

DRAFT # 27: Submitted for June 5, 2020 Meeting

*Bundy
Carr
Inlender
Koss
Roche

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

ISSUES: What are the ethical obligations of a lawyer for a client with diminished capacity?

DIGEST: A lawyer for a client with diminished capacity has the same ethical obligations to the client as the lawyer would owe to a client whose capacity to decide is clear. The client's diminished capacity may, however, alter the ways in which the lawyer is required to fulfill those obligations. When the lawyer reasonably believes that the client lacks the capacity to make a decision, the lawyer may be required to refuse to assist in effectuating the client's expressed wishes. When the client's diminished capacity exposes the client to harm that the client is unable to recognize or prevent, the lawyer cannot take protective action involving disclosure or use of the client's confidential information without the client's informed consent. A lawyer advising a competent client may want to recommend that the client give advanced consent to protective disclosure of confidential information in the event that the client should in the future suffer diminished capacity that exposes the client to harm. If properly limited and informed, such a consent would be ethically proper.

AUTHORITY

INTERPRETED: Business & Professions Code Section 6068 (e); Rules of Professional Conduct 1.0.1 (e), 1.1, 1.2, 1.4, 1.6, 1.8

INTRODUCTION AND SCOPE

Few problems in the law of professional responsibility are more difficult than the issue of a lawyer's obligations to a client whose diminished capacity prevents the client from making adequately considered decisions relating to the representation. Many American jurisdictions have sought to clarify those obligations by enacting a version of American Bar Association Model Rule 1.14. ("ABA Model Rule 1.14"). As part of California's recent effort to revise its Rules of Professional Conduct, the Second Commission for the Revision of the Rules of Professional Conduct ("Second Commission") prepared and submitted to the California Supreme Court a proposed California version of Rule 1.14 ("Proposed Rule 1.14") that was intended to

CLEAN

reconcile the approach of the ABA Rule with unique features of California law, including California's statute and rule governing attorney-client confidentiality. Without explanation, the Supreme Court declined to adopt the Proposed Rule.¹ The Supreme Court's rejection of Proposed Rule 1.14 creates a need for guidance concerning the effect of rejection of the Rule, and the ethical obligations of attorneys for clients with diminished capacity under the Rules of Professional Conduct and the State Bar Act.

This opinion focuses on the ethical obligations of privately retained lawyers for persons with diminished capacity in civil litigation, transactional and estate planning matters. It does not extend to representation of a minor, to criminal matters, or to situations where the putative client already has a guardian ad litem or other person empowered to act for them—though the principles discussed here may also apply in those cases.

The opinion concerns the obligations of lawyers under the Rules of Professional Conduct, the State Bar Act and other relevant California authorities. It is widely acknowledged that a lawyer representing a client with diminished capacity will also sometimes be required to make difficult judgments under the applicable standard of care. This Committee does not opine on the standard of care. Accordingly, in discussing these issues we assume that the lawyer's conduct as described meets the applicable standard of care.

The conclusions in this opinion are based on existing California law. To the extent that a rule or concept is supported by existing law, we believe that the fact that the rule or concept was also reflected in Proposed Rule 1.14 provides no basis for rejecting that rule or concept. The Supreme Court did not explain its decision to reject the Proposed Rule. Accordingly, 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 one or more of the Rule's specific provisions; or (4) for some combination of those or other reasons. Given that uncertainty, the fact that a rule or concept was contained in Proposed Rule 1.14 cannot be regarded as a ground for rejecting it if the rule or concept is consistent with California's existing ethics rules.

STATEMENT OF FACTS

1. Lawyer has represented Client for many years and prepared Client's initial estate plan. In recent years, Lawyer has seen Client socially and has noticed signs of diminished capacity. Client has now asked Lawyer to prepare a new estate plan, largely disinheriting Client's children in favor of Client's younger companion, who has recently moved in with Client. Based upon information available to the lawyer and further reasonable inquiries, Lawyer reasonably believes that the client lacks testamentary capacity and that, but for Client's diminished capacity, Client would not make the new testamentary dispositions. May Lawyer properly prepare the new estate plan?

¹ Proposed Rule 1.14 and the Commission's Report and Recommendation can be found at https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.14-all.pdf

CLEAN

2. Lawyer represented Client in a recently settled personal injury matter, involving a large recovery, and has now been asked by 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 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. 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 and that in the consultant's opinion Client is now 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 to advise him against the transaction, 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 these circumstances, 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 will likely prevent Client from recognizing or acting to 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. What, if any, measures may Lawyer take to protect the Client from harm?

DISCUSSION AND ANALYSIS

Relevant Ethical Issues

Allocation of Authority: 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 "substantial rights." Rule 1.2; *Blanton v. Womancare, Inc.* (1985) 38 Cal. 3d 396, 404. Rule 1.2 further provides that subject to the lawyer's duty of confidentiality, the lawyer "may take such action on behalf of the client as is impliedly authorized to carry out the representation." *Id.* The lawyer must also reasonably consult with the client as to the means with which the Client's objectives are to be pursued. *Id.* This allocation of authority cannot be changed except with the client's consent, and such consent may not be implied from the fact of representation itself. *Id.* Comment 1.

The client's power of decision is supported by multiple professional duties, including among others, the duties of competence, communication, confidentiality, loyalty, and independent judgment.

Competence: The duty of competence calls for the lawyer to exercise the "(i) learning and skill and (b) mental, emotional and physical ability reasonable necessary" to provide the legal services called for in the representation. Rule 1.1 (b). A violation of Rule 1.1 requires intentional, reckless, grossly negligent or repeated violations of this standard. Rule 1.1 (a). 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. As stated above, in

the discussion of Scenarios 1 and 2, we will assume that the lawyer’s conduct satisfies the applicable standard of care.

Communication: The duty of communication requires that the lawyer, among other things, inform the client about any matter requiring the client’s informed consent, Rule 1.4 (a) (1), keep the client “reasonably informed” about “significant developments relating to the representation,” Rule 1.4 (a) (3), and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4 (b).

Confidentiality: 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.” Rule 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).

Loyalty: 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, 1299 (citing *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 289) (emphasis in original).

Candid Advice and Independent Professional Judgment: 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].

Client Capacity

The Rules of Professional Conduct and the State Bar Act do not define the level of client capacity required to make the decisions that the rules reserve to the client. Instead, California’s law respecting client capacity derives from other sources, including statutes and case law. Interpretation of that law is outside our purview. Moreover, lawyer judgments about a client’s capacity will often be highly fact dependent and governed by the applicable standard of care. We nevertheless include a brief discussion of the law of capacity because it provides necessary background for our ethical analysis and because the content and application of that law will often be relevant, and sometimes essential, to ethical decision making by a lawyer whose client’s capacity is diminished or could in the future become so.

To make a decision other than those concerning testamentary matters and consent to health care, 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 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,² which, 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.* subsections (b)-(c). 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.”

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.

The Impact of Diminished Capacity on the Professional Relationship

An adjudication that a client is wholly incapacitated terminates a contractual attorney client relationship and the attorney’s authority to act for the client. *Sullivan v. Dunne* (1926) 198 Cal. 183, 192 (client unable to communicate; mind was a “blank”).³ Short of that situation, however,

² 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).

³ A lawyer may sometimes represent a person who clearly lacks the ability to make or communicate any preference or decision concerning the matters typically reserved to a client. This may occur, for example, when the lawyer is

there are many situations where a client may be entitled to legal representation, even though the lawyer reasonably believes that the client is suffering from diminished capacity.⁴ For example, such a client may wish to defend against the appointment of a conservator. See Probate Code §1471 (requiring the appointment upon request of counsel for a person opposing establishment of a conservatorship, “whether or not that person lacks or appears to lack capacity”); *see also*, *Graham v. Graham*, 40 Wash. 2d 64, 67-68 (1950) (evidence of incapacity does not terminate client’s right oppose appointment of a guardian). Or the client may have the capacity to make some decisions within the scope of the representation but not others. *See Anderson v. Hunt*, 196 Cal.App.4th at 215 (client lacked contractual capacity but had testamentary capacity). In other cases, the client’s incapacity may be clear, but for financial, emotional or other reasons seeking a guardianship may be undesirable or impractical. *See* Restatement (Third) of the Law Governing Lawyers §24, Comment *d*. In such representations, the lawyer should, insofar as reasonably possible, seek to preserve a normal attorney-client relationship. M. Tuft, E. Peck & K. Mohr, California Practice Guide, Professional Responsibility ¶7:73.5 (2019).

When a client has diminished capacity, the client’s ability to make legally effective decisions may be in doubt. There is a risk that the client’s proposed course of conduct may not be legally effective, frustrating the client’s objectives. The client’s lack of capacity may also prevent the client from giving legally effective informed consents within the lawyer-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. More fundamentally, the client’s diminished capacity gives rise to a risk that the approaches to representation used with a competent client will not lead to a decision that accurately reflects and serves the client’s interest. 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.

These considerations do not change a lawyer’s ethical obligations to the client, but they may well effect how a lawyer will go about meeting them. For example, in order to fulfill the duty of competence, a lawyer may need to make an assessment of the client’s capacity. In so doing, the lawyer may want to consider consulting medical, psychological or other professionals with an understanding of the cognitive and emotional issues involved in determining the client’s capacity

acting pursuant to court appointment. *See Conservatorship of Drabick* (1988) 200 Cal. App. 3d 285 (court appointed attorney for person in persistent vegetative state). In such cases, the lawyer must be guided by the lawyer’s independent understanding of the client’s best interests. *Id.* at 212.

⁴ There would be serious problem with a rule that a lawyer was powerless to act for a client concerning matters within the scope of the representation simply on the basis of the lawyer’s reasonable conclusion that the client was incapacitated.

“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.”

Restatement (Third) of the Law Governing Lawyers, Section 31, comment *e*.

and how the attorney-client relationship should be adjusted to reflect them. Restatement (Third) of the Law Governing Lawyers Section 24, Comment *d* (“Where practical and reasonably available, independent professional evaluation of the client’s capacity may be sought.”); American College of Trusts and Estates Counsel, Commentaries on the Model Rules of Professional Conduct, Rule 1.14, SM061 ALI-ABA 541 (4th edition 2006) (“ACTEC Commentaries”) (“In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.”)

A client’s diminished capacity may also impact how the lawyer fulfills the duty to communicate with the client. Depending on the nature of the functional deficit, diminished capacity may blunt the client’s understanding of the client’s own interests and objectives or make it more difficult for the client to communicate them to third persons. It may also make it more difficult for the client to take in the amounts or kinds of information that a lawyer communicates or to deliberate upon the lawyer’s advice. As a consequence, the nature of the lawyer’s reasonable consultation concerning means, under Rule 1.2 and Rule 1.4 (a) (2), or 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. To deal with these issues, a lawyer may wish to consider involving experts, therapists, family members or others in the process of communication. Restatement (Third) of the Law Governing Lawyers § 24, Comment *c*.

When a client’s capacity is in doubt, the lawyer’s duty of loyalty continues to require the lawyer 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, and in some situations the client may benefit from having those persons involved in the client’s decision making process, the lawyer should “keep the client’s interests foremost,” and consider the interests of others only insofar as they matter to the client. ACTEC Commentaries at 544; *see also Moore*, 109 Cal. App. 4th at 1299.⁵ Similarly, “lawyers should be careful not to construe as proof of disability a client’s insistence on a view of the client’s welfare that a lawyer considers unwise or otherwise at variance with the lawyer’s own views.” Restatement Section 24, Comment *c*.

At the same time, the client’s diminished capacity may create grave doubts about whether the client’s chosen course actually “effectuates the client’s wishes” and reflects an understanding of its “legal and practical implications.” When a lawyer represents a client with diminished capacity in opposing the establishment of a conservatorship, these questions are normally not so urgent, because the client’s interest in being heard is strong, and although the lawyer may legitimately worry that the client’s decision to oppose may not serve the client’s long term

⁵ In *Moore* the court held that the lawyer did not owe a duty to the beneficiaries of a prior will to assess the client’s capacity to make a 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 potentially subject to attack. The opinion makes clear that the lawyer continued to owe duties of competence and loyalty to the client making the will.

interests, the persons seeking the conservatorship can be counted upon to bring those interests to the attention of the tribunal. Restatement (Third) of the Law Governing Lawyers Section 24, Comment c. Similar considerations may also apply in other litigation settings where the client's capacity is in issue. When acting in a counseling role, however, the lawyer may have a greater obligation to consider the consequences of the client's diminished capacity. In the estate planning arena, for example, it is said that "because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline," including by taking steps to preserve evidence that would support a finding of capacity. ACTEC Commentaries at 56 (cited in *Moore*, 109 Cal. App. 4th at 1306). On the other hand, the same authorities state that to protect the client "a lawyer should generally not prepare a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity." *Id.* The two positions reflect common sense judgments that effectuating the client's stated preferences in cases where the client has the capacity to make a decision, though the issue is close, protects both the client's autonomy and the client's interests, while effectuating a decision made without capacity disserves both. In many situations involving diminished capacity, the decision whether the duty of loyalty calls for effectuating the client's decision or declining to do so will raise difficult questions of judgment without clear or perfect answers. While California has no law on the question, we believe that it would follow other American jurisdictions in holding that a disinterested lawyer who exercises "an informed professional judgment in choosing among...imperfect alternatives," is not subject to professional discipline for the lawyer's resolution of the problem. Restatement (Third) of the Law Governing Lawyers § 24, Comments *b.*, *d.*

Finally, the duty of confidentiality will often determine the steps that a lawyer may take 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. The client's informed consent may not be required in order to disclose such information to persons retained by the lawyer or coming within the boundaries of the attorney-client relationship.⁶ When, however, a lawyer wants to make

⁶ For example, informed consent would not normally be required for disclosure to professionals retained or consulted in order to evaluate the client's capacity or to assist in communicating with the client, provided that the lawyer secures the person's agreement to preserve the confidentiality of the underlying information. Formal Opinion 2010-179 at pp. 4-5; Los Angeles County Formal Opinion 518 at p. 14 (2006); ABA Formal Opinion 95-398; *see also* rule 5.3 (b) (requiring a lawyer to take reasonable effort to ensure that retained non-lawyers conduct themselves in a manner consistent with the lawyer's professional obligations). Such persons typically are directed by the attorney and communications to and from such persons are normally covered by the attorney-client privilege. California Evidence Code Section 952; *City and County of San Francisco v. Superior Court (Hession)* 37 Cal. 2d 227, 236-38. Involving family members in confidential client decision making can also be accomplished consistent with preservation of the privilege where such persons are "present to further the interest of the client in the consultation" or because disclosure to them "is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." *See* California Evidence Code Section 952; *Hoiles v. Superior Court*, 157 Cal. App. 3d 1192, 1200. If the lawyer reasonably anticipates, however, that a family member could not be trusted to follow the client's or the lawyer's instructions with respect to sensitive client

protective disclosures to unrelated third persons, informed consent is required. , even if the attorney reasonably believes that the disclosure would benefit the client and is necessary to protect the client from harm. Formal Opinion 1989-112; M. Tuft, E. Peck & K. Mohr, California Practice Guide: Professional Responsibility ¶7:102.1. If the client lacks the capacity to give such consent, is unavailable, or declines to give such consent, the lawyer may not make such disclosures.⁷

The duty of confidentiality combines with the duty of loyalty to bar a lawyer from initiating 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 and that bringing the action would be in the client’s best interest. In bringing such an action, a lawyer would necessarily be disclosing confidential information about the client’s condition, in violation of Rule 1.6, and taking action “directly adverse” to the client, in a manner forbidden by Rule 1.7 (a). Formal Opinion 1989-112; LA County No. 450.

In these respects, California law differs from the majority of American jurisdictions. Under ABA Model Rule 1.6, a lawyer is impliedly authorized to disclose confidential information in order to further the objectives of the representation. Consistent with that 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). California’s confidentiality rules bar this approach.

Application of the Law to the Stated Facts

In Scenario 1, Lawyer was initially concerned about the client’s capacity to make a will. On the basis of further inquiries, , the lawyer has reasonably concluded that the Client lacks even the low level of capacity required for testamentary decisions and that, if the Client were not suffering from diminished capacity, the Client would not view the proposed new will as in the Client’s interest. We assume that Lawyer’s judgment meets the applicable standard of care. At a minimum, the lawyer’s duty at this point is to provide Client with candid advice concerning Lawyer’s conclusions. If the Lawyer believes it would help assist the Client in understanding that advice to have others, whether experts or family members, involved in communications between Lawyer and Client, the Lawyer may involve such persons in lawyer-client communications, with the Client’s informed consent if necessary.⁸ Should the Client decide to

confidential information, the client’s informed consent may be required in order for disclosures to be made to them. Cf. Formal Opinion 2010-179 at p. 4 & n. 12. Finally, there may be cases where the persons that the lawyer wishes to involve in the process already knows the relevant confidential information, because, for example, the person regularly provides care for and interacts with the client.

⁷ 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.

⁸ See note 6 *supra*.

accept Lawyer's advice, the Lawyer need not go further. Should the Client decline to accept the Lawyer's advice, the Lawyer should decline to prepare the will. The Lawyer's reasonable belief is that the Client lacks the capacity to make a decision reflecting the Client's interest and that the Client's preferred course would actually damage the Client's interest. Given that reasoned judgment, the duty of loyalty requires that the lawyer decline to prepare the new testamentary instruments.

In Scenario 2, the Lawyer acted reasonably in seeking advice concerning Client's capacity. The Lawyer's retained consultant has now opined that Client does not have the capacity required for the transaction that the Client proposed. The Lawyer has sought to deliver candid advice advising against the transaction, but has been unable to do so. Lawyer now reasonably believes that Client is suffering from diminished capacity, and that by reason of that incapacity, Client is threatened with harm that the Client is unable to perceive or prevent. Lawyer may seek to continue to contact Client to deliver appropriate advice. If that proves impossible or infeasible, however, Lawyer may be powerless to prevent harm to the Client, because California's strict confidentiality rules do not permit the disclosure of information about the Client's condition to third parties without Client's informed consent. In addition, California's confidentiality and conflict of interest rules bar the lawyer from initiating 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, can 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 Protective 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 diminished capacity 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. *See* Probate Code Sections 4120-30. Clients can specify that the power will not be terminated by incapacity of the principal. Probate Code Section 4124 (a). Alternatively, the effectiveness of such a power can be made contingent on the client principal's incapacity. *Id.*, Section 4024 (b). A principal who executes a springing power may designate one or more persons, including the attorney in fact, who shall have the power, by sworn declaration under penalty of perjury, to conclusively determine that the client has become incapacitated so that the power of attorney can take effect. Probate Code Section 4129 (a)-(b). A limited power of attorney, granted to the attorney, could expressly authorize the lawyer to take action, including if necessary disclosure of confidential information, in the event that the lawyer or a specified third person prepares a declaration 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 to identified third persons where the lawyer reasonably determines that the conditions justifying protective action have been met.

For either the power of attorney or a simple advance consent option, the critical ethical issue is whether an advanced consent to the disclosure of confidential information is ethically permissible. Rule 1.6 does not by its own terms require that an informed consent to disclosure of confidential information 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. *Maxwell* thus supports the proposition that an informed consent to future disclosure can be enforced if it is 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.*⁹ 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 upheld advance consents to a conflict 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.¹⁰

Taken together, these authorities support the ethical propriety of a competent client's advance consent to the lawyer's protective disclosure or use of confidential information in the limited circumstance where the lawyer reasonably believes that the client's capacity is diminished, the client is threatened with harm, and the client's incapacity prevents the client from recognizing or acting to prevent that harm, provided that the Lawyer takes steps to ensure that the client's consent is informed within the meaning of Rule 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 the kind of situationally focused advanced consent that California courts have 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 necessary to 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 a present or former 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.¹¹ To hold that such an express consent could not be

⁹ 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).

¹⁰ The validity under California law 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).

¹¹ This opinion does not decide whether a competent client could give advance informed written consent to the lawyer's personally initiating proceedings for the establishment of a conservatorship where the lawyer reasonably believes that grounds for establishing a conservatorship exist and that doing so is necessary to protect the client from harm. Because in such an action the lawyer would nominally be directly adverse to the client, such a consent would necessarily involve not just informed consent to disclosure and use of confidential information, but also informed written consent to formal adversity under Rule 1.7 (a). On the other hand, if a client does not have other people in

CLEAN

given would infringe on 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 or modify the consent at any time.

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 potential 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 a client who becomes incapacitated in the future may be unable to give effective contemporaneous consent to protective disclosure. Finally, lawyer should explain that the client can modify or 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 what was consented to, and of what was done 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 contested, documenting the terms of the consent and the lawyer's disclosures in writing is likely to be essential to ensure 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 the conditions triggering the consent have been satisfied. 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 demonstrate 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

A lawyer for a client with diminished capacity should attempt, insofar as reasonably possible, to preserve a normal attorney client relationship with the client. The lawyer's ethical obligations to such a client do not change, but the lawyer may find it necessary or desirable to change how the lawyer goes about fulfilling them. In some situations, the client's lack of capacity may require that the lawyer decline to effectuate the client's expressed wishes. When the lawyer reasonably believes that the client's diminished capacity exposes the client to harm, the lawyer may seek the client's informed consent to take protective measures. If the client cannot or does not give informed consent, the lawyer may be unable to protect the client against harm. A lawyer

his life who could be counted on to initiate such a proceeding, such a focused consent could provide a competent client with an important protection against future harm that may not be obtainable in any other way.

CLEAN

506 representing a competent client who may later become incapacitated may propose to the client
507 that the client give advanced consent to protective disclosure in the event that such incapacity
508 occurs. If appropriately limited and informed, such a consent is ethically proper.