

1 THE STATE BAR OF CALIFORNIA
2 STANDING COMMITTEE ON
3 PROFESSIONAL RESPONSIBILITY AND CONDUCT
4 FORMAL OPINION INTERIM NO. 13-0002
5

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

8 **DIGEST:** A lawyer for a client with diminished capacity should attempt, insofar as
9 reasonably possible, to preserve a normal attorney client relationship with
10 the client. The lawyer's ethical obligations to such a client do not change,
11 but the client's diminished capacity may require the lawyer to change how
12 the lawyer goes about fulfilling them. In representing such a client, a
13 lawyer must sometimes make difficult judgments relating to the client's
14 capacity. Provided that such judgments are informed and disinterested,
15 they should not lead to professional discipline. In some situations, the
16 client's lack of capacity may require that the lawyer decline to effectuate
17 the client's expressed wishes. When the lawyer reasonably believes that
18 the client's diminished capacity exposes the client to harm, the lawyer may
19 seek the client's informed consent to take protective measures. If the
20 client cannot or does not give informed consent, the lawyer may be unable
21 to protect the client against harm. A lawyer representing a competent
22 client who may later become incapacitated may propose to the client that
23 the client give advanced consent to protective disclosure in the event that
24 such incapacity occurs. If appropriately limited and informed, such a
25 consent is ethically proper.

26 **AUTHORITIES**

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

29 Business and Professions Code section 6068(e).

30 **INTRODUCTION AND SCOPE**

31 Few problems in the law of professional responsibility are more difficult than the issue of a
32 lawyer's obligations to a client with diminished decision-making capacity. Many American
33 jurisdictions have sought to clarify those obligations by enacting a version of American Bar
34 Association Model Rule 1.14. ("Model Rule 1.14"). As part of California's recent effort to revise

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.

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 law, including California’s statute and rule governing attorney-client confidentiality. The Supreme Court did not adopt Proposed Rule 1.14.² Therefore, 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 lawyers for adults with diminished capacity, in civil litigation, transactional and estate planning matters, including lawyers who are privately retained, court-appointed, or employed by public or non-profit organizations. 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.

Within those practice settings, the opinion focuses on four issues central to the ethical representation of clients with diminished capacity: (a) the lawyer’s duty to maintain, insofar as reasonably possible, a normal attorney-client relationship with the client, as reflected in the rules relating to competence, communication, loyalty and non-discrimination; (b) the lawyer’s obligations in making judgments concerning the client’s capacity; (c) the existence and scope of the lawyer’s authority to take protective action on behalf of a client with diminished capacity; and (d) the ethical propriety of advanced consent by a competent client to the lawyer’s disclosure of confidential information to in the event that the client’s future diminished capacity exposes the client harm that could be prevented by such disclosure.

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 discuss those laws here only as they bear on the content of the lawyer’s ethical obligations.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, we do not believe that the fact that a rule or concept was contained in Proposed Rule 1.14 can be regarded as grounds for rejecting it if the rule or concept is otherwise consistent with California’s existing ethics rules.

⁴ See discussion at Section B. 4, *infra*.

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 about opposing the application for a conservatorship. 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 capacity. 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 capacity. After examining Client, the consultant

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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's diminished capacity indicates that nephew lacks authority to act for Client, exposes Client to a substantial threat of financial harm at nephew's hands and 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 serious financial or psychological 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, under what conditions, if any, may Lawyer ethically recommend that Client consider or execute such a consent?

DISCUSSION AND ANALYSIS

A. Capacity and Diminished Capacity

Capacity: Capacity is the ability to make and communicate a decision with legal consequences. It is not mentioned or defined within California's Rules of Professional Conduct or the State Bar Act. Rather, it is defined by external law. 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 or could become diminished, we briefly discuss it here.

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 decision maker, 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 capacity 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 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

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.

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].

As the foregoing discussion makes clear, capacity is presumed, and is defined by standards that often require both legal and factual judgment in application. Moreover, the question of capacity is decided on an issue by issue basis and is situational. The fact that a client may lack capacity to make a particular decision does not mean that the client cannot make a different decision involving different issues or different levels of complexity, and the fact that a client may lack the capacity to make a decision at one time does not necessarily mean that the client lacks capacity to make that decision at a different and more favorable time.

Diminished capacity: Diminished capacity is also not defined in the professional rules. Common sense suggests that it can refer to several different situations. In extreme cases, the client may be wholly incapacitated, and unable to make or communicate any relevant decision. The client may be incapable of making or communicating a particular decision, but have the capacity to make other decisions associated with the representation. See *Anderson v. Hunt*, 196 Cal.App.4th 722, 726 [126 Cal.Rptr.3d 736] (client lacked contractual capacity but had testamentary capacity). Alternatively, the client may lack the capacity to make some decisions without some assistance or accommodation, but have the capacity to make those decisions with assistance or accommodation.

B. The Impact of Diminished Capacity on the Professional Relationship

The concept of diminished capacity intersects with the rules of professional ethics wherever those rules involve a decision that is reserved to the client. The law of capacity governs client decisions about the formation and termination of the attorney client relationship. It governs decisions occurring within that relationship in the many situations where a particular action requires the client's informed consent. See, e.g., Rules 1.5 (a) (2), 1.6 (a), 1.7 (a)-(b), 1.8.1, 1.8.2, 1.8.6, 1.8.7. And it also governs the substantive decisions concerning the objectives of the representation or the client's "substantial rights" that the professional rules reserve to the client. Rule 1.2; *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151].

When representing a client who has or may have diminished capacity, the lawyer must be alert to the risk of concluding too readily that the client is not capable of making decisions about the representation, without due attention to the legal presumption of capacity, without assessing capacity on a decision by decision basis, and without taking any measures to enhance the client's ability to make and communicate an effective decision. At the same time, the lawyer must also be alert to the risk that, even with appropriate advice and assistance, the client may be unable to make a legally effective decision, frustrating the client's objectives, or

that diminished capacity will result in a decision that does not serve the client’s interest or exposes them to harm that the client cannot understand or prevent.

In representing a client who suffers, or may be suffering, from diminished capacity, two overarching principles are of particular importance. First, 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.); *accord*, Restatement (Third) of the Law Governing Lawyers § 24. This principle is not separately codified in the California Rules of Professional Conduct, but as the discussion below will show, it necessarily flows from the obligations contained in those rules, many of which expressly require conduct reasonable in the circumstances. This principle will often require the lawyer to propose or adopt practices and procedures designed to enhance or protect the client’s capacity to decide.

The second principle recognizes that representing a client with diminished capacity may require a lawyer to make difficult decisions relating to capacity in situations of factual and legal uncertainty. The uncertainty may be legal: there is limited authority construing California’s capacity statutes or applying them to common factual situations. Or it may be factual, for example, involving, among other things, uncertainties in the diagnosis or prognosis of an underlying condition, the client’s expressed or actual interests, the reliability of those who claim to have the client’s interests at heart, or the severity and imminence of potential harm. While California has no law on the question, we believe that it would follow other American jurisdictions in holding that in this context 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). *Cf. Smith v. Lewis* (1975) 13 Cal. 3d 349,359; *Davis v. Damrell* (1981) 119 Cal. App. 883, 887 (no liability for professional negligence when the state of the law was unsettled at the time the professional advice was rendered and the advice was based upon the exercise of an informed judgment.)

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 inquire into or make judgments concerning the client’s capacity.⁷ If the lawyer

⁷ 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

lacks learning and skill in addressing issues of a 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.⁸ See Rule 1.1(c). In addition, the lawyer may consider, with the client’s consent where required, 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 duty of competence may also require the lawyer to consider, or implement, 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.⁹ Alternatively, with the client’s consent as required, 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).¹⁰

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

Matrimonial Lawyers 481, 482 (“Although lawyers seldom receive formal capacity assessment training, they make capacity judgments on a regular basis.”)

⁸ A lawyer may wish to seek 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.

⁹ Fleischner and Schur, *supra*, note 6, at 355-56; Sabatino, *supra*, note 6, at 487-89.

¹⁰ Such measures may include a supportive decision making agreement, in which relatives, friends or professionals agree to support the client in making his or her own decisions. For extensive information on supportive decision-making see <https://www.aclu.org/other/supported-decision-making-resource-library>.

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 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 above in the discussion of the duty of competence.

3. Loyalty

The duty of loyalty requires that the lawyer act solely in the client's interest, and "protect [the] client in every possible way," while avoiding "any relation which would prevent [the lawyer] from devoting [the lawyer's] entire energies to [the] client's interest." *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC* (2003) 109 Cal.App.4th 1287, 1299 [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*, 109 Cal. App. 4th at 1298 (citations and quotations omitted). In determining and acting on the client's interest, the lawyer's obligation to exercise independent judgment requires attention to the client's expressed wishes, if known or reasonably knowable.¹¹ It also 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 avoid paternalism, being "careful not to construe as proof of disability a client's insistence on a view

¹¹ 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.

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).

Other persons 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 (cited in *Moore, supra*, 109 Cal.App.4th at 1299). While the involvement of interested third persons in the client’s deliberative process may enhance the client’s ability to make and communicate decisions, and the lawyer’s ability to understand the client’s interests, lawyers must also be alert to the potential that their involvement could increase the risk of harm to the client, whether through undue influence or harmful disclosure of confidential information.

While the duty of loyalty requires the lawyer for a client with diminished capacity to pay close attention to the client’s expressed interests, diminished capacity may also give rise to serious concerns about whether the client’s chosen course actually “effectuates the client’s wishes” and reflects an understanding of its “legal and practical implications.” The duties of loyalty and independent professional judgment also require attention to those concerns.¹² 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 possible 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. In

¹² In *Moore* the Court held that the lawyer did not owe a common law duty of care to the beneficiaries of a client’s 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.

such situations, and consistent with the discussion in the introduction to this Part B., a disinterested lawyer who exercises informed professional judgment should not be subject to professional discipline for the lawyer's resolution of the problem.

4. Non-Discrimination

California Rule of Professional Conduct 8.4.1 (a) provides, in pertinent part, that in representing a client or terminating or refusing to accept the representation of any client, a lawyer shall not . . . 1) . . . unlawfully discriminate against persons on the basis of any protected characteristic." Whether discrimination is unlawful "shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination...in employment or in offering goods or services to the public." Rule 8.4.1 (c). The protected characteristics covered by the rule include both "physical disability" and "mental disability." Rule 8.4.1 (b).

Thus, to the extent that federal or state anti-discrimination laws protect persons with diminished capacity or with the mental or physical conditions giving rise thereto, Rule 8.4.1 requires a lawyer to comply with anti-discrimination laws applicable to that condition. Analysis of the scope and content of those laws is beyond the scope of this opinion, but, an example may be helpful. 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, in complying with Rule 8.4.1, lawyers who represent clients with diminished capacity should consider whether the ADA or other similar laws require such accommodations for their client, in lieu of or in addition to any measures required by other ethical obligations, in order to comply with their ethical obligations under Rule 8.4.1.

5. Taking Protective Action: Authority, Confidentiality, and Loyalty

When a lawyer represents a client with diminished capacity, and has determined that, as a consequence of that incapacity, the client is exposed to harm, an initial question is whether the lawyer continues to have authority to take protective measures in the client's best interest. There is little California law on this issue. The common law rule is that the incapacity of the principal wholly terminates the agency relationship. American Law Institute, Restatement (Second) of Agency § 122 (1). Clearly that rule has no application to a lawyer whose authority is established by court appointment. Moreover, even as to contractual agency relationships, its

application to situations of diminished capacity is doubtful.¹³ The Restatement of the Law Governing Lawyers states that:

The general rule of agency law that insanity or incompetence of a principal...terminates an agent's authority...may be inappropriate as applied to a lawyer's beneficial efforts to protect the rights of a client with diminished capacity. Such a client continues to have rights requiring protection and often will be able to participate to some extent in the representation (see § 24). If representation were terminated automatically, no one could act for the client until a guardian is appointed, even in pressing situations. Even if the client has been adjudicated to be incompetent, it might still be desirable for the representation to continue, for example to challenge the adjudication on appeal or to represent the client in other matters. Although a lawyer's authority does not terminate in such circumstances, the lawyer must act in accordance with the principles of Section 24 [requiring that the lawyer maintain insofar as possible, a normal attorney client-relationship and act in the client's best interest] in exercising continuing authority."

(*Restatement (Third) of the Law Governing Lawyers*, section 31, Comment (e).)

The Restatement approach is consistent with other aspects of California law, notably including the substantive law's insistence that capacity be assessed on a decision-by-decision basis and situationally, and the requirement of the duty of loyalty that the lawyer "'protect [the] client *in every possible way.*'" *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC* (2003) 109 Cal.App.4th 1287 at 1287 (emphasis in original), and with law from other jurisdictions. *Graham v. Graham* (1950) 40 Wash.2d 64 67-68 [240 P.2d 564] (evidence of incapacity does not terminate client's right to employ counsel in opposing appointment of a guardian). Accordingly, absent a final judicial determination of incapacity, a lawyer's judgment that a client is incapacitated should not by itself terminate the lawyer's authority to take protective action in the client's best interest if such action is within the scope of the representation.¹⁴ Other aspects of California law, however, may significantly restrict the protective actions available to the lawyer.

¹³ The Restatement of Agency expressly declined to take a position "as to the effect of the principal's temporary incapacity due to a mental disease." *Id.* §122 Reporter's Note. That logic of that reservation would seem, however, to apply to many forms of diminished capacity.

¹⁴ *Sullivan v. Dunne* (1926) 198 Cal. 183, 192 [244 P. 343] does not call for a different conclusion. That case predates both the modern view of the rights of persons with diminished capacity and the enactment of the ethical rules under discussion here. Moreover, the holding in that case that the trial court's finding of complete incapacity terminated any claim of the lawyer to represent a person with diminished capacity in appealing an order of guardianship was an alternative ground for the decision—the Supreme Court also affirmed the trial court's finding that the lawyer had never had any authority to act for the putative client in the guardianship matter in the first place. Moreover, as the Supreme Court noted, the evidence of complete incapacity supporting the trial court's finding was compelling and undisputed, suggesting that the unauthorized appeal was frivolous or motivated by grounds other than the client's welfare.

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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 limit the steps that a lawyer may take to respond to a client’s diminished capacity. In many, if not most, situations, information about the client’s diminished capacity, whether or not subject to the attorney client privilege, will be confidential and 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. 1978-1.¹⁵

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.¹⁶ 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 2019) 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.¹⁷

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

¹⁵ In some cases, the client’s incapacity may be known to all relevant actors and the disclosure thereof may have no tendency to harm or embarrass the client. For example, a lawyer may reach a judgment that the client’s known incapacity creates a risk that the lawyer-client relationship will be terminated, leaving the client without representation, unless the lawyer seeks court appointment of counsel. In such circumstances, the disclosure of the client’s incapacity to the court would not involve the disclosure of confidential information, both because the information is available to all relevant actors and because its disclosure to the court poses no risk of harm or embarrassment to the client.

¹⁶ 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.

¹⁷ 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.

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.¹⁸

The duty of confidentiality combines with the duty of loyalty to bar a lawyer from initiating a conservatorship proceeding against a client without the client’s informed written consent, even if the lawyer reasonably believes that the standard for a conservatorship has been met and that bringing the action would be in the client’s best interest. In bringing such an action, a lawyer would necessarily be disclosing confidential information about the client’s condition, in violation of rule 1.6, and taking action “directly adverse” to the client, in a manner forbidden by rule 1.7(a). Cal. State Bar Formal Opn. No. 1989-112; Los Angeles County Bar Assn. Formal Opinion No. 450.¹⁹

6. Advanced Consents to Disclosure of Confidential Information

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 disclose relevant confidential information if such disclosure is necessary to protect them from substantial harm, by giving an advance consent to such disclosure on specified conditions.

The ethical propriety of such a consent is supported by Rule 1.2, which permits a client to give advance authorization “to take specific action on the client’s behalf without further

¹⁸ 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).

¹⁹ In these respects, California law differs from the majority of American jurisdictions. Under ABA Model Rules 1.6 and 1.14, a lawyer for a client with diminished capacity has implied authority to disclose confidential information about the client’s capacity and to take protective measures, including disclosure of confidential information, in circumstances where diminished capacity exposes the client to harm. See ABA Formal Opn. 96-404 (1996). California’s confidentiality statute and rule bar this approach.

consultation,” provided that there is no material change in circumstances, the lawyer has complied with the duty of communication under Rule 1.4, and subject to the client’s right to revoke the authorization at any time. Rule 1.2 Comment [2].

Rule 1.6 does not 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.²⁰

Though not controlling, the standards governing advance consent to a conflict of interest that has not yet arisen 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 . . . , the greater the likelihood that the client will have the requisite understanding.” Rule 1.7, Comment [9]. Consistent with Opinion 1989-115 and *Maxwell*, however, even a fully informed prospective consent cannot authorize incompetent representation. *Id.* Applying these principles, California courts have upheld advance consents to representation adverse to a former client in the same matter²¹ and to representation adverse to a current client in an unrelated matter.²²

Taken together, these authorities support the ethical propriety of a competent client’s advance consent permitting the lawyer’s protective disclosure or use of confidential information on specified conditions. But they also point to important limitations on such consents.

²⁰ In *Maxwell*, the Supreme Court held that an a criminal defendant’s advance waiver of confidentiality as part of an arrangement to compensate his chosen defense counsel was adequately informed, 30 Cal. 3d at 621-22, but could not be enforced until after all criminal proceedings had become final, because allowing 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.* at 610 n.1.

²¹ See *Zador Corp. v. Kwan*, (1995) 31 Cal.App.4th 1285 [7 Cal.Rptr.2d 754].

²² See *Visa U.S.A, Inc. v. First Data Corp.* (N.D. Cal. 2003) 241 F.Supp.2d 1100. 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].

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First, the client's consent must be informed within the meaning of rule 1.0.1(e), in that the lawyer has communicated "(i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." The relevant circumstances would include a future change in the client's capacity, the lawyer's judgment at that time that the client's diminished capacity exposes the client to substantial physical, psychological harm that the client is unable to recognize and/or prevent, and a consent that in those circumstances the lawyer could disclose confidential information to the extent that the lawyer reasonably believes is necessary to prevent the harm. The consent should disclose the benefits of such a consent, which could include vindication of the client's purposes, exposure of wrongdoing by others, and the prevention of harm. And it should also disclose the risks, including the risk that the lawyer may make an error in judgment, that sensitive information may become more broadly known, and that disclosure may lead to litigation regarding the client's capacity.

Second, the consent must be revocable at any time, so long as the client has the legal capacity to revoke, and the right to revoke should be highlighted in the informed consent. *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). In addition, the lawyer should not act on the consent if changed circumstances, or the passage of time, would make it unreasonable to do so. Thus, if the lawyer has reason to believe that the client, while competent, would have revoked the consent if consulted, the lawyer should not act upon it.²³

Assuming that the client's advanced consent complies with the foregoing standards, 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 and the benefits and risks of such disclosure. 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 serious harm in circumstances where the client is powerless to do so.²⁴ To hold that such an advance consent could not be given would infringe

²³ A public comment on an earlier version of this opinion suggested that such a consent would only be proper if conditioned on the lawyer's having reconfirmed with the client immediately prior to disclosure that the consent remains in effect. Such a requirement would largely vitiate the notion of advance consent. Moreover, such a check back requirement would make sense only if the lawyer has reason to believe that the client both has the capacity to revoke and would wish to do so. Since in those circumstances, the lawyer would already be barred from acting on the consent, adding a check back requirement would not generate additional protection for the client, and could lead to additional harm.

²⁴ This opinion does address 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

499 on an informed, competent client's right to enlist the client's lawyer as part of a coherent
500 strategy to protect against future harm.

501 Accordingly, in assisting a competent client to plan for potential future incapacity, a lawyer may
502 properly invite the client to consider an advance consent to disclosure that meets the above
503 standards, along with other means of addressing such incapacity, such as springing powers of
504 attorney and structured decision making, and, if consistent with the applicable standard of
505 care, may recommend the use of such a consent.

506 Rule 1.6 does not require that informed consent to disclosure of confidential information be in
507 writing. It is evident, however, that it would be both prudent and the better practice to obtain
508 any advance consent for this purpose in writing and in a separate document. The client's
509 interest is in having the consent be enforceable, absent revocation or changed circumstances,
510 and enforceability depends on proof of what was consented to, and of what was done to
511 ensure that the consent was informed. Given that any dispute about enforceability will arise in
512 the future, and only after the client's capacity is contested, documenting the terms of the
513 consent and the lawyer's disclosures in writing and including them in a separate document that
514 makes both the consent and the required disclosures more salient will increase the likelihood
515 that the consent will be enforced. The client has a further interest in the lawyer feeling on solid
516 professional ground in taking protective action pursuant to the consent when the triggering
517 conditions are met. That interest is also served by putting the consent in writing, since without
518 such a writing no lawyer can be confident that a subsequent finder of fact will conclude the
519 lawyer acted properly. For all these reasons, a lawyer whose client gives informed consent to
520 the proposed disclosures should document that consent in a separate writing.

521 **C. Application of the Law to the Stated Facts**

disclosure and use of confidential information, but also informed written consent to formal adversity under rule 1.7(a).

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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 reasonably 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, an interest that is especially salient given the restrictions on liberty that can result from a conservatorship and the client's right to be heard in opposition to those restrictions. 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 as required. 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.²⁵

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

²⁵ To the extent that the lawyer entertained doubts about the client's capacity prior to undertaking the representation, the lawyer could also, before agreeing to the representation, and with the prospective client's informed consent as necessary, have conducted a similar inquiry into the client's capacity. If, following such an inquiry, the lawyer concluded that the prospective client either lacked capacity to form an attorney client relationship or to make a will, the lawyer would then have been free to decline the representation.

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suffering from diminished capacity and that by reason of that incapacity, Client is threatened with harm at Nephew's hands that Client is unable to perceive or prevent. In these circumstances, Lawyer is not required to accept Nephew's representation that he is authorized to act on behalf of the client. 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 is able to contact Client directly, 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 consider giving 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, provided that such advice meets the standard of care and the consent meets the standards outlined in Section B. 6 above. In particular, the consent must be fully informed and revocable at any time, provided the client has the capacity to do so, should be in writing, and should be contained in a separate document.

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, including taking those steps reasonably necessary to fulfil the lawyer's duties of competence, communication, loyalty and non-discrimination. In representing such a client, a lawyer must sometimes make difficult judgments relating to the client's capacity. Provided that such judgments are informed and disinterested, they should not lead to professional discipline. 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.