

HEADLINE: Proposed Formal Opinion Interim No. 13-0002 (Client with Diminished Capacity)

SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 13-0002 (Client with Diminished Capacity).

Deadline: February 16, 2021

Background

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with applicable State Bar policy and procedure, the Committee shall publish proposed formal opinions for public comment (See, State Bar Board of Trustee Resolutions July 1979 and December 2004. See also, Board of Trustee Resolution November 2016).

On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 13-0002 interprets the new Rules of Professional Conduct.

Discussion/Proposal

Proposed Formal Opinion Interim No. 13-0002 considers: What are the ethical obligations of a lawyer for a client with diminished capacity?

The opinion interprets rules 1.0.1(e), 1.1, 1.2, 1.4, 1.6, and 1.8 of the Rules of Professional Conduct of the State Bar of California; Business and Professions Code section 6068(e).

The opinion digest states: 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 may not 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.

At its October 23, 2020 meeting and in accordance with their procedures, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 13-0002 for a 90-day public comment distribution.

Any fiscal/personnel impact

None

Background material

Proposed Formal Opinion Interim No. 13-0002

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

February 16, 2021

Direct comments to

Comments should be submitted using the [online Public Comment Form](#). The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
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 may not 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.

AUTHORITIES

INTERPRETED: Rules of Professional Conduct 1.0.1(e), 1.1, 1.2, 1.4, 1.6, 1.7 of the Rules of Professional Conduct of the State Bar of California.¹

Business and Professions Code section 6068(e).

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 with diminished decision-making capacity. Many American jurisdictions have sought to clarify those obligations by enacting a version of American Bar Association Model Rule 1.14. ("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 reconcile the approach of the ABA Model Rule with unique features of California

¹ Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

law, including California's statute and rule governing attorney-client confidentiality. The Supreme Court did not adopt Proposed Rule 1.14.² Nonetheless, there is a need for guidance with respect to the ethical obligations of attorneys for clients with diminished capacity under the Rules of Professional Conduct and the State Bar Act.³

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.

This opinion is based on existing California ethics law. Though other federal and state laws may regulate an attorney's relationship with a client or prospective client with diminished capacity, we do not discuss them here.⁴ Finally, the opinion does not address issues of the standard of care applicable to professional decisions concerning the representation of such a client. We assume that in each of the fact situations that we discuss, the lawyer's actions, beliefs, and judgments as described have been reached in accord with the applicable standard of care.

² 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.

³ Because the Supreme Court rejected the rule in its entirety and without explanation, it is not possible to determine whether Proposed Rule 1.14 was rejected: (1) because of its overall permissive approach; (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) because of 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 grounds for rejecting it if the rule or concept is otherwise consistent with California's existing ethics rules.

⁴ For example, Title III of the Americans with Disabilities Act ("ADA") forbids discrimination against persons with disabilities in places of public accommodation. As defined by implementing regulations, covered disabilities include mental impairments that substantially limit one or more major life activities, a record of having such impairment, or being regarded as having such an impairment. 28 C.F.R. § 36.104. Many of the conditions that can lead to diminished capacity also qualify as disabilities under the Act. Law offices are places of public accommodation under the Act. 42 U.S.C. § 12181(7)(F). Prohibited discrimination involves failure to make reasonable accommodations, that is, modifications in policies, practices and procedures, when such modifications are necessary to provide services to persons with disabilities. 42 U.S.C. § 12182(b)(2)(A)(ii). Accordingly, lawyers who represent clients with diminished capacity should consider whether the ADA and other similar laws require such accommodations for their client, in addition to any measures required by their ethical obligations, in order to comply with their obligations under such laws.

STATEMENT OF FACTS

Scenario 1

Client was injured in an automobile accident, suffering a brain injury that has resulted in a change in personality, episodes of mania, and an increase in highly risky personal behavior. Client's relatives have recently said that they plan to institute conservatorship proceedings against Client. Client consults Lawyer. With Client's consent, Lawyer involves both a diagnostician and a close friend in the process of determining Client's capacity and wishes, scheduling consultations at times when Client is not manic. Based upon that process, Lawyer reasonably believes that the evidence supports establishing a conservatorship and that doing so would protect Client from substantial risks of harm. Lawyer has also concluded that Client could improve his own decision making, and significantly reduce the likelihood of a conservatorship, if he were, with the lawyer's help, to establish his own supportive decision-making structure involving both the friend and the diagnostician. Lawyer has advised Client of these conclusions, but Client has rejected Lawyer's advice and wishes to oppose the establishment of the conservatorship. Lawyer believes that the decision is imprudent, but also reasonably believes that Client has the capacity to make the decision to oppose the conservatorship, and that the decision reflects Client's commitment to maintaining personal liberty, notwithstanding the risks involved. May Lawyer represent the client in opposing the establishment of a conservatorship?

Scenario 2

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 disinherit 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 Client lacks testamentary capacity, that, but for Client's diminished capacity, Client would not make the new testamentary dispositions, and that Client is at substantial risk of being subjected to undue influence by Client's younger companion. May Lawyer properly prepare the new estate plan?

Scenario 3

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. With Client's consent, Lawyer retains a physician as a consultant to assess Client's competence. After examining 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 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 Client from harm?

Scenario 4

Lawyer is preparing an estate plan for a competent client with substantial experience and resources and a difficult and contentious family situation. In the course of their discussions, Client discloses that a family member suffered from dementia related to Alzheimer's disease, and as a consequence was financially exploited by other family members. Client is concerned to avoid or minimize the risk of something similar happening to Client in the future. Lawyer is aware that one way to protect against that risk would be for Client to give advance consent to the lawyer's disclosure of client confidential information at a future time where Lawyer reasonably believes that Client is incapacitated, that the incapacity exposes Client to harm, and that the disclosure of the information is reasonably necessary to prevent that harm. Assuming that it is consistent with the duty of care to do so, may Lawyer ethically recommend that Client execute such a consent?

DISCUSSION AND ANALYSIS

A. Allocation of Authority and Diminished Capacity

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 [212 Cal.Rptr. 151]. 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 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. Rule 1.2, Comment [1].

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,⁵ 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).⁶ Moreover, "the required level of understanding depends entirely on the complexity of the decision being made." *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 641 [158 Cal.Rptr.3d 364].

Marital and testamentary capacity are determined by different, and lower, standards. "Marriage arises under a civil contract, but courts recognize this is a special kind of contract that does not require the same level of mental capacity of the parties as other kinds of contracts." *In re Marriage of Greenway, supra*, 217 Cal.App.4th at 641. "Similarly, the standard

⁵ 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. (Cal. Prob. Code § 811(a)(1)-(4).)

⁶ In the case of capacity to contract, a presumption affecting the burden of proof arises that a person is of unsound mind "if the person is substantially unable to manage his or her own financial resources or resist undue influence." (Cal. Civ. Code § 39(b).) See, *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 642-42 [158 Cal.Rptr.3d 364]. The interaction between the Civil Code and the Probate Code presumptions is beyond the scope of this brief informational summary.

for testamentary capacity is exceptionally low.” *Id.* at 242. Under Probate Code section 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 [126 Cal.Rptr.3d 736].

B. 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 [244 P. 343] (client unable to communicate; mind was a “blank”).⁷ Short of that situation, however, 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.⁸ For example, such a client may wish to defend against the appointment of

⁷ 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 acting pursuant to court appointment. See *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185 [245 Cal.Rptr. 840] (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.

⁸ 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

a conservator. See Probate Code section 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* (1950) 40 Wash.2d 64 67-68 [240 P.2d 564] (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 722, 726 [126 Cal.Rptr.3d 736] (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*, section 24, Comment (d) (2000). In such representations, the lawyer should, insofar as reasonably possible, seek to preserve a normal attorney-client relationship. (See, e.g., Tuft et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2019) Ch. 7-24, § 7:73.5.)

When a client has diminished capacity, the client’s ability to make legally effective decisions may be in doubt. The client’s proposed course of conduct may not be legally effective, frustrating the client’s objectives. 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. Finally, the client may sometimes lack the capacity to form an attorney-client relationship, or to give 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. Cal. State Bar Formal Opn. No. 1989-112.

1. Competence

The duty of competence calls for the lawyer to exercise the “(i) learning and skill and (ii) 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).

When a client shows signs of diminished capacity, the lawyer’s duty of competence may require the lawyer to investigate the client’s capacity.⁹ If the lawyer lacks learning and skill in

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).)

⁹ Fleischner and Schur, *Representing Clients Who Have or May Have “Diminished Capacity”: Ethics Issues* (Sept.-Oct. 2017) 2017 Clearinghouse Review 346, 352 (“as uneasy as some attorneys may be about assessing their client’s capacity, case situations...often demand it.”) Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It And What Do you Do About It* (2000) 16 J. of Am. Acad. of Matrimonial Lawyers 481, 482 (“Although lawyers seldom receive formal capacity assessment training, they make capacity judgments on a regular basis.”)

addressing issues of client's capacity, and cannot readily acquire it, the lawyer may wish to consider associating with or consulting a lawyer with more experience in doing so.¹⁰ See Rule 1.1(c). In addition, the lawyer may consider, with the client's consent, consulting medical, psychological or other professionals with an understanding of the cognitive and emotional issues involved in determining the client's capacity and how the attorney-client relationship should be adjusted to reflect them. See *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 ed. 2006) ("ACTEC Commentaries") ("In appropriate circumstances, the lawyer may seek the assistance of a qualified professional."). The lawyer may also want to consider measures to support the client's capacity to make decisions relevant to the representation. For example, the lawyer may modify how lawyer-client communications are conducted by adjusting the interview environment, communicating more slowly or in writing, spending extra time or having multiple sessions, or communicating with the client at times when the client is less fatigued, more lucid or more receptive.¹¹ Alternatively, with the client's consent, the lawyer may seek to enhance the client's communications and decision-making capacity by involving family, friends or professionals to support the client in understanding, considering and communicating decisions relating to the representation. *Restatement (Third) of the Law Governing Lawyers*, section 24, Comment (c).¹²

2. 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).

A client's diminished capacity may also impact how the lawyer complies with the duty to communicate with the client. 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, or to deliberate upon, the lawyer's advice. As a consequence, the nature of the lawyer's reasonable consultation concerning the means to accomplish the client's objectives, under rule 1.2 and rule 1.4(a)(2), or the explanation that is "reasonably necessary to permit the client to make

¹⁰ A lawyer may wish to get the client's advance consent to the association of lawyers or other professional as part of the retention agreement or otherwise. To the extent that such a consent contemplates disclosure of client confidential information, the lawyer should take account of the standards for such consents discussed later in this opinion.

¹¹ Fleischner and Schur, *supra*, note 6, at 355-56; Sabatino, *supra*, note 6, at 487-89.

¹² For extensive information on supportive decision-making see <https://www.aclu.org/other/supported-decision-making-resource-library>.

informed decisions regarding the representation” under rule 1.4(b) may be different for a client with diminished capacity. A lawyer seeking to fulfill the duty of communication may want to consider a number of the measures described in the preceding paragraph.

3. Loyalty and Independent Professional Judgment

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 [135 Cal.Rptr.2d 888] (citing *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289 [36 Cal.Rptr.2d 537]) (emphasis in original).

Consistent with the duty of 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].

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, supra*, at p. 1298 (citations and quotations omitted). In determining and acting on the client’s interest, the lawyer’s obligation to exercise independent judgment requires putting aside any conventional prejudices associated with the client’s condition. In addition, lawyers should keep in mind the statutory presumption of capacity and “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 (Third) of the Law Governing Lawyers*, section 24, Comment (c). Others may have also strong interests in the outcome of the client’s decisions. Where that is the case, 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, supra*, 109 Cal.App.4th at 1299.¹³ While the involvement of interested third persons in the client’s deliberative process may enhance the client’s decision-making capacity, lawyers must also be alert to the potential that their

¹³ 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. 109 Cal.App.4th at 1298. 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 new wills for testators whose capacity was potentially subject to attack. *Id.* at 1298-99. The express premise of the holding, then, was that the lawyer’s duty of loyalty to the *client* required the lawyer to reach a judgment about the client’s capacity to make the will.

involvement could increase the risk of harm to the client, whether through undue influence or harmful disclosure of confidential information.

At the same time, the client's diminished capacity may create 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 may be less urgent, because 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, supra*, 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*, section 24, Comments (b) and (d).

4. 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 and 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).

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., Cal. State Bar Formal Opn. No. 1989-112 at p. 2; Orange County Bar Association Formal Opn. No. 95-002 at IID-034; Los Angeles County Bar Assn. Formal Opn. No. 450 (1988); San Diego County Bar Association Ethics Opn. 1978-1.

Unless an exception to the duty of confidentiality applies, a lawyer who wishes to disclose confidential information concerning the client’s diminished capacity must obtain the client’s informed consent to do so.¹⁴ This is true even if the attorney reasonably believes that the disclosure would benefit the client and is necessary to protect the client from harm. Cal. State Bar Formal Opn. No. 1989-112; Tuft et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 201) Ch. 7-33, § 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.¹⁵

In assessing the client’s capacity to give informed consent to protective measures, the lawyer should consider that capacity to give such consent is presumed, that measures may be available to enhance the client’s capacity to give the consent, and that, in any assessment of capacity, the required level of understanding depends on the complexity of the decision being made. *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 641 [158 Cal.Rptr.3d 364]. Accordingly, less capacity should be required for consents that involve simpler or more familiar subjects or where the benefits of disclosure are clear and easily understood.¹⁶

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

¹⁴ There may also be cases where the persons that the lawyer wishes to involve in the process already know the relevant confidential information, because, for example, the person regularly provides care for and interacts with the client.

¹⁵ Bar Association of 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, also concluded that California law did not grant implied authority to disclose.

¹⁶ Among the measures that a lawyer should consider to reduce the risks associated with an otherwise beneficial disclosure are obtaining agreements to preserve the confidentiality of information from persons to whom disclosures are made and managing such communications to preserve, to the fullest extent possible, any applicable privileges. For example, experts or family members can be involved in confidential client decision-making consistent with the privilege where such persons are “present to further the interest of the client in the consultation” or 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 Evidence Code section 952; *City and County of San Francisco v. Superior Court (Hession)* 37 Cal.2d 227, 236-38 [37 Cal.2d 227] (expert); *Hoiles v. Superior Court*, 157 Cal. App. 3d 1192, 1200 [157 Cal.App.3d 1192] (family members).

violation of rule 1.6, and taking action “directly adverse” to the client, in a manner forbidden by rule 1.7(a). Cal. State Bar Formal Opn. No. 1989-112; Los Angeles County Bar Assn. Formal Opinion 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 has implied authority to disclose information “necessary to obtain an assessment of the client’s capacity” or to enlist “the client’s family or other interested persons” to aid the lawyer in assessing the client’s capacity or determining how to proceed. ABA Formal Opn. 96-404 (1996). In addition, under Model Rule 1.14, 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 proceedings 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 statute and rule bar this approach.

5. Use of Powers of Attorney and Advanced Consents

Because California law limits the implied authority of a lawyer to disclose confidential information or take other measures to protect an incapacitated client from harm, and because once incapacitated, a client may be unable to authorize such steps, competent clients who face a risk of future incapacity may wish to take steps to ensure that in the event of future diminished capacity, their lawyers will still be able to use and disclose relevant confidential information for their benefit.

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 central 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. Cal. State Bar Formal Opn. No. 1989-115 (“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* (1982) 30 Cal.3d 606 [180 Cal.Rptr. 177], 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 at 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 duties of competence and loyalty.

Though not controlling, the standards governing advance consent to a conflict of interest are also relevant. 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.* Even with full information, however, a client may not give prospective consent to a conflict that would not be consentable 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 [7 Cal.Rptr.2d 754]. 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.* (N.D. Cal. 2003) 241 F.Supp.2d 1100, 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.¹⁷

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 sufficiently well-defined circumstances where the client is incapacitated and the lawyer reasonably believes that disclosure is in the client's best interest, provided that Lawyer takes steps to ensure that the client's consent is informed within the meaning of rule 1.0.1(e).

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 advance consent for this purpose 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 will 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 will greatly increase the likelihood 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 triggering conditions are met. That interest is also served by putting the consent in writing, since without such a writing no lawyer can be confident that a subsequent finder of fact will conclude 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.

¹⁷ 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.* (2018) 6 Cal.5th 59, 86 [237 Cal.Rptr.3d 424].

C. Application of the Law to the Stated Facts

In Scenario 1, Lawyer may represent Client in opposing the establishment of a conservatorship, even though the lawyer believes that the evidence justifies the establishment of a conservatorship and that doing so would protect Client from substantial risks of harm. Client has expressed the wish to oppose the request for a conservatorship. This is a decision that the law reserves to Client, and Lawyer believes that Client has the capacity to make that decision and that the decision, though imprudent, is consistent with Client's expressed interest in personal freedom. Lawyer has satisfied the duty to exercise independent professional judgment and give candid advice by explaining the risks involved in Client's chosen course and other reasonably available alternatives that could mitigate those risks consistent with the preservation of Client's liberty. Client has rejected that advice. Any concern that Lawyer has that Client's decision may be imprudent is mitigated by the fact that the family members seeking the conservatorship can be counted upon to bring the potential harms to Client to the attention to the tribunal. *Restatement (Third) of the Law Governing Lawyers*, section 24, Comment (c).

In Scenario 2, Lawyer was initially concerned about the client's capacity to make a will. On the basis of further inquiries, conducted with Client's consent, the lawyer has reasonably concluded that Client lacks even the low level of capacity required for testamentary decisions, that, if Client were not suffering from diminished capacity, Client would not view the proposed new will as in Client's interest, and that Client is subject to a substantial risk of undue influence. We assume that Lawyer's judgment meets the applicable standard of care. At a minimum, Lawyer's duty at this point is to provide Client with candid advice concerning Lawyer's conclusions. If Lawyer believes it would assist Client in understanding that advice to have others, whether experts or family members, involved in communications between Lawyer and Client, Lawyer may involve such persons in lawyer-client communications, with Client's informed consent. Should Client decide to accept Lawyer's advice, Lawyer need not go further. Should Client decline to accept Lawyer's advice, Lawyer should decline to prepare the will. Lawyer's reasonable belief is that Client lacks the capacity to make a decision reflecting Client's interest and that Client's preferred course would actually be contrary to that interest and would expose Client to the risk of exploitation. Given that reasoned judgment, the duty of loyalty requires that Lawyer decline to prepare the new testamentary instruments.

In Scenario 3, Lawyer acted reasonably in seeking advice concerning Client's capacity. Lawyer's retained consultant has now opined that Client does not have the capacity required for the transaction that Client proposed. 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 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 Client, because California's confidentiality rules do not permit the disclosure of information about 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 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, Lawyer may be able to disclose confidential information to concerned relatives or other authorities. If not, then Lawyer may not go further.

In Scenario 4, Lawyer may ethically recommend to Client that Client give advance consent to the lawyer's disclosure of client confidential information at a future time where Lawyer reasonably believes that Client is incapacitated, that the incapacity exposes Client to harm, and that the disclosure of the information is reasonably necessary to prevent that harm. The ethical case for allowing such an advanced consent is stronger than for the advance consents approved in the decided cases. Like those consents, the consent is not open-ended: it specifies the information to be disclosed and the circumstances in which disclosure is allowed. Unlike those consents, however, which expanded the lawyer's freedom to take action *adverse* to the client, this advanced consent expands the lawyer's ability to protect the client from foreseeable risks of serious harm.¹⁸ To hold that such an advance consent could not be 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 mitigated by the fact that the client can revoke or modify the consent at any time, if competent to do so. Cf. *Restatement (Third) of the Law Governing Lawyers*, section 122, Comment (f) (consent to conflict revocable except to the extent it has been relied upon).

To ensure that the consent is informed, Lawyer's written communication and explanation of the circumstances and the material risks should identify the risk to Client of becoming incapacitated, including the risk that if incapacitated Client may be unable to recognize impending harm or authorize action to prevent it. It should also define the circumstances in which protective disclosure would be authorized, and the benefits and risks of such disclosure, including the prevention of harm and the potential exposure of sensitive confidential information about Client's mental and physical condition. Client should also be informed that Client can modify or revoke the consent at any time, so long as Client has the capacity to do so. Finally, for the reasons discussed above, the better practice would be for both Lawyer's disclosures and Client's consent to be in writing.

¹⁸ 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 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.

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

Public Comment - Proposed Opinion 13-0002

Commenting on behalf of an organization	No
Name	Anonymous
City	Three Rivers
State	California
Email address	shenaesq@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Having been an elder law attorney for many years, and a California attorney for over 30 years, I am quite aware that neither I nor most lawyers are qualified to determine whether a person has diminished capacity. An advance consent is a terrible idea (my capacity is fine, but I don't remember everything I've ever signed, and strongly believe the likelihood that a client would forget any such consent is high).</p> <p>The current Rule of Professional Conduct about not revealing confidential client information is easy to follow and clear. Everything in the proposed change impairs, or is likely to impair attorney/client relationships, thus worsening things, rather than improving them.</p>

February 15, 2021

Committee on Professional Responsibility and Conduct (COPRAC)
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion Interim No. 13-0002 (Client with Diminished Capacity)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Formal Opinion Interim 13-0002 and appreciate the opportunity to comment on the proposed opinion.

We support COPRAC's overall conclusions and applaud its efforts to address the issues presented in the opinion. One overall comment that we have, though, is that, at 17 pages of relatively dense material, the opinion runs the risk of being less useful to practitioners in need of guidance on these important subjects. We have found that often times, the longer an opinion is, the less likely it is to be read thoroughly or in its entirety.

COPRAC may want to consider shortening the opinion where appropriate. One specific suggestion that might assist in this effort is to omit some of the information including the legislative history on page 1, including footnotes 2 and 3, and the background regarding the Supreme Court not adopting a version of Rule 1.14, which is background information that is not necessary to the analysis. In addition, the discussion of implied consent under ABA Model Rule 1.6 on page 12 is far more than is needed, given that California law does not have the concept of implied consent.

We recommend that COPRAC reconsider its reliance on ACTEC and the Restatement. Both of these sources rely on the existence of ABA Model Rule 1.14, and therefore may have less relevance in California.

We suggest that COPRAC make the opinion more concrete. There are several places that refer to what the attorney "could do" or "should do" or, even worse, "should consider doing."

The proposed opinion states that it is limited to discussion of California ethics law, and then cites as an example of what is not discussed the Americans with Disabilities Act. However, this ignores the fact that the ADA is an anti-discrimination law that is addressed by rule 8.4.1, part of California ethics law. The entire footnote 4 is much longer than is needed to make its point, but some reference should be made to rule 8.4.1.

We believe that the ability of the attorney to obtain a power of attorney should not be considered. It creates a possible conflict of interest between the attorney and client, and could too easily be misused.

Several places in the opinion suggest, either with a power of attorney or an advance consent, that disclosure could be made to a family member. Many of us believe this is a bad idea, particularly in a trusts and estates practice where the matter can remain open for years or even decades. Others recognize that a family member may be nominated by the client as a fiduciary and that in many cases, such an individual would be the most likely person to be able to take action to protect the individual from further harm, and believe that the decision should be left to the attorney and client. Those who are concerned about disclosure to a family member are concerned that the lawyer has no way of knowing whether a particular family member is likely to be helpful to the client or try to take advantage. Additionally, a lawyer cannot predict at the time the advance consent is given whether a particular family member will be helpful to the client or try to take advantage of the client in the future, as family dynamics and circumstances could change, often without the lawyer's knowledge. Disclosure, if permitted, should be to a third party without a personal interest in the matter.

The most important part of the opinion is the fourth hypothetical addressing advanced consent to the disclosure of information in the event of potential harm to a client with diminished capacity. This part of the opinion could be better developed and may merit a separate opinion. While we do agree that advance informed consent could be given under some circumstances, this part of the opinion does not consider the topic fully.

The authority cited from the advance conflict waiver opinions is not directly applicable, so that practitioners could not safely rely on the conclusions stated. Some members of our committee questioned whether this information should be provided at all. COPRAC should consider citing to Rule 1.2, Comment [2] which provides that a client may authorize the lawyer to take specific action on the client's behalf without further consultation and that a lawyer may rely on such advance authorization, absent a material change in circumstances. This provision may provide a more direct basis for the advance consent discussed in the opinion.

We recommend that COPRAC provide more detailed guidance on how informed consent could be obtained, including, what type of disclosure is required to obtain such consent.

In the discussion of scenario 4 we further recommend that COPRAC consider providing guidance on the scope of disclosure. Perhaps an analogy could be drawn to Business and Professions Code 6068(e) disclosure in cases of risk of substantial bodily harm. Finally, we would like COPRAC to further consider when such informed consent may not be enforceable given a change in circumstances.

Thank you for your attention and opportunity to comment.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil J. Wertlieb". The signature is fluid and cursive, with the first name "Neil" being more prominent.

Neil J Wertlieb
Co-Chair
California Lawyers Association Ethics
Committee

February 16, 2021

The State Bar of California
Standing Committee on Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105
Submitted Via Online Public Comment Form

**Re: Comments from Elder and Disability Rights Advocates
Proposed Formal Opinion Interim No. 13-0002: “Client with
Diminished Capacity”**

Dear Members of the Committee:

Thank you for the opportunity to comment on Proposed Formal Interim Opinion No. 13-0002 (“the Proposed Opinion”). This letter is submitted by five California organizations that have substantial experience in legal representation of elders and individuals with disabilities throughout the state: California Advocates for Nursing Home Reform, Disability Rights California, Disability Rights Education and Defense Fund, Public Interest Law Project, and Law Foundation of Silicon Valley.¹

This coalition of elder and disability rights advocates thanks the Committee for the time and attention it has taken to draft a thoughtful opinion that underscores the ethical challenges that may arise when attorneys represent or seek to represent clients with diminished capacity. We especially appreciate the Proposed Opinion’s emphasis that “[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.” Proposed Opinion at 1.

¹ Our agencies have a long history of advocacy on the subject of attorney representation of clients with diminished capacity. Starting in 2009, we have provided written comments on the State Bar’s various attempts to adopt rules governing this topic.

In addition, we thank the Committee for including a section that outlines the legal standards for determining capacity in various contexts. Proposed Opinion at 5-6. We believe that it is important for attorneys to understand that a client's capacity to decide depends upon the decision at issue. As discussed below, we encourage the Committee to include clearer explanations of the relevant capacity standards governing each of the hypothetical situations set forth in the Proposed Opinion's scenarios.

Though we believe that much of the Proposed Opinion's analysis is correct, we have serious concerns about the ethicality and legality of the Proposed Opinion's framework for allowing a client to give an attorney advance consent to disclose confidential client information at a future time. We also believe that the Committee can make amendments to provide better support for the conclusions outlined for Scenarios 1-3, as well as provide more robust guidance for effective, non-discriminatory representation of clients with disabilities.

We believe that attorneys owe the duties of loyalty and confidentiality to all clients, regardless of our perception of a client's capacity. We are deeply concerned that the advance consent to disclose confidential information contemplated by the Proposed Opinion inadequately protects clients' interests.

I. The Proposed Opinion should include a more robust discussion of an attorney's non-discrimination obligations.

We urge the Committee to recognize that paternalism has been an extremely prominent part of disability discrimination throughout history.² The risk of

² See, e.g. the "Findings and Purposes" section of the federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(a)(5) (The Congress finds that "individuals with disabilities continually encounter various forms of discrimination, including ... overprotective rules and policies). The ADA has been adopted into California law as a floor—but not a ceiling—of protection. See, e.g., Cal. Gov. Code 11135(b).

paternalism is heightened in asymmetrical relationships, including attorney-client relationships, when services are provided by professionals who have undergone extensive training and licensing. In such circumstances, professionals must be particularly careful to ensure that they are not relying on stereotypes or lack of experience with disability to reach paternalistic conclusions.

The Proposed Opinion uses afterthought footnotes (4 and 12) to cover the critical concepts of non-discrimination, reasonable accommodations, and supported decision-making. These concepts should be front and center to any opinion about representing clients with impaired cognitive capacity. The Proposed Opinion needs more robust examples and analysis of reasonable accommodations, including supported decision-making, as superior and legally-required alternatives to revealing a client's confidential information over the client's objection. Scenarios 1-4 and the Proposed Opinion's discussion of them miss opportunities to discuss the particulars of how reasonable accommodations might work in these contexts, as well as strategies and resources to help attorneys most effectively advise and represent their clients in challenging situations.

In some places, the Proposed Opinion also implies that reasonable accommodations are optional best practices as opposed to legal requirements. The Proposed Opinion suggests "the lawyer *may* modify how lawyer-client communications are conducted by adjusting the interview environment, communicating more slowly or in writing, spending extra time or having multiple sessions, or communicating with the client at times with the client is less fatigued, more lucid or more receptive." Proposed Opinion at 8 (emphasis added). These are excellent examples of reasonable accommodations and are, indeed, best practices in many situations. However, the Opinion should also emphasize that attorneys generally have a legal and ethical *duty* to not to discriminate against clients with disabilities and that providing effective communication and reasonable accommodations are critical components of fulfilling that duty. See California Rules of Professional Conduct, 8.14 (prohibited discrimination in the legal profession); 28 C.F.R. §

36.302 (reasonable accommodations in places of public accommodation); Civ. Code, §§ 51, 54.1 (prohibited discrimination by businesses/places of public accommodation). To provide better guidance to attorneys representing clients with disabilities, including those clients who may have diminished capacity, the opinion should provide a robust explanation and examples of how reasonable accommodations work in practice.

II. The Committee should strengthen Scenarios 1, 2, and 3 by adding additional analysis and facts.

The facts and conclusions presented in Scenarios 1, 2, and 3 of the Proposed Opinion accurately reflect some of the ethical dilemmas presented during legal representation of clients who may have diminished capacity. As advocates for elders and people with disabilities, we are steadfast proponents of a client's right to exercise autonomous decision-making. A cornerstone of our advocacy principles is that the duty of loyalty requires an attorney to carry out a client's *expressed* interests, even if the attorney believes that the client's preferred course of action may not be in the client's *best* interests. If an attorney reasonably believes that advocating for a client's expressed interests may result in an illegal or harmful result, the attorney may decline to follow the client's wishes and cease representation. In our experience, this is one of the most difficult decisions that we have to make as attorneys.

We encourage the Committee to strengthen the Proposed Opinion's discussion of Scenarios 1-3 by including analysis of the relevant legal standards for client capacity to make the decisions described in each. The Scenarios would provide more helpful guidance to attorneys if they contain application of the facts to the relevant legal standards for capacity.

A. Scenario 1

First, we appreciate how Scenario 1 in the Proposed Opinion recognizes the ability of an attorney to represent the expressed interests of a client who opposes the establishment of a conservatorship, even if the attorney has

concerns that imposition of a conservatorship may actually be in the client's best interests. This Scenario illustrates the important and unique role of an attorney representing a client in an adversarial proceeding that has the potential to take away some or all of their decision-making autonomy. The Committee should strengthen this Scenario by affirmatively stating that it is important for people who are at risk of having their legal autonomy taken away by a court to have access to an attorney who will represent their expressed interests in that proceeding.

Next, we appreciate how the attorney in Scenario 1 takes reasonable steps to determine that the client has capacity to make decisions about the direction of representation. Specifically, the attorney in Scenario 1 accommodates the client by scheduling consultations during times when the client is less likely to be experiencing symptoms that may cloud their judgment. This is a good example of how lawyers can provide reasonable accommodations to clients.

In addition, the attorney obtains the client's consent to involve both a diagnostician and a close friend in the capacity determination. Though we agree that these are reasonable steps for an attorney to take if the attorney questions a client's competence, the Committee should strengthen this scenario by adding more information about the minimum qualifications for a diagnostician who serves this purpose. Scenario 1 would also be improved by the addition of a discussion of the fallibility of competency determinations, even those made by qualified professionals.³ In our extensive experience, it is common for different professionals to reach different conclusions about a client's mental state. Therefore, the opinion of a professional should not be the controlling factor in determining whether a client has competence to make decisions regarding representation.

By taking these steps, the attorney is both able to make a well-reasoned determination regarding the client's capacity to direct their own representation and to advise the client most effectively regarding the likely strengths and

³ See discussion at Section III.A, *infra*.

weaknesses of the client's chosen course of action. The attorney is able to represent the client in pursuing the client's expressed interest to oppose the conservatorship even though the attorney believes that a conservatorship is likely in the client's best interest.

B. Scenario 2

Next, we also believe that Scenario 2 reaches the correct conclusion that the duty of loyalty requires the attorney to decline to prepare the estate plan if, based on an application of the legal standard for testamentary capacity to the facts, they believe the client lacks testamentary capacity to make the proposed changes. However, the Committee can strengthen this scenario in the following ways. First, it can reference the very low standard for testamentary capacity, which the Proposed Opinion describes on pages five and six. For example, short-term memory loss alone would not meet the standard.

Next, the Committee can add examples of the "signs of diminished capacity" noticed by the attorney, explain whether the attorney evaluated whether the diminished capacity he observed rises to the statutory level of lack of competence related to testamentary capacity, other information that was available to the attorney, as well as examples of "further reasonable inquiries" that an attorney could make, with the client's consent, to determine whether the client had testamentary capacity to change the estate plan. Examples of these types of facts are critical to show that the attorney is not making unfounded assumptions based on value judgments about the client having a new, younger companion.

In addition, it would be helpful to know if the attorney in Scenario 2 is making this capacity determination while already retained by the client for estate planning purposes, or if the attorney is making this determination before taking on a new representation. The ethical issues of terminating representation versus declining representation are different and clarity would make the scenario more useful.

C. Scenario 3

We also thank the Committee for including Scenario 3 in the Proposed Opinion, as it demonstrates a challenging situation that we have all encountered—the inability to take protective action by reporting harm or suspected abuse to a third party without obtaining consent from the client without revealing confidential client information. In our experience, the duties of confidentiality and loyalty are of utmost importance in situations like these, and attorneys—even those with the best intentions—should not substitute their judgment for that of their clients when it comes to revealing confidential client information obtained in the course of representation. Further, reporting potential abuse to third parties, such as law enforcement, could expose the client to more serious harm. This is especially true in situations involving elder or domestic abuse, where the alleged abuser may retaliate against the client. The Proposed Opinion would benefit from a more robust discussion of strategies and resources for assisting clients in these types of challenging situations without compromising the client’s safety or autonomy.

As with Scenario 2, the Committee should strengthen the hypothetical presented in Scenario 3 by adding additional facts, such as examples of factors that led the attorney to notice “a deterioration in Client’s apparent competence.” In addition, we encourage the Committee to include information about the legal standard for competency to make a loan, and more specificity about the type of physician appropriate to assess a client’s capacity to make decisions to direct legal representation.

III. The Proposed Opinion’s analysis of Scenario 4 is inconsistent with both the attorney’s duty of confidentiality and the client’s right to exercise autonomous decision-making absent a judicial determination of incapacity.

The conclusion reached by Scenario 4—that an attorney may disclose confidential information if a client has provided an earlier advance consent to do so—raises serious problems that cannot be reconciled under the advance

consent procedures outlined in the Proposed Opinion. The Proposed Opinion assumes that a “reasonable” attorney will act according to the appropriate standard of care when determining that a client lacks capacity such that disclosure of confidential information is necessary to prevent harm. However, it ignores the principle that a person cannot be forced to give up the right to control disclosure of confidential information without a judicial finding of incompetency or other court order compelling the disclosure. In addition, Scenario 4 does not contemplate an attorney offering the client the opportunity to revoke the advance consent prior to the disclosure of confidential information. For these reasons, elaborated upon below, our coalition has grave concerns about the advance consents contemplated by the Proposed Opinion.

A. Clients perceived by their lawyers to have “diminished capacity” retain their rights to control disclosure of their confidential information unless a court has adjudicated that they lack that capacity.

Advance consents by clients in anticipation of a significant cognitive impairment in the future—such as advance healthcare directives—are typically considered smart planning. California law and policy supports such advance consent regarding health care and management of one’s finances and estate. See Probate Code § 4600 *et seq.* (advance health care directives); Probate Code § 4100 *et seq.* (springing powers of attorney). In these documents, the principal can consent to a range of activities performed on their behalf by an agent and can order that specific activities be performed under certain conditions.

While California law recognizes and encourages the use of advance consents, such consents are nonetheless subject to amendment or revocation by the principal at any time. In other words, the principal retains ultimate control over the actions of an agent on their behalf. Additionally, California law states that all adults are legally presumed to have capacity to

make decisions. See Probate Code § 810. Principals can revoke their advance consents at any time. See Probate Code §§ 4151, 4695.

The only legal process for stripping an adult's rights to make decisions, to empower or override agents, or to give or revoke advance consents is by proving in court that the adult meets the legal criteria for "incompetency." See Probate Code §§ 1800 *et seq.* (setting forth judicial determination that conservatorship is necessary to appoint a conservator to make financial, medical, and/or placement decisions for an incapacitated person); and 3200 *et seq.* (setting forth a judicial determination of incapacity as the only means by which medical decision-making power may be taken away from an adult who is not subject to conservatorship). Neither doctors nor social workers nor family members nor attorneys may legally determine whether a person lacks capacity such that they can infringe on the person's right to direct their own life. Only judges, after due process of law has been provided, may do so.

Requiring an attorney to follow a strict process before impairing a person's rights is not only statutorily and constitutionally required, it is ethically necessary. Impairing a person's rights, such as revealing their confidential information without their consent, should only be performed, if at all, when there is an exceptionally high degree of confidence that the incapacity determination is just and correct. In the context of an attorney's decision to reveal their client's confidential information based on the attorney's assessment that their client lacks capacity, such process would include, at a minimum, providing the client with notice of the planned disclosure and an opportunity for the client to object and withdraw their consent. But such process is absent from the Proposed Opinion. Endorsing the authority of a lone attorney, who makes an inexpert determination of capacity and potential "harm," to impair a client's rights without any notice or opportunity to object leaves too much room for attorneys to substitute their own judgement to override the express wishes of their clients.

Most attorneys are poorly suited to assess a client's capacity. Nothing in American legal education prepares an attorney to make such a determination.

Further, in the field of capacity and capacity determinations, a central tenet is the continued unreliability of capacity assessments. Even physicians experienced in assessing capacity demonstrate significant variation in their evaluation of individual patients that often renders their capacity judgments quite unreliable. See Marson, Daniel C. et. al., “Consistency of Physician Judgments of Capacity to Consent in Mild Alzheimer’s Disease,” JOURNAL OF THE AMERICAN GERIATRIC SOCIETY, Vol. 45 (April 1997), at 453-57. In the Marson study, physicians had only 56% agreement regarding the capacity of patients to make medical decisions. The study’s authors deemed the results “alarming,” substantiating “a long-standing clinical concern, namely, that physician competency assessment is a subjective, inconsistent, and arguably idiosyncratic process.” See *id.* at 455-56. Further, the attorney’s determination that the client now lacks capacity is likely to be influenced by the attorney’s desire to protect the client from harm; if the client is acting in a way that the attorney believes is against the client’s best interest, then the attorney may be more likely to attribute those actions to a lack of capacity so that the attorney can reveal confidential information in order to protect the client from the client’s own inadvisable choices.

If physicians trained and experienced in assessing cognitive capacity produce largely unreliable capacity assessments, we are certain that assessments by attorneys will be entirely untrustworthy. In fact, the central focus of the conservatorship proceedings, and many estate contests, is competing expert assessments of competences. Having such untrustworthy assessments used as a central justification for disregarding the most fundamental tenet of the attorney-client relationship is not supported by law.

B. The Proposed Opinion contravenes the law by failing to require the attorney to give the client with a chance to object before their confidential information is revealed.

The Proposed Opinion permits attorneys, based on their own unreliable determinations of capacity, to use an advance consent that may be decades old and completely forgotten by the client, to:

- overrule their client's objections to the disclosure of confidential information; or
- surreptitiously reveal confidential information and fail to give their client an opportunity to object.

These troubling outcomes of the Proposed Opinion are enabled by its fundamental flaw: it does not require the attorney to tell the client, in advance, the attorney's intention to reveal confidential information and give the client the opportunity to revoke their advance consent.

The issue of people "with capacity" writing advance directions to cover future decisions when they have "lost capacity" creates complicated ethical concerns. In the contexts of healthcare decisions and decisions regarding one's finances and placement, California law is clear that, until a person has been *judicially determined* to have lost capacity, they retain the ability to modify prior orders or overrule their agents. This principle is explicitly reflected in the following state statutory mandates:

- Probate Code § 810 (capacity to make decisions is presumed);
- Probate Code §§ 2355(a) (only if a conservatee has been adjudicated to lack the capacity to make healthcare decisions, the conservator has the exclusive authority to make health care decisions for the conservatee);
- Probate Code § 2356(a) (due process is required for a judicially-determined conservatee to be placed in a mental health treatment facility on an involuntary basis);
- Probate Code § 3200 *et seq.* (establishes the necessity of judicial determinations of capacity to make health care decisions for adults without conservators);
- Probate Code § 4150 (a principal may modify a power of attorney);
- Probate Code § 4151 (a principal may revoke a power of attorney);
- Probate Code § 4153(a)(2) (the authority of an attorney-in-fact under a power of attorney may be revoked when the principal informs them that

their authority is revoked, or when and under what circumstances it is revoked);

- Probate Code § 4689 (an agent under a power of attorney for healthcare may not make a healthcare decision if the principal objects to the decision); and
- Probate Code § 4695 (patients who have not been adjudicated incapacitated may revoke their advance healthcare directives).

Therefore, when a client who retains the legal presumption of capacity (i.e., incapacity has not been adjudicated), that client has the right—and should be afforded the opportunity—to revoke their prior consent to the disclosure of that confidential information. That right cannot be exercised unless the attorney notifies the client of their intent to disclose confidential information pursuant to the terms of the advance consent.

Although the Proposed Rule acknowledges that “the client can revoke or modify the consent at any time, if competent to do so,” it fails to require attorneys to notify their clients immediately before their confidential information is going to be revealed, thus depriving the client of the opportunity to make that modification or revocation. Proposed Opinion at 16. Even more worrisome, since the attorney has determined the client has “lost capacity,” the Proposed Opinion implies without analysis or discussion that the attorney may ignore the client’s explicit revocation of advance consent based on the attorney’s conclusion that the client no longer has capacity. If the attorney has determined that the client lacks capacity to give consent to protective action, the attorney also likely assumes that the client lacks capacity to revoke the advance consent. Using an untrained attorney’s unaudited opinion of a client’s capacity to impair the client’s right to protect their confidential information is an impermissible revocation of the client’s rights, including their constitutional right to autonomy privacy.

The Committee should provide more guidance for disclosing a client’s confidential information using an advance written waiver. To this end, the

Committee should make clear that such a disclosure is legal and ethical in only two scenarios:

- When the client is given notice of the attorney's intention to invoke an advance waiver, and the client is given reasonable opportunity to revoke it. Such a revocation would be definitive unless a court has adjudicated that the client lacks capacity to make decisions about the confidentiality of their attorney client communication; or
- When a client lacks any ability to communicate consent or objection to an attorney's intention to invoke an advance waiver (e.g., when the client has lost the ability to communicate as the result of a stroke).

Without these important changes, a client's right to revoke an advance waiver is largely meaningless. Few clients, after having given advance consent, would ever consider the matter again or contemplate a revocation unless they learned that their agent was planning to imminently use the advance consent. Failing to require attorneys to notify their clients before their confidential information will be revealed and giving clients an opportunity to revoke their consent is deceitful and will erode clients' trust in attorneys and damage the practice of law in California.

IV. Beyond the ideas presented above, the Committee can further improve the Proposed Opinion.

As outlined below, we believe that the Committee can improve the Proposed Opinion by providing more clarity about key terms and the structure of an "advance consent" document.

First, the Proposed Opinion suffers from a lack of definitions of key terms that will likely mean different things to different attorneys. For example, the Proposed Opinion does not define foundational terms such as "harm" and "capacity." Defining terms is essential to make the Opinion's guidance meaningful. In the follow-up to the 1997 Marson study cited above,

researchers found that the consistency of judgment among physicians in assessing cognitive capacity improved when they were given more detailed definitions of capacity. See Marson, Daniel C. et. al., “Consistency of Physicians' Legal Standard and Personal Judgments of Competency in Patients with Alzheimer's Disease,” JOURNAL OF THE AMERICAN GERIATRIC SOCIETY, Vol. 48 (August 2000) at 911-18.

Second, the Proposed Opinion would be strengthened by a recommendation or requirement that the advance waiver of confidentiality be in a writing separate from the retainer agreement, so as to inspire a closer examination of its terms by clients. Proposed Rule 1.14 required attorneys to put advance consents to disclose confidential information in separate writings. See Proposed Rule 1.14(d), available at: https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.14-all.pdf.

Relatedly, the Committee could strengthen the Proposed Opinion by adding a discussion of potential power imbalance between attorneys and clients, and the potential for abuse if attorneys—even well-meaning ones—use advance consents to disclose confidential information as a condition of representation. Clients should retain the power to decide whether or not to have an advance consent as a term of legal representation by an attorney.

Lastly, the Proposed Opinion would benefit from a recommendation that an attorney can present the client with alternatives to advance consent. Such alternatives include a supported decision-making plan or creation of a springing power of attorney to designate an agent to make decisions in the future.

V. Conclusion

This coalition of elder and disability rights advocates understands that some attorneys have been clamoring for years for State Bar guidance on the ethical issues presented by representation of clients with diminished capacity,

particularly regarding the ability to disclose confidential client information in order to prevent harm to the client. Though the Committee can strengthen Scenarios 1-3 by adding additional facts, we believe that they do reach the right conclusions and provide appropriate guidance to attorneys. While we understand first-hand how difficult these situations can be, all of us have experience addressing such situations and firmly believe that loyalty and confidentiality have to take priority.

As stated above, if the Committee decides to proceed with adoption of this Proposed Opinion, it should make changes first to ensure that the final Opinion both accurately reflects attorneys' ethical obligations and assists attorneys in providing competent, nondiscriminatory representation to clients who have mental disabilities or cognitive impairments. With respect to advance consent for the disclosure of confidential client information, the Proposed Opinion must require the attorney to give the client notice of their intention to reveal the confidential information and an opportunity for the client to object and revoke the advance consent. If the client has not been adjudicated to lack the capacity to control their attorney's disclosure of confidential information, the attorney must abide by any objection as a repudiation of any prior waiver.

We appreciate the care that the Committee has taken in drafting this Proposed Opinion, as well as its consideration of these comments. We would be happy to discuss these comments and answer any questions.

Sincerely,

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Public Comment - Proposed Opinion 13-0002

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From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am often appointed in Mental Health to assist a person where the PD has a conflict and visit the client in a psych war. As the atty I do what the client advises me is to be done even if not in my opinion in the best interest of the client. So I advocate for the client.</p> <p>gmay be required to refuse to assist in effectuating theed.</p> <p>I also have long term estate planning clients that over the years are showing signs of cognitive impairment client's expressed wishes that do not seem in their immediate or future best interest and then later retract the desire or change it around.</p> <p>i want the rule to give more information and substance to : may be required to refuse to assist in effectuating the client's expressed wishes.</p> <p>What is meant by required to refuse. Any guidelines? I read the 4 scenarios.</p> <p>I would support if more examples or explanation.</p>



Los Angeles County Bar Association

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February 12, 2021

Dena M. Roche
Chair, Standing Committee on
Professional Responsibility and Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Request for Public Comment on Proposed Formal Opinion
Interim No. 13-0002

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (the "Committee") appreciates the opportunity to submit the following comments on proposed Formal Opinion Interim No. 13-0002 (duty to client with diminished capacity).

We acknowledge COPRAC's efforts on this complex topic, and the proposed interim opinion is certainly the product of extensive research and analysis. While we agree with much of the proposed opinion, we do have the following comments and suggestions:

General Comments: This is a lengthy opinion on a difficult subject for which California, the Supreme Court having rejected proposed rule 1.14, does not have a specific rule. The Committee recognizes this necessitates some analysis of statutes, case law and other potentially applicable rules. However, at seventeen (17) pages, with four (4) distinct scenarios, the opinion is overlong and should be pared down to focus on essential analysis. Substantial portions of the opinion offer what may be best characterized as practice tips or guidance on the potential means to accomplish particular tasks that may be relevant to the representation of a client with diminished capacity, but do not focus on the particular fact patterns. The opinion does not get to the substantive analysis of the scenarios until page 15. This detracts from the opinion and may dissuade readers from getting all the way through.

There are many discussions of case law and points that could be done with greater brevity. We offer just a few examples. The discussion of ABA Model Rule 1.6 and California law differences on the first full paragraph of page 12 could be reduced to a couple of sentences. The key point here is the last sentence of that paragraph. We urge you to remove the analysis of the ABA rule; that Rule differs materially from California standards of lawyer conduct, and including that discussion risks misleading California lawyers. Similarly, the discussion of Maxwell in the second paragraph of page 13 is long, not needed in such detail. Sometimes the mere citation of a case and the point to be made is sufficient. The conclusion in the last sentence of the paragraph could be made with far less discussion. Generally, the discussion of advance consents at pp. 13-14 could be significantly reduced. Where questions of the adequacy of a particular advanced consent are not the focus of the opinion, it need not address the case law in this detail.

Generally, the footnotes are lengthy and, in some instances, too detailed. Perhaps consideration should be given to brevity to reduce length.

Particular Comments:

Digest:

We express concern that the digest is internally inconsistent. In the first sentence it poses that the issue is the client's capacity to make decisions. Later in the digest it refers to the lack of capacity to recognize or prevent harm, which does not necessarily involve the making of a decision. The digest should clarify what type of capacity is at issue, e.g., the ability to make an informed decision and to provide the lawyer with instructions concerning implementing decisions. If the capacity issue is one of being unable to recognize or prevent harm, that should perhaps be separately addressed and not mixed with decision-making capacity in the digest.

In line 5, the digest also poses an issue of the lawyer's reasonable belief regarding the client's lack of capacity, which the Committee believes is not the appropriate standard here because it is subjective. The lawyer must not only have the belief, but the circumstances leading to that belief must be such that it is reasonable. Considering Rule 1.0.1(j), the standard for reasonable belief is an objective one. The Digest should not omit this important distinction.

Page 2: In the partial paragraph at the top of page 2, the word "Nonetheless" should read "Therefore".

In the second paragraph, why is the discussion limited to "privately retained" lawyers? It should apply to all lawyers in this situation.

The statement that "we do not discuss" in the second sentence of the third paragraph is not quite accurate. They are discussed in some detail in footnote 4. If that detail is retained, a better phrase would be that "we do not substantively address..."

Scenario 1: In the fourth line, the sentence would be improved with a subject matter of the consultation, i.e., about the subject of opposing the conservatorship.

Scenario 3: In the analysis of this scenario, at page 16, the Committee questions the suggestion about being able to get past nephew to speak with Client, and especially so where Client is incapacitated, as determined by the consultant. This is suggesting a potential course of action to evade a lawful agent of the client. It seems to assume that the power of attorney was wrongfully obtained or is invalid. The conclusions in Scenario 3 in this regard are dangerous, and perhaps the conclusion should be that in these circumstances, if Lawyer is not willing to follow direction from the attorney-in-fact, he or she should withdraw.

Page 7: The last sentence on page 7 suggests that the lawyer may be required to investigate the client's capacity. Doing so depends very much on the circumstances of the representation, because the lawyer unilaterally undertaking such an investigation could be adverse to the wishes and the interests of the client. The Committee believes that if the lawyer merely takes steps to investigate based upon observation of signs of diminished capacity, that may violate the duty of loyalty and the duty to communicate with the client about a substantial development. The opinion should discuss the limited circumstances in which such an investigation would be warranted, such as where establishing the competence of the client is part of the purpose for which the lawyer was retained, or where it is necessary to the validity of the transaction the lawyer was retained to accomplish. In other circumstances it might be against the interests of the client without informed consent. There is a material difference between a lawyer being sensitive to signs of diminished capacity and addressing that topic with the client and the lawyer making a unilateral decision to scout around for evidence; the difference goes to loyalty and also to the client's responsibility for payment of the lawyer's fees and expenses.

Footnote 10: In the first sentence, the word "seek" would be better here than "get".

We note that footnote 10 is purely a practice tip, not essential to the opinion or its conclusions. The same is true of the comment at the top of page 9, and in footnote 16, just as a few examples. There are many of these practice tips about what a lawyer might consider, and they significantly lengthen the opinion without answering ethical questions.

Scenario 4, Advance Consents (Digest and pp. 12-14, 16):

The last two sentences of the digest focus on an advanced consent for protective disclosure of confidential information. This is an important factor in Scenario 4. The opinion, however, does not address that an advanced consent provided by a client years ago might be stale or that any advance consent remains effective only while the facts and the lawyer's understanding of the facts remain unchanged. Case law

demonstrates that generic disclosures made long ago may no longer be adequate. The subject should at least be addressed as part of the element of informed consent.

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Respectfully submitted,



Elizabeth L. Bradley,
Chair, Professional Responsibility and Ethics Committee

Public Comment - Proposed Opinion 13-0002

Commenting on behalf of an organization	No
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From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

1. 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.

I completely agree with this part of opinion. I had a case of a mentally incapacitated adult male. If I talked to him during a friendly conversation, he sounded completely lucid. However my client had lost his executive functioning ability (higher reasoning). He claimed his representative payee, who had been taking care of his finances, was overcharging him. I explained to my client why the costs of his assisted living facility were so high: it was because the fees included meals, house cleaning and social services. Yet he could not seem to fathom why the monthly assisted living facility fees should be any more than regular apartment rent of a bygone era of some 20 years prior. And he wanted to rid himself of his representative payee at the urging of a recent "friend", who most likely intended to relieve my client of his substantial monthly income. Because my client lacked the capacity to understand the danger he was putting himself in by removing the representative payee and instead handling his own finances, I refused to help him do what he was asking me to help him with. I later learned my client would rinse out his adult diapers and hang them on his lamps to "save money", with an awful smell emanating from his room.

2. When the client's diminished capacity exposes the client to harm that the client is unable to recognize or prevent, the lawyer may not take protective action involving disclosure or use of the client's confidential information without the client's informed consent.

I don't agree with this part of the opinion. Let's take the above scenario. Suppose I discover that my client plans to revoke the power of his current representative payee in favor of making his "friend" his new representative payee. (Even though he doesn't

have executive functioning, the bank is not necessarily going to know he lacks capacity. Remember, in day to day conversation he sounds perfectly normal.) According to the proposed opinion, all I can do is advise my client not to do anything so foolish and the reasons why. If my client is determined to make his friend his representative payee anyway, I could not contact his bank or Adult Protective Services to try and put a stop to what I know is going to be a financially devastating decision. I have to stand by and let it happen. In some states, lawyers are mandated reporters of elder abuse, including financial abuse. Thus I believe the proposed opinion should be modified as follows: When the client's diminished capacity exposes the client to harm that the client is unable to recognize or prevent, the lawyer may not take protective action involving disclosure or use of the client's confidential information without the client's informed consent, unless there is a very real possibility of substantial elder abuse, including financial elder abuse.

Public Comment - Proposed Opinion 13-0002

Commenting on behalf of an organization	No
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From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I don't like that approach. It suggests that the lawyer has to make the initial decision about whether or not to do it, but if he or she decides not to do it because of incapacity he or she just leaves the client hanging. I think it's time to recognize the majority view, and the reasonable expectation of most clients, that if they come to the lawyer when disabled the lawyer will take steps to help them, not just say they can't help and bail out. While prior authorization in retainer agreement may help some prospectively, that doesn't solve current problems or problems with future attorneys.

I am not a member of the California Bar, and this call for public comment recently came to my attention through a nationwide continuing legal education resource.

I am submitting the following general comments and specific observations regarding Scenarios 1 and 4 from the perspective of someone who (1) is a member of the Bar in another state, (2) has assisted with Social Security disability matters in a third state, and (3) has worked or volunteered part-time in behavioral health and social services roles at different times over the last seven years. None of the non-legal roles have been subject to professional licensing requirements, so my comments should not be taken as the perspectives of a licensed healthcare provider.

General comments: I agree with the Committee’s overall conclusion that, insofar as reasonably possible, a normal attorney-client relationship should be preserved in cases involving questions of diminished capacity.

It is well known that clients who interface with the behavioral health system can experience reduced autonomy. This may include attempts by various parties to intervene in their decision making and override their independent preferences, believing that this is for their good. In many cases these attempts are misguided and cause harm.

It may be beneficial that our profession avoid making similar mistakes, and that we focus on providing a reliable oasis of normalcy and control for the individuals employing our services. In some cases the sense of having someone fully “on their side” and respecting their wishes could even have an incidental, positive impact on our clients’ mental health.

Scenario 1: The first scenario contemplates a lawyer consulted to help a client oppose a conservatorship, which the lawyer believes would be in the client’s best interest. In this case the lawyer reasonably believes that the client has decision making capacity, but feels that the client is asking to pursue an “imprudent” course of action.

The Committee’s conclusion is a welcome one for me as a practitioner—and particularly as someone with parallel training in behavioral health, which could easily lend itself to a blurring of the lines demarcating my role in my clients’ lives.

Generally speaking, a client hires a lawyer to assist in the pursuit of their interests, as expressed autonomously by the client.

Calling on the lawyer to further evaluate the “prudence” of those expressed interests can put an unfair burden on the lawyer, as most lawyers are not experts in behavioral health and equipped to make that determination.

It also denies the client autonomy, if their independent decisions can be overridden by their attorney—perhaps all the more unfairly, if the attorney’s own biases or lack of behavioral health expertise lead to misguided conclusions about what is best for the client.

To the extent that the attorney’s role can be limited to carrying out a client’s wishes, this seems most helpful to both parties.

Scenario 4: The fourth scenario involves advanced consent to disclose confidential client information at a future time, if the lawyer reasonably believes that the client is incapacitated, that the lack of capacity exposes the client to harm, and that the disclosure is reasonably necessary to prevent harm.

Here I would only note that in general ‘consent’—what constitutes consent, when it is valid, when it has been revoked—can be a challenging concept, even for seasoned behavioral health practitioners, and especially where an individual's mental state can change in unpredictable ways from day to day or over time.

In my personal view the types of advanced agreements described by the Committee should always be detailed clearly in writing, in order to avoid either the lawyer or the client finding themselves in an ambiguous or uncomfortable position in the future.

Public Comment - Proposed Opinion 13-0002

Reference #	13618066
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Commenting on behalf of an organization	Yes
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ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The interim opinion states both that an attorney-client relationship is contractual (pg. 6), and implies that an attorney may assist a client with only testamentary capacity but not contractual capacity (pg. 7). How can a lawyer ethically enter into such a relationship in the first place?

And if a lawyer can assist a client with only testamentary capacity, is the lawyer prohibited from charging any money, since an exchange of funds for a service is clearly a contract (and other rules require informed written consent if another person pays)?

If the lawyer can charge for the service, is the lawyer required to charge under \$1000.00, since client lacks the capacity to sign a written agreement?

Please add to the opinion to clarify on what grounds a lawyer may represent a person in creating a will (or a simple trust), when that person lacks contractual capacity to enter into an attorney-client relationship in the first place, but who, in the lawyer's judgement, does have testamentary capacity.

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IP	Anonymous
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February 8, 2021

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Re: *Request for Public Comment on Proposed Formal Opinion No. 13-0002*

Dear Ms. Roche and Members of the Committee:

In response to the State Bar of California's request for public comment with respect to your Committee's Proposed Formal Opinion Interim No. 13-0002 (client with diminished capacity), I respectfully submit the following comments:

1. The over-arching ethical concept in representing clients with diminished capacity as set forth in ABA Model Rule 1.14(a), in Restatement §24(1), and in RRC's proposed rule 1.14(a) is the requirement that the lawyer maintain, as far as reasonably possible, a normal client-lawyer relationship with a client with diminished capacity. This should be the starting point in the Committee's analysis. Lawyers should be advised that the over-arching ethical duty applies regardless of the degree of client incapacity and that it entails a heightened awareness of the client's needs and often greater diligence in achieving effective communications. The opinion makes reference to this ethical concept in the final sentence in the paragraph ending on page 6. However, the concept should be included in the Digest and discussed at the outset in Part B. Much of the rest of the discussion in Part B flows from this primary duty. Comments [1] and [2] of the Model Rule and Comment "b" to Restatement §24(1) expand on how this concept applies. There is a need to provide lawyers with more guidance on maintaining a normal client-lawyer relationship with clients with mental disabilities. See, David A. Green, "I'm Ok-You're Ok": *Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" With a Client With a Mental Disability*, 28 J Legal Prof. 65 (2003-2004). Lawyers practicing in California would benefit from an expanded discussion of this primary ethical duty.

2. The statement on page 2 that the opinion focuses on the ethical obligations of privately retained lawyers for persons with diminished capacity is too narrow and, at a minimum, deserves clarification. For example, the Committee correctly points out in footnote 7 that there are occasions when a lawyer may represent an incapacitated client by court appointment. There are also non-profit and public benefit lawyers who specialize in representing clients with severe

mental incapacity that would benefit from the opinion. Some of the organizations I represent in this area receive public funding. While I understand the opinion is not intended to apply to criminal defense lawyers or lawyer's representing minors, lawyers who are appointed to represent clients with diminished capacity in civil matters and lawyers working in the public and quasi-public sectors, particularly those who specialize in representing mentally impaired clients, should be included within the purview of the opinion.

3. Among the remedies available to both public and private practitioners in California, depending on the circumstances, is the ability to act on behalf of an impaired client by court appointment where the client's incapacity is not confidential and the lawyer lacks client authority. The opinion would benefit by adding a discussion on when seeking court appointment to represent a substantially impaired client might be an available option.

4. The discussion on page 6 on whether a client who is entirely incapacitated terminates the attorney-client relationship could lead lawyers to mistakenly believe they are powerless to act even in absence of an adjudication. The opinion should affirmatively state that until a represented person is adjudicated as being entirely incapacitated, that person's lawyer has a client relationship and must continue to act in the client's best interest. §31 of the Restatement does not include complete incapacity as terminating the lawyer's actual authority to act to protect the client. Although Comment "b" acknowledges that incapacity to give valid consent usually ends a contractual relationship, it cross references to Comment "e", which is partially quoted in footnote 8 of the draft opinion. The final sentence in Comment "e" states: "Although a lawyer's authority therefore does not terminate automatically in such circumstances (i.e., insanity or incompetence), the lawyer must act in accordance with the principles in §24 (A Client with Diminished Capacity) in exercising continuing authority." This final sentence should be included if footnote 8 is retained. One might argue that *Sullivan v. Dunne*, a case that applied common law agency principles, is controlling. However, the case was not decided based on California's later adopted ethics rules. It would provide greater clarity and important guidance in today's practice if the Committee unequivocally stated that insanity and complete incompetence does not automatically terminate an attorney-client relationship and that absent adjudication of the client's incapacity, the lawyer must continue to act in the best interests of the client.

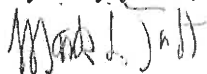
5. The opinion appears to suggest that a lawyer needs client consent to seek the assistance of a qualified professional to enhance the lawyer's ability to communicate with the client and improve the client's ability to understand and make decisions (e.g., discussion in Section B.1 on page 8 and Section C on page 15). However, proposed Rule 1.14(c)(2) and Comment [6] were intended to alert lawyers to the fact that under Evidence Code §952 a communication is nonetheless confidential even though it is made in the presence of another person, such as a qualified nurse practitioner or other trained professional, who is present to further the interests of the client in the consultation or who is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. Retaining such qualified assistance pursuant to §952 would not destroy the confidential nature of the

communication and would not require client consent any more than if the lawyer retained an interpreter or consultant as means of effectively communicating with the client. While there is a discussion of §952 in footnote 16, it would provide better guidance for California lawyers to discuss this option in the text of the opinion as an available means of maintaining a normal attorney-client relationship and obtaining client consent to taking protective action, particularly in regard to scenario no. 3.

6. You might consider telling lawyers in the opinion's conclusion that in difficult situations they may be called upon to exercise informed professional judgment in choosing among imperfect alternatives.

I wish to thank the Committee for seeking to address such an important and difficult topic and for considering these comments which I believe will help clarify and strengthen this important opinion.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark L. Tuft", with a stylized flourish at the end.

Mark L. Tuft

MLT

1498343.2

December 30, 2020

California State Bar Standing Committee on
Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105

Re: Formal Opinion Interim No. 13-0002

Dear Committee:

I write in opposition to Formal Opinion Interim No. 13-0002. I maintained an active practice for many years, prior to retiring, and now perform volunteer legal services for the local Legal Aid. Accordingly, my current clients are poor, mostly elderly, many suffer from mental illness and/or addiction issues, and many suffer from all the above. In short, these individuals certainly fall within the category of diminished capacity and represent a vulnerable population that needs extra legal protection from our profession, not less, and our ethical guidelines should set forth heightened ethical obligations to afford this protection.

The digest for Formal Opinion Interim No. 13-0002 summarizes the proposed opinion succinctly:

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 present, the lawyer may not 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.

The problem with this language is two-fold:

First, the language “[w]hen 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,” presents a quandary: is the attorney ethically prohibited from representing a client he or she believes “lacks the capacity to make a decision”? Is an attorney who comes to believe, as a matter unfolds, that his or her client lacks capacity to make informed decisions, ethically obligated to withdraw from representation?

I would suggest that many clients who need our help the most are, usually through no fault of their own, in their current legal situation because of a lifetime of poor decision making. As written, the easiest way for an attorney to maintain compliance is to either refuse the representation at the outset or withdraw while the matter is pending. Either course of action ultimately harms the client.

Second, the language “[w]hen the client's diminished capacity exposes the client to harm that the client is unable to recognize or present, the lawyer may not take protective action involving disclosure or use of the client's confidential information without the client's informed consent,” is much too broad.

As stated, this provision deals with a client of “diminished capacity” who is unable to recognize the potential harm he or she is facing. A decision needs to be made; the client is unable to make that decision. The attorney is in the best position to make the decision, based on the specific facts presented, as to how to produce the best outcome for his or her client. If that requires disclosure of confidential information, without the consent of a client who is unable to provide informed consent, then the attorney is in the best position to make that determination.

The committee provides some Case Scenarios in its proposed opinion. I would offer another:

Prospective Client is a tenant in a Section 8 Housing Project. She has received a 30-day notice to vacate based on alleged misconduct. Tenant contacts Attorney for representation. Attorney determines that Client, who until recently was homeless, suffers from some type of disorder that manifests itself in unruly conducted in a group living facility such as where Client was placed. Client is adamant about “fighting the eviction.” Attorney knows, based upon years of experience, that Client will lose at a trial, be evicted, and thus become ineligible for future Section 8 housing assistance. In other words, Client will again be homeless.

Attorney believes that he can negotiate a resolution with the landlord that will allow Client to move to a less restrictive facility, thus preventing the eviction, and resulting in continued benefits.

Does Attorney refuse to represent Client since he knows that to preserve Client’s housing, he will have to pursue a resolution contrary to Client’s expressed wishes?

Does Attorney take the case and then withdraw later if Client remains recalcitrant in her position?

If Attorney does take the case, can he protect his Client by negotiating a resolution that is unquestionably in the Client's best interests, even if it involves going against Client's "expressed wishes" and requires disclosing information (such as the fact that Client experiences fear when forced to live in a group setting) to the landlord or Section 8 provider to effectuate the settlement?

I would suggest that Attorney should assume representation and assist the Client by making the decisions that need to be made, and helping the Client understand those decisions, regardless of Client's expressed wishes. That is representation.

In one Scenario set forth in the proposed Opinion, the following factual scenario is presented:

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 Client lacks testamentary capacity, that, but for Client's diminished capacity, Client would not make the new testamentary dispositions, and that Client is at substantial risk of being subjected to undue influence by Client's younger companion. May Lawyer properly prepare the new estate plan?

Under the current Rules of Professional Conduct, as well as the proposed Opinion, recusal would be mandatory. This is entirely reasonable. An attorney cannot reasonably represent a client in performing an act that he or she believes the client does not understand and is the result of undue influence.

It is the second part of the proposed Opinion that raises trouble. If the attorney withdraws from representation under these circumstances, what happens to the client? The client will still be of diminished capacity and subject to undue influence. A less ethical attorney or document preparation service will simply step in to fill the void. Doesn't it make more sense for the attorney to have an ethical obligation to take all steps necessary to protect the client rather than abandon the client? Up to and including notifying family members or Adult Protective Services, even if it means disclosing confidential information. Any other course of action is simply kicking the can down the road. If the attorney does not step in to protect the client, who will? Often the attorney is in the best position to know the facts, know their client's true intention, and the ramifications of the action being taken.

While I am sure unintended, the language offered in the proposed Opinion limits the professional ethical obligations we, as attorneys, have to this vulnerable population, rather than enhancing them. Accordingly, I would like to offer an alternative prospective for consideration.

Regarding withdrawal from representation, it should be harder for an attorney to withdraw from representation of a client with diminished capacity. Attorneys should be encouraged to represent this population, but once representation is undertaken, if the attorney believes he or she needs to withdraw because of the client's lack of capacity, the attorney should be ethically required to seek and obtain Court permission for withdrawal. The reason is simple; given the highly foreseeable negative consequences of the withdrawal (including at times life and death ramifications) our profession should be ethically required to withdraw as a last resort.

Regarding making decisions, including disclosing confidential information to protect the client, the Bar should recognize, and appreciate, that the representing attorney is in the best position to make that decision. The proposed language should reflect that in assessing an attorney's ethical obligation to protect a client of diminished capacity, an attorney is required to use his or her best efforts. Further, an attorney fulfills his or her ethical responsibility by placing the client's interests first, under the circumstances presented, even if flexibility regarding strict adherence to confidentiality is required.

In sum, it is our ethical responsibility to protect our clients. Clients of diminished capacity need our extra protection. I understand that contemporary thought is to not infringe on a person's decision-making rights; even it that freedom from interference results in a negative outcome. However, in crafting ethical obligations for attorneys who represent clients of diminished capacity, that paradigm should be reexamined. I would respectfully suggest that a more flexible approach be recognized, based on the achievement of a good result, as opposed to protecting an abstract right. Does a person have a right to be homeless? Does a person have a right to bequeath all their worldly possessions to a distant relative who suddenly enters the scene? Yes, but those rights presuppose that the individual knowingly and voluntarily makes that decision. That population is the not the subject of the proposed ethical Opinion.

Thank you for considering my thoughts and thank you for all you do for our profession.

Sincerely,

Eric A. Woosley
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805-452-6832