

1 DRAFT # 26: Submitted for April 16, 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**

14 **ISSUES:**

16 **DIGEST:**

18 **AUTHORITY
INTERPRETED:**

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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.

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

STATEMENT OF FACTS

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

DISCUSSION AND ANALYSIS

General Principles

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

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

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

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

The duty of confidentiality forbids the lawyer from disclosing any information relating to the representation whose disclosure would be harmful or embarrassing to the client, unless the client has given informed consent to the disclosure. Business & Professions Code Section 6068 (e); Rule 1.6 (a). 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). This is in contrast to the law in most other American jurisdictions, which treat a lawyer as having implied authority to disclose confidential information, without express authorization from the client, where the lawyer reasonably believes that disclosure is necessary to accomplish the purpose of the representation. Model Rule 1.6 (a).

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

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

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

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

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

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

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

Probate Code Section 812.

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

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

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

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).

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

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

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

The Impact of Diminished Capacity on the Professional Relationship

A client's diminished capacity has several impacts on the attorney client relationship and the attorney's professional obligations.

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

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

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

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

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

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

The duties of confidentiality and loyalty inform and limit the lawyer's ability to respond to a client's diminished capacity. Information about the client's diminished capacity, whether or not subject to the attorney client privilege, 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 1978-1.² Accordingly, the lawyer must have the client's informed consent to disclose such information, even to experts or family members whose involvement the lawyer reasonably believes would benefit the client and even when the lawyer believes that such disclosure is necessary to protect the client from harm. Formal Opinion 1989-112. If the client lacks the capacity to give such consent, is unavailable, or declines to give such consent, the 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.

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

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

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

Application of the Law to the Stated Facts

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

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

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

Advanced Planning to Permit the Lawyer to Take Protection Action in the Event of Diminished Capacity

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

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

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

Both of these solutions depend on the validity of an advance consent by the client to a future 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 so broad as to constitute 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 621-22.⁴ *Maxwell* thus supports the proposition that an informed consent to future disclosure can be enforced if it sufficiently narrowly drawn and otherwise consistent with the lawyer's performance of the lawyer's professional duties.

Though not controlling, the standards governing advance consent to a conflict of interest are 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.*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.

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 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.⁶

These authorities indicate that a competent client should be able to agree in advance to authorize the client's lawyer to take protective action in the limited circumstance where the client's diminished capacity gives rise to threat of harm to which the client cannot effectively respond, 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 approved. 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 the advance consents upheld in the decided cases, which 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.⁷ To hold that such an express consent could not be given would limit an informed, competent client's right to enlist the client's lawyer as part of a coherent strategy to protect against future harm. 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

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.

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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.

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