

DRAFT # 25: Submitted for February 28, 2020 Meeting

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

ISSUES:

DIGEST:

**AUTHORITY
INTERPRETED:**

NOTE: This partial draft deals with one of the multiple issues to be covered in this draft opinion: the validity of an advance consent to protective disclosure of confidential information in order to prevent harm to an incapacitated client. The next draft of the opinion will cover other issues, including the duties of a lawyer to a client that is already incapacitated, and other planning options that should be considered for clients who are not yet incapacitated but may become so. Rather than wait for the drafting of those sections, however, it seemed preferable to share this partial draft, which raises a discrete and important issue, for discussion with the Committee.

STATEMENT OF FACTS

Lawyer represents Client in estate planning and business succession matters. Lawyer is preparing an estate plan for Client. Although Client is clearly competent, and has the capacity required to execute the estate plan and conduct the Client's business, Client is elderly and has a family history of dementia. There is a significant risk that the Client could subsequently become incapacitated, in which case the Client's estate and business succession planning may be thwarted and the Client may suffer emotional and financial harm from persons who do not have the Client's best interests at heart. As part of planning to protect against that risk, Lawyer would like to propose that Client execute a written consent providing that the Lawyer may take protective action on the Client's behalf, including disclosure of relevant confidential information, when the Lawyer reasonably believes that (1) the Client has significantly diminished capacity; (2) protective action is in the Client's best interest and reasonably necessary to prevent, or reduce the risk of, substantial physical, financial or emotional harm to the Client, and (3) the Client's significantly diminished capacity renders the Client unable to recognize, make adequately considered decisions with respect to, or act to prevent the harm. Such consent would not extend to the lawyer's seeking a conservatorship for the client, although the disclosures

authorized might lead other persons to seek such a conservatorship. Moreover, the consent would be revocable at any time. The Lawyer wants to know whether such a consent to such protective disclosures would be valid.

DISCUSSION AND ANALYSIS

Lawyers who represent clients with diminished capacity frequently have information about the nature and extent of client incapacity or the threat of harm to the client that is not generally known. Sometimes information is learned as part of a communication subject to the attorney-client privilege. Whether or not such information is privileged, however, it is protected from disclosure under Business and Professions Code Section 6068 (e) (1) and rule 1.6 because it is “information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client.” *See, e.g.*, Formal Opinion 1989-112 at p. 2; OCBA Formal Opinion 95-002 at IID-034; LACBA Formal Opinion 450 (1988); SDCBA Ethics Opinion 1978-1.

Most American jurisdictions have adopted versions of American Bar Association Model Rules 1.6 and 1.14 that recognize a lawyer’s implied authority to disclose confidential information when reasonably necessary to protect an incapacitated client from harm. California, however, does not recognize implied authority to disclose confidential information. Instead, Rule 1.6 requires that the client give informed consent to such disclosure. The Rules define informed consent as “agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.” RPC 1.0.1 (e). Rule 1.6 does not require that the informed consent be in writing.

A client who suffers from diminished capacity may, however, lack the capacity to give informed consent, and in particular to understand the relevant circumstances or the material risks involved. For that reason, a competent client’s advance informed consent to disclosure, given before the client is incapacitated, may be the only effective means by which a client who wants to empower the lawyer to make appropriate protective disclosures to prevent threatened harm can achieve that aim.

There is no categorical barrier to an advance informed consent to disclosure of confidential information. Rule 1.6 does not by its own terms require that informed consent to disclosure be contemporaneous with the disclosure. Formal Opinion 1989-115 states that “an advance waiver of...confidentiality protections is not, *per se*, invalid. *Id.* at 3. Rather, it depends on two basic requirements. First, the client must be “adequately informed of the information and communications which may be disclosed and the uses to which they may be put.” Second, the disclosures proposed must be consistent with the lawyer’s duties of competence and loyalty. *Id.*

These requirements are also reflected in *Maxwell v. Superior Court*, 30 Cal. 3d 606 (1982), upon which Opinion 1989-115 relied. One question presented in *Maxwell* was whether a criminal defendant who paid for his lawyer’s services by giving up the rights to his life story could give advance consent to the disclosure of confidential information required for counsel to monetize those rights. The contract contained two provisions prospectively waiving confidentiality rights. In one the defendant agreed to waive, on counsel’s future demand, his attorney-client privilege and “any and all other privileges and rights which would prevent the full and complete exercise”

of counsel's interests. 30 Cal. 3d 610 n.1. The Court noted, with apparent agreement, counsel's concession in oral argument that this provision was an "overreach" and could not be enforced as written. *Id.* In the other, the client promised to (1) give counsel all materials pertaining to his life and experiences, (2) use his best efforts to gather such information in the hands of others, and (3) to confer with counsel as often as they reasonably require to enable them to elicit all the details of his life. The Court held that this provision could not be validly invoked by the lawyer until after all criminal proceedings had become final. Though the contract of retention provided that the lawyer's representation extended only through trial, the Court held that any reading of this provision that would allow the lawyer to disclose prejudicial, confidential material at any time during the pendency of criminal proceedings would place the lawyer in violation of duties of fairness, undivided loyalty and diligent defense arising under the Professional Rules and the contract of retention. *Id.* Subject to those limitations, however, the Court held that the consent was adequately informed. *Id.* at 621-22.¹

Though not controlling, the standards governing advance consent to a conflict of interest is also relevant here. Consistent with Opinion 1989-115 and *Maxwell*, Comment [9] to Rule 1.7 expressly states that Rule 1.7 "does not preclude an informed written consent to a future conflict in compliance with applicable case law." The central issue with an advance consent is "the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding." Rule 1.7 Comment [9]. The experience and sophistication of the client, and whether the client is independently represented, are also relevant in determining whether the client reasonably understands the risks involved. *Id.* 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.

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). Even with full information, however, a client may not give prospective consent to a conflict that would be nonconsentable under Rule 1.7 (d) or that would result in incompetent representation. *Id.*

The cases in which California courts have found advance consent to a conflict to be sufficiently informed fall into two categories. First, such consents have been upheld when a joint client agrees that if the joint relationship ends it will not seek to exercise its right to prevent counsel from proceeding adversely to it on behalf of the other joint client or clients. *See, e.g., Zador*

¹ 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. .

Corp. v. Kwan, (1995) 31 Cal. App. 4th 1285. Second, in some circumstances, courts have upheld advance consents to concurrent adverse representation in unrelated matters. Thus, in *Visa U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003), the consenting client agreed that the law firm could in the future act adversely to the consenting client on behalf of another identified existing client of the firm in unrelated matters, provided that the lawyers involved in representing the consenting client were screened. The validity of more open-ended advance consents to future conflicts is contested,² and the Supreme Court has expressly declined to take a position on their enforceability. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal. 5th 59, 86 (2018).

Taken together, these authorities demonstrate that the proposed advance consent should be enforceable, provided that the Lawyer takes steps to ensure that the Client’s consent is informed within the meaning of RPC 1.0.1 (e). This is so for several reasons. First, the consent is narrow, and clearly identifies the type of information to be disclosed and the specific circumstances in which it would be disclosed. This is precisely the kind of situationally focused consent that California courts have uniformly found to be enforceable. Second, the consent does not authorize any disclosure that would violate the lawyer’s duty of competence or loyalty. Instead, disclosure is authorized only if the lawyer reasonably believes that it is in the client’s interest and would protect the client from harm. Thus, unlike advance consents that expand the lawyer’s power to act adversely to the client, this advance consent empowers the lawyer to take actions that serve the client’s interest and that, but for the consent, the lawyer might be unable to take. Third, any residual risk that the consent will result in frustration of the Client’s aims is further mitigated by the fact that the Client can revoke the consent at any time, provided that the Client still has the capacity to do so.

To ensure that the consent is informed, Lawyer’s communication and explanation of the circumstances and the material risks should identify for the client, to the extent possible, the risk to the Client of becoming incapacitated, and the kinds of harm that could result from such incapacity. The Lawyer should also explain the limited circumstances in which protective disclosure would be authorized, the kinds of information that would be disclosed, and the benefits and risks of such disclosure, including the prevention of harm and the broader exposure of sensitive confidential information about the client’s mental and physical condition. The lawyer should also explain the advantages and disadvantages of advance consent, including the risk that an incapacitated client may be unable to give effective contemporaneous consent to protective disclosure. Finally, Lawyer should explain that so long as the Client retains capacity to do so, Client can revoke the consent at any time and for any reason.

² A number of Federal courts applying California law have declined to enforce such waivers, even against sophisticated clients. *United States ex rel. Bergelectric Corp. v. Sauer, Inc.*, 2018 WL 6619981 (N.D. Cal. 2018) (“any and all conflicts of interest which presently exist, or may hereafter exist”), *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100 (E.D. Cal. 2015) (waiver with respect to “any other client either generally or in in any matter in which [the consenting client] may have an interest” is “broad, general and indefinite”); *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074 (C.D. Cal. 2015 (any existing or future client in any matter not substantially related; open-ended as to time); *Concat LP v. Unilever, PLC*, 350 F. Supp. 796 (N.D. Cal. 2004) (consent to present and future representation of any existing or new clients adverse to consenting client is unenforceable “boilerplate”). There is authority from other jurisdictions enforcing such a broad consent against a sophisticated client represented by counsel. See, e.g., *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013).

CLEAN

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

CONCLUSION