client is concluded, Attorney has an obligation to communicate with the Client concerning significant developments in the representation. CRPC 3-500.

CLEAN

85 Attorney also has a duty of confidentiality to Client that extends to “all information relating to
86 the representation,” including information subject to the attorney client privilege and the work
87 product immunity and other information which the client has requested to be inviolate or whose
88 disclosure might be embarrassing or detrimental to the client. CPRC 3-100, Discussion
89 paragraph [2]; Formal Opinion 2016-195 (citing multiple authorities). That duty requires an
90 attorney to act with reasonable care to protect such information from unauthorized disclosure,
91 Formal Opinion 2010-179, and not to disclose such information without the client’s informed
92 consent.

93
94 Finally, consistent with the Attorney’s obligation of confidentiality, Rule 3-700 (D), which
95 governs the release of the client’s file at the close of the representation, calls for the release of
96 the file “to the client, at the request of the client.” As we explained in our Formal Opinion 1994-
97 134 at footnote 3, this provision requires direct confirmation with the client before the file may
98 be released to an attorney who purports to be acting as successor counsel:

99
100 “It is not uncommon for attorneys to receive telephone calls or letters from another
101 attorney, representing that the second attorney has been hired by the client to take over
102 the representation and asking for the file. An attorney should not turn over the file to
103 ‘successor’ counsel without first confirming with the client directly that the client has
104 indeed hired the second attorney and wants the file released. Failure to do so could result
105 in prejudice to the client, including for example, the waiver of the attorney client
106 privilege or work product protection.”

107
108 On the stated facts, each of these duties bars Attorney from acceding to New Counsel’s
109 instructions to refrain from contacting Client or to turn over the Client’s file. Those instructions
110 are inconsistent with the Attorney’s best available information concerning Client’s objectives
111 and intentions. Attorney has not received any sufficiently reliable confirmation from Client that
112 her objectives have changed, that she has decided to discharge Attorney, that she has hired New
113 Counsel, or that she has given informed consent to the disclosure of confidential information or
114 the release of her file to him. In these circumstances, there is an unacceptable risk of prejudice to
115 the client. These concerns are heightened because the Attorney reasonably believes that Client
116 was competent when she last communicated with Client, but is aware of information suggesting
117 Client may subsequently have become incompetent or vulnerable to exploitation. If the Client in
118 fact lacks the capacity to make the decisions attributed to her by New Counsel, then the Client’s
119 decision to discharge Attorney or to authorize the release of confidential information should not
120 be given effect.

121
122 In these circumstances, some more reliable form of communication with the Client is required
123 both by the affirmative duty to communicate significant information relating to the
124 representation and by the duty to seek informed client consent to disclosure of confidential
125 information, including the Client’s file. Such communication must be sufficiently direct and

CLEAN

126 detailed to permit the attorney reasonably to conclude that the Client in fact has in fact made the
127 decisions attributed to her and that she had the capacity to do so.²

128
129 This conclusion is not altered by New Attorney's statements concerning Client's wishes, his
130 authority to act for Client and right to receive confidential information: those are precisely the
131 issues on which more reliable confirmation is required. Nor, in the circumstances, can Attorney
132 reasonably rely on the Client's purported release of her file because the Attorney is not
133 reasonably confident that it is genuine.

134
135 The lawyer's duty to communicate with the Client in these circumstances is different from the
136 permissive right to take protective action to prevent harm to a person with significantly
137 diminished capacity recognized in national authorities such as ABA Model Rule 1.14. Unlike
138 the optional right to take protective action, the duties to communicate significant developments
139 to the client and to obtain informed consent are required by obligations of competence, loyalty
140 and confidentiality. Moreover, unlike the permissive rights recognized in Model Rule 1.14,
141 those obligations are not triggered by the lawyer's awareness of the likelihood that the Client has
142 diminished capacity, but are simply an application of duties that are owed to both competent and
143 in competent clients, albeit in a situation where the Client's possible diminished capacity may
144 complicate the task of compliance.

145
146 In attempting to communicate with the Client, Lawyer is entitled to seek assistance from third
147 persons, whether they are family members or trained professionals. However, the Lawyer's
148 ability to explain the situation or the need for assistance will necessarily be limited by her duty of
149 confidentiality, since she does not have the Client's informed consent to disclose information
150 relating to the representation.

151 If, despite further reasonable efforts, the Lawyer is unable to communicate with the Client in a
152 manner that permits a reasonably confident conclusion that Client has decided on a change in
153 counsel and has given informed consent to the disclosure of confidential information, she must
154 refuse to turn over the relevant files, placing the burden on New Counsel either to provide
155 additional evidence on those matters or to seek judicial relief. Under California law, however,
156 Attorney does not have any further right to take protective action on the Client's behalf, both
157 because she lacks sufficient information concerning her incapacity and because she lacks the
158 Client's informed consent to take such action.

159
160 This conclusion highlights the importance of advance planning in those situations where it is
161 reasonably foreseeable that the Client may suffer from diminished capacity. Appropriate powers
162 of attorney, specific directives to be followed with respect to subsequent requests for files and
163 other confidential information, or agreed upon measures of client capacity or incapacity to make
164 a subsequent decision to discharge an attorney or authorize the release of confidential

² This Opinion does not take a position on whether, in appropriate circumstances, it would be reasonable to rely upon such a communication from an authorized agent of an individual client. Here, however, the Lawyer lacks sufficient grounds reasonably to conclude that New Counsel is in fact authorized to act for Client.

The Opinion also expresses no view on the standard of capacity that applies to the Client's decision to discharge an attorney or authorize the release of confidential information, which is a matter of law. *See* Cal Probate Code §§810-812; *Anderson v. Hunt*, 196 Cal. App. 4th 722, 728-29 (2011).

CLEAN

information are among the means by which an Attorney may be able to help the Client take advance measures to protect and effectuate their competent decisions against the threat of subsequent incapacity or exploitation. Such measures may also have the incidental benefit of simplifying estate planning attorneys' compliance with their ethical obligations.

CONCLUSION