

Memorandum

To: COPRAC

From: Steve Bundy

Date: October 17, 2019 (for October 25 Meeting)

Re: Reviving Opinion 13-0002 Vulnerable Client

This memorandum recommends continuing with the above opinion and outlines a proposed approach to the new version. The goal at the October 25 meeting is to determine whether the Committee supports this approach. If it does, the aim would be to present a revised opinion at the Committee's next meeting.

For those new to the Committee, the background is discussed in the attached memorandum prepared for the July meeting. The subject of the opinion is the duties of a lawyer who represents a client who is actually or potentially incapable of making binding legal decisions or recognizing/preventing threatened harm. (The scope would exclude incapacity due to being underage and the specialized body of law dealing with incapacity in criminal matters.) The opinion would be of principal value to those representing elderly clients in connection with estate planning and financial matters, though its reach would not be limited to such cases.

The current opinion was begun in 2013 and has gone through many drafts authored by persons no longer on the Committee. It was held up in 2017-18 because proposed Rule 1.14 covered much of the same territory, and it looked as though it would be enacted. The Supreme Court, however, declined to adopt Rule 1.14.

At the July meeting, the Committee was uncertain concerning the value of a new opinion. Over the past couple of months, I've had conversations with a number of people who are expert in this area, including Mark Tuft, former COPRAC chair and principal draftsman of Rule 1.14, Peter Stern, an estates and trust lawyer who has been deeply involved in this area for over 20 years for the Estates and Trusts section of the Bar (now CLA) and the Association of Trusts and Estates Counsel (ACTEC), and Stuart Seborn, west coast litigation director for Disability Rights Advocates. Stern and Seborn are representative of two different wings of the profession—the estates and trusts bar generally favors giving lawyers broad authority to take protective measures; the disability rights bar worries that lawyers will be too quick to conclude that their clients are incapacitated and will end up taking actions that do not reflect their clients' expressed needs and interests.

The consensus among those I consulted is that there is a strong need for an opinion in this area. That need is increased by the failure to enact Rule 1.14, which may cause some practitioners to mistakenly believe that the concepts embodied in that Rule are not good law or that the Rules of Professional Conduct have nothing to say to issues of representing an incapacitated client. This consensus has changed my own thinking in the matter—it now appears to me that a new opinion is desirable.

The proposed opinion would deal with two scenarios. In one it is relatively clear that the client is suffering from some incapacitating condition and, as a consequence, is threatened with harm that they are not able to recognize and/or prevent. In the other, there is a foreseeable risk that the client may in the future become incapacitated in a way which opens them up to the risk of harm.

Here is a tentative list of issues to be addressed/directions to be taken subject to further research, analysis and drafting.

1. The rejection of Rule 1.14 does not mean that there are no ethical principles that apply in representing a vulnerable client. In fact prior law on the topic remains in force and the new Rules of Professional Conduct also speak to the issues.
2. The rejection of Rule 1.14 also does not mean that every ethical obligation or permission described in that Rule is not part of existing law. The answer to that question depends on an analysis of whether existing law, including the new Rules, supports a particular obligation or permission.
3. In general, when a client is incapacitated, the lawyer's obligations of competence and loyalty require the lawyer, to the extent reasonably possible, to maintain a normal lawyer-client relationship with that client.
4. In situations where there is a question concerning whether a client is incapacitated, the lawyer has an obligation to take reasonable steps to evaluate the client's capacity, relying on the relevant legal standards for the kinds of decisions involved (such as those in Probate Code Sections 810-813) and the tools (including consultation with experts) reasonably available. Under California law, there is a rebuttable presumption that the client has legal capacity. The required standard of capacity can and will differ for different types of client decisions.
5. In cases where the client lacks the capacity to take certain actions, or that capacity is doubtful, the lawyer may have an obligation to consider and/or recommend the participation of third persons, including family members or knowledgeable professionals, in the counseling process where such participation would permit maintaining a normal lawyer-client relationship. The lawyer also has an obligation to structure such participation in a manner consistent with preservation of privilege and confidentiality.
6. If the client is threatened with harm, the lawyer has a duty, insofar as reasonably possible, to counsel the client concerning the risks and magnitude of the harm and the measures that could be taken to eliminate or mitigate the risk of harm. To the extent that the lawyer believes that preventative measures, including disclosure of confidential information, is in the client's interest, the lawyer must seek the client's informed consent to take such action. Under the applicable standards of capacity, a client who lacks the capacity to appreciate or prevent threatened harm may still have the capacity to give informed consent to taking of protective measures.
7. Conversely, if the client is unavailable or lacks the capacity to give informed consent to protective disclosures, then the lawyer may not take any protective action involving disclosure of the client's information, even if disclosure would clearly advance the client's interests. The reason is that California confidentiality rules do not recognize the

concept of implied authority to disclose confidential information, but instead require informed consent to do so.

8. A lawyer advising a competent client who faces a significant risk of later becoming incapacitated in a way that could threaten the achievement of the client's objectives or expose the client to harm has an obligation to be familiar with, and where appropriate discuss with the client, available means of protecting against the future risks and harms to which incapacity would expose the client. Available means for doing so may include durable powers of attorney and other measures.
9. A lawyer may obtain present consent from a competent client for the future disclosure by the lawyer of confidential information as needed to prevent the frustration of the client's objectives or harm to the client in circumstances where incapacity has rendered the client incapable of taking protective action on her own or giving effective present consent to the attorney's taking protective action. Such a consent is consistent with the confidentiality rules, and the general principles governing advance consents, if it is (a) fully informed, (b) limited to circumstances where the client's future inability to give a present consent to disclosure would result in preventable harm to the client; and (c) revocable by the client at any time (assuming the client has the capacity to do so).

These issues involve the duties of competence, loyalty and confidentiality. To the extent that they involve issues of competence, the goal would not be to specify disciplinary standards for incompetence or define which actions meet the standard of care. Instead, consistent with the Committee's approach to technology, e-discovery and data breaches, the goal would be provide a framework within which lawyers can consider what the duty of competence requires of them, rather than bright line answers.

Some of these propositions seem obviously correct. Others are more controversial and further study may show that they cannot be maintained. The question for the Committee is whether it generally supports an opinion along these lines as providing helpful guidance to the profession, and whether it thinks that the above list of issues points in the right direction. If so, then the next step would be a redraft of the opinion to reflect this new direction.

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. 4<sup>th</sup> 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.<sup>1</sup>

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<sup>1</sup> 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.”).

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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 hand 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. 4<sup>th</sup> 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.

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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

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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.<sup>2</sup>

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

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<sup>2</sup> 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. 4<sup>th</sup> 722, 728-29 (2011).

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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**



**REDLINE**

DRAFT # 24: Submitted for April 7, 2018 Meeting

Dietz  
\*Bundy  
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**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
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**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:**

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## REDLINE

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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~~~~Nephew~~ 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 ~~is confident~~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. ~~Dukemjian~~Oasis West Realty, LLC v. Goldman, 51 Cal. 4<sup>th</sup> 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).~~[cites]~~

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.



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

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

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

On the stated facts, each of these duties bars Attorney from acceding to New Counsel’s instructions to refrain from contacting Client or to turn over the Client’s file. Those instructions are inconsistent with the Attorney’s best available information concerning Client’s objectives and intentions. Attorney has not received any sufficiently reliable ~~direct~~ ~~[question: should this be “verified?”]~~ confirmation from Client that her objectives have changed, that she has decided to discharge Attorney, that she has hired New Counsel, or that she has given informed ~~consented~~ to the disclosure of confidential information or the release of her file to him. In these circumstances, there is an unacceptable risk of prejudice to the client. These concerns are heightened because the Attorney ~~knows~~ reasonably believes that Client was competent when she last communicated with Client, but is aware of information suggesting ~~she~~ Client may subsequently have become incompetent or vulnerable to exploitation. If the Client in fact lacks the capacity to make the decisions attributed to her by New Counsel, then the Client’s decision to discharge Attorney or to authorize the release of confidential information should not be given effect.

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

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127 direct and detailed to permit the attorney reasonably to conclude that the Client in fact has in fact  
128 made the decisions attributed to her and that she had the capacity to do so.<sup>2</sup>

129  
130 This conclusion is not altered by New Attorney's statements concerning Client's wishes, his  
131 authority to act for Client and right to receive confidential information; ~~or the confidentiality of~~  
132 ~~his claim to be acting for her, since those~~ those are precisely the issues on which more  
133 reliable~~direct~~ confirmation is required. Nor, in the circumstances, can Attorney reasonably rely  
134 on the Client's purported release of her file ~~both because its scope is limited to disclosure of the~~  
135 ~~file [I am unclear as to what this means]and~~ because the Attorney is not reasonably confident  
136 ~~satisfied~~ that it is genuine.

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

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

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

163  

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<sup>2</sup> 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. 4<sup>th</sup> 722, 728-29 (2011).

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

~~{Query: where to go from here.~~

~~1. Can Attorney satisfy her obligations simply by asking New Counsel for better proof, without any direct communication with the client?—At least with respect to the release of the File, Opinion 1994-134 says no. If this is right, shouldn't the answer be the same or stronger for the other duties? If direct communication is not required, do we want to opine on what that better proof would consist of?~~

~~2. If we don't think that the Attorney can proceed without some form of direct [verified?] contact with the Client, which is certainly the explicit statement in 1994-134, do we want to opine what form of direct contact would suffice?~~

~~3. What if the Attorney is unable to establish the required level of contact with the client without help from a third party, like Niece. May Attorney communicate with her in order to fulfill her obligations to inform and to seek consent?~~

~~I'm not aware of any additional authority bearing directly on the three forgoing questions.—Is anyone else aware of such authority?]~~

## CONCLUSION