



The State Bar of California

OPEN SESSION AGENDA ITEM NOVEMBER 2021 REGULATION AND DISCIPLINE COMMITTEE III.A

DATE: November 18, 2021

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion 2021-207: Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2021-207 developed by the Committee on Professional Responsibility and Conduct (COPRAC), following the close of two public comment periods.

BACKGROUND

COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the committee has approved a formal opinion following consideration of public comment, the formal opinion and

¹ Each published opinion includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although nonbinding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility (See e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

DISCUSSION

This agenda item requests approval for the publication of proposed Formal Advisory Ethics Opinion 2021-207. Before being finalized for publication, while the opinion was still in development and out for public comment, it was designated as proposed Formal Opinion Interim No. 13-0002.

Proposed Formal Opinion Interim No. 13-0002 was drafted by COPRAC, and at its meeting on October 23, 2020, in accordance with COPRAC's procedures, the committee approved the opinion for an initial 90-day public comment circulation.³ Subsequently, at its meeting on June 11, 2021, COPRAC revised the opinion in response to public comments received and approved an additional 60-day public comment period circulation.

The full text of the proposed opinion is provided as Attachment A. The question addressed in the proposed opinion is: "What are the ethical obligations of a lawyer for a client with diminished capacity?" The opinion digest states:

A lawyer for a client with diminished capacity should attempt, insofar as reasonably possible, to preserve a normal attorney-client relationship with the client, that is, a relationship in which the client makes those decisions normally reserved to the client. The lawyer's ethical obligations to such a client do not change, but the client's diminished capacity may require the lawyer to change how the lawyer goes about fulfilling them. In particular, the duties of competence, communication, loyalty, and nondiscrimination may require additional measures to ensure that the client's decision-making authority is preserved and respected. 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, a lawyer should not be viewed as having acted unethically simply because in hindsight those judgments are later determined to have been mistaken. 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 may propose to the client that the client give advanced consent to protective disclosure in the event that the client later becomes incapacitated and that incapacity exposes the client to harm. If appropriately limited and informed, such a consent is ethically proper.

³ See Board Resolution, December 2004.

Public Comment

In response to the second public comment period that ended on August 24, 2021, 10 commenters submitted a comment. The comments are provided as Attachment B.

Natalie Blake submitted a comment requesting that the opinion address cases that she believes “negate[] any duty to the client to confirm that a competent client’s intent is accomplished. By allowing an incompetent client to make changes, the duty to protect the competent client’s intent is breached.” (See *Moore v Anderson, Zeigler, Disharoon, Gallagher & Gray, PC* (2003) 109 Cal.App.4th 1287.) The committee amended footnote 16 to clarify how the *Moore* decision discussed the duty owed to the client by stating: “The Court did not hold that the lawyer owed no duty to the *client* to consider capacity. Instead, it stated that ‘[t]he attorney who is persuaded of the client’s testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills [the] duty of loyalty *to the testator*.’ (*Id.* at 1299.) (Emphasis added.)”

Elaine Roberts Musser expressed opposition to the opinion because she believes attorneys should be mandated reporters of both physical and financial elder abuse. The committee believes the opinion strikes the proper balance in providing guidance to attorneys on how to seek the client’s informed consent to take protective measures for the benefit of the client when the client is exposed to physical, financial, or emotional harm as balanced against California’s strict duty of confidentiality that is set forth in statute.

James Keen submitted a comment indicating opposition to the opinion but did not provide commentary on the substance of the opinion.

Mathew Sotorosen submitted two separate public comment forms indicating support for the opinion but did not include any commentary.

The Orange County Bar Association (OCBA) submitted a comment stating they “appreciate that COPRAC has taken the time to address the complicated issues regarding clients and prospective clients with diminished capacity. We think that the opinion provides helpful analysis and guidance in an area that needs attention.” OCBA shared several observations, including suggesting that scenario four and the concept of seeking advance consent be separated out into a new ethics opinion. During the first round of comment COPRAC considered dividing the opinion as suggested and decided not to do so. The issue of whether and how a lawyer may ethically take protective action when a client’s diminished capacity exposes the client to physical, emotional, or financial harm is central to representing clients with diminished capacity. COPRAC believes the protective action component cannot be adequately addressed without attending to the issue of advance informed consent. Therefore, the discussion of advance informed consent and the issues presented in scenario four are closely linked to the analysis of scenarios one through three, and the elimination of the advanced consent analysis from this opinion would substantially reduce the value of the opinion to practitioners.

The Association of Discipline Defense Counsel stated that they found the opinion to be well written and that it provides helpful guidance in understanding an attorney's ethical responsibilities in this area. They suggested the opinion could also address an attorney's consideration to withdraw under rule 1.16 when a client is experiencing diminished capacity. Due the current length of the opinion, the committee declined to add additional content concerning this topic.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee (LACBA) submitted a comment stating they agree with much of the proposed opinion and believe it addresses an important topic. LACBA offered several comments and suggestions. Many of their comments were stylistic and drafting changes, most of which COPRAC agreed with and accepted. LACBA also observed the opinion is long and suggested that scenario four and the concept of seeking advance consent be separated out into a new ethics opinion. COPRAC declined to adopt this approach for the reasons stated in response to OCBA, above.

Mark Tuft stated support for the opinion and observed that the "discussion provides practitioners with valuable and much needed advice in a logical format."

Twenty-one legal services organizations submitted a single comment stating while they "strongly support much of the proposed opinion," they cannot support adoption of the opinion because they believe "[w]ithout a requirement for the attorney to notify the client of the intent to disclose information pursuant to a previously-given advanced consent and provide an opportunity to object by revoking the consent, the Proposed Opinion would violate existing California laws and ethical rules." COPRAC devoted extensive time and discussion to the advance consent analysis and modified the opinion with respect to this topic in response to the first round of public comment. The opinion does not preclude a lawyer from notifying a client prior to disclosing information if the lawyer believes that doing so would be in the best interests of the client. Footnote 28 observes that the informed written consent can specify whether the lawyer is required to attempt to contact the client prior to disclosure. However, the committee observed that if all consents were required to be contemporaneous with the disclosure, then the concept of advance consent would be ineffective. The committee believes the opinion makes clear that the concept of advance informed consent is both recognized and permitted by the Rules of Professional Conduct and case law. Finally, the opinion expressly states that the consent must be revocable at any time, and the right to revoke should be highlighted in the informed written consent.

The California Lawyers Association Ethics Committee (CLA) stated "[i]n general, we approve of the opinion and believe that it provides helpful guidance." CLA offered several comments and suggestions for clarifying the opinion, many of which COPRAC agreed with and accepted. CLA also suggested the committee consider whether scenario four and the concept of seeking advance consent should be separated out into a new ethics opinion. COPRAC declined to adopt this approach for the reasons stated in response to OCBA, above.

At its meeting on September 10, 2021, following consideration of the public comments received, COPRAC approved the opinion for submission to RAD for formal publication. The State

Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approves the publication of Formal Ethics Advisory Opinion No. 2021-207.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee; following publication for public comment and consideration of the comments received, and upon the recommendation of the State Bar Standing Committee on Professional Responsibility and Conduct, approves the publication of Formal Ethics Advisory Opinion 2021-207, attached here as Attachment A.

ATTACHMENTS LIST

- A.** Formal Ethics Advisory Opinion 2021-207
- B.** Full Text of Public Comments

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2021-207**

- ISSUES:** What are the ethical obligations of a lawyer for a client with diminished capacity?
- DIGEST:** A lawyer for a client with diminished capacity should attempt, insofar as reasonably possible, to preserve a normal attorney-client relationship with the client, that is, a relationship in which the client makes those decisions normally reserved to the client. The lawyer's ethical obligations to such a client do not change, but the client's diminished capacity may require the lawyer to change how the lawyer goes about fulfilling them. In particular, the duties of competence, communication, loyalty, and nondiscrimination may require additional measures to ensure that the client's decision-making authority is preserved and respected. 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, a lawyer should not be viewed as having acted unethically simply because in hindsight those judgments are later determined to have been mistaken. 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 may propose to the client that the client give advanced consent to protective disclosure in the event that the client later becomes incapacitated and that incapacity exposes the client to harm. If appropriately limited and informed, such a consent is ethically proper.
- AUTHORITIES
INTERPRETED:** Rules of Professional Conduct 1.0.1(e), 1.1, 1.2, 1.4, 1.6, 1.7, and 8.4.1 of the Rules of Professional Conduct of the State Bar of California.¹
- Business and Professions Code section 6068(e).

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.

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. 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 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 the 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, confidentiality, loyalty and nondiscrimination; (b) the lawyer's obligations in making judgments or decisions relating to the client's capacity;⁴ (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 in the event that the

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 denied the request to approve 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 In this opinion we use the terms judgment and decision interchangeably. No difference in meaning is intended. We do not suggest or conclude that lawyers must themselves acquire the medical or psychological expertise required to diagnose a client's mental condition. However, based on their own observations, experience, or other sources, including consultation with experts in appropriate situations, lawyers may in certain circumstances form a reasonable belief, or make a legal judgment, that a client has diminished capacity. Such a reasonable belief or judgment about a client's diminished capacity may in turn affect the ethical considerations in representing such a client, as addressed in this opinion.

client's future diminished capacity exposes the client to harm that could be prevented by such disclosure.

This opinion is based on existing California 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 a lawyer's ethical obligations.⁵ Finally, this 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.

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 of Client 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 ethically represent the client in opposing the establishment of a conservatorship?

Scenario 2

Lawyer has known and represented Client for many years and prepared Client's initial estate plan. In recent years, Lawyer has frequently seen Client socially and has noticed signs of diminished capacity. Client has now asked Lawyer to prepare a revised 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 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

⁵ See Discussion section B.4., *infra*.

is at substantial risk of being subjected to undue influence by Client's younger companion. May Lawyer ethically 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 the nephew, and about the 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 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 the nephew, who tells Lawyer that Client has given the nephew a power of attorney and that he will pass the information on to Client. Based upon these circumstances, Lawyer reasonably believes that the nephew lacks authority to act for Client, and that Client's diminished capacity exposes Client to a substantial threat of financial harm at the 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 ethically 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 wants 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 any 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."

(Cal. Prob. Code, § 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 the diagnosis of a mental or physical disorder. Instead, there must be affirmative evidence of a deficit in one or more of the person's mental functions,⁶ 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." Probate Code section 811(b).

These provisions do not enact a single standard for contractual capacity. *Andersen v. Hunt* (2011) 195 Cal.App.4th 722, 730 [126 Cal.Rptr.3d 736]. Rather, capacity "must be evaluated by a person's ability to appreciate the consequences of the particular act he or she wishes to take." *Id.* (Emphasis in original.) The required level of understanding depends on the complexity of the decision being made. *Id.*; *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 641 [158 Cal.Rptr.3d 364]. Moreover, 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

⁶ The statute identifies a nonexclusive 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).)

take into consideration, the “frequency, severity, and duration of periods of impairment.” Probate Code section 811(c).⁷

Marital and testamentary capacity are determined by different and lower standards. “Marriage arises out of 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.” *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 do any of the following:
 - (A) Understand the nature of the testamentary act.
 - (B) Understand and recollect the nature and situation of the individual’s property.
 - (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 health disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual’s devising property in a way that, except for the existence of the delusions or hallucinations, the individual would not have done.

(Cal. Prob. Code, § 6100.5.)

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, *Andersen*, *supra*, 196 Cal.App.4th at 726–728.

As the foregoing discussion makes clear, capacity is presumed and is defined by standards that often require both legal and factual judgment in application.⁸ 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

⁷ 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 fraud or undue influence.” (Cal. Civ. Code, § 39(b).) See, *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 642 [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.

⁸ See generally, *Capacity and Undue Influence: Assessing, Challenging, and Defending* (Cal. CEB Action Guide 2020).

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 Rules of Professional Conduct. 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. 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 Conduct 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, and 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 shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client," that is, a relationship in which the client makes those decisions normally reserved to clients. See, e.g., Tuft et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2019) Ch. 7-24, § 7:73.5. This principle is not separately codified in the 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.⁹

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 that speaks directly to 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" should not be viewed as having acted unethically simply because in hindsight the judgment is later determined to have been mistaken. Restatement (Third) of the Law Governing Lawyers, section 24, comments (b) and (d); see also American Bar Association, Formal Opinion 491 at 9 and note 26 (2020) (discussing the "numerous contexts" evaluating attorney conduct where "courts and regulators have warned against hindsight bias"); *cf. Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [118 Cal.Rptr. 621]; *Davis v. Damrell* (1981) 119 Cal.App.3d 883, 887 [174 Cal.Rptr. 257] (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.)¹⁰

1. Competence

The duty of competence calls for the lawyer to exercise the "(i) learning and skill and (ii) mental, emotional and physical ability reasonably necessary" to provide the legal services called for in

⁹ Green, "I'm OK-You're OK": Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" with a Client with a Mental Disability (2003-2004) 28 J. Legal Prof. 65, 81 ("a lawyer's duty to her client does not change because the client has a mental disability. However, a lawyer does need a heightened sense of awareness to the needs of a client with a mental disability and may need to be more diligent in assuring effective communications and respecting the objectives of the client.")

¹⁰ The Restatement has been found persuasive by at least one California court addressing a capacity-related issue where there was no California authority directly on point. *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC* (2003) 109 Cal.App.4th 1287, 1301-1302 [135 Cal.Rptr.2d 888]. The Rules of Professional Conduct also permit consideration of ethics opinions, rules, and standards from other jurisdictions for guidance on proper professional conduct. Rule 1.0, Comment [4].

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.¹¹ If the lawyer 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.¹² 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 (4th ed. 2006) SM061 ALI-ABA 541 ("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.¹³ 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

¹¹ Fleischner and Schur, *Representing Clients Who Have or May Have "Diminished Capacity": Ethics Issues* (2007) 41 Clearinghouse Rev. J. of Poverty L. & Pol'y 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.") As noted above in footnote 4, we do not suggest or conclude that a lawyer must become expert in, or must independently make, the technical medical and psychological assessments that may sometimes underlie a determination of capacity. Sometimes a lawyer will be able to address capacity issues on the basis of the lawyer's own observations and experience, without regard to such expertise. Where application of legal capacity standards depends upon medical or psychological issues outside of the lawyer's expertise, however, the lawyer may, if consistent with the applicable standard of care, consider involving such professionals, as discussed below.

¹² 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.

¹³ Fleischner and Schur, *supra*, note 6, at 355–356; Sabatino, *supra*, note 6, at 487–489.

communicating decisions relating to the representation. (Rest.3d Law Governing Lawyers, *supra*, § 24, com. c.)¹⁴

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 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]

¹⁴ 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>.

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.¹⁵ 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 of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views." (Rest.3d Law Governing Lawyers, *supra*, § 24, com. 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.¹⁶ 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

¹⁵ 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.

¹⁶ 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. (*Moore*, at p. 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 1298–1299.) The Court did not hold that the lawyer owed no duty to the *client* to consider capacity. Instead, it stated that "[t]he attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills [the] duty of loyalty to the testator." (*Id.* at 1299.) (Emphasis added.)

conservatorship can be counted upon to bring those interests to the attention of the tribunal. (Rest.3d Law Governing Lawyers, *supra*, § 24, com. 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 generally should 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 such situations, and consistent with the discussion in the introduction to this section B, above, a disinterested lawyer who exercises informed professional judgment should not be viewed as having acted unethically simply because subsequent events prove the decision to have been mistaken.

4. Nondiscrimination

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 and in offering goods or services to the public." Rule 8.4.1(c)(3). The protected characteristics covered by the rule include both "physical disability" and "mental disability." Rule 8.4.1(c)(1).

Thus, to the extent that federal or state anti-discrimination laws protect persons with diminished capacity or associated mental or physical conditions, rule 8.4.1 requires a lawyer who represents such persons to comply with anti-discrimination laws applicable to that condition.¹⁷ Analysis of the scope and content of those laws is beyond the scope of this opinion,

¹⁷ Rule 8.4.1(f)(2) provides that the rule does not prohibit "declining or withdrawing from a representation as required or permitted by rule 1.16." In addition, Comment [3] to the rule states that:

"A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law."

but an example may be helpful. The Americans with Disabilities Act (ADA) forbids discrimination against persons with disabilities in places of public accommodation. 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. §§ 36.104–36.105. Conditions that can lead to diminished capacity may 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 laws¹⁸ require accommodations for their client, in addition to any measures required by other ethical obligations.

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 an agency relationship with the client that confers authority to take protective measures in the client's best interest. This is a question of law, not of ethics, and there is little California law on the question.¹⁹ Because the legal issue is so closely intertwined with ethical considerations, however, we briefly review it here. The common law rule is that the incapacity of the principal wholly terminates the agency relationship. Restatement (Second) of Agency section 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.²⁰ The Restatement of the Law Governing Lawyers states that:

¹⁸ For example, in California, the Unruh Civil Rights Act, Civil Code section 51(b) prohibits discrimination against persons based upon both "disability" and "medical condition" and declares that such persons "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

¹⁹ *Sullivan v. Dunne* (1926) 198 Cal. 183, 192 [244 P. 343] held that a determination of complete incapacity in a guardianship proceeding, on the basis of evidence that was compelling and essentially uncontested, terminated a lawyer's authority to appeal that determination. But the Supreme Court's alternative holding was that the lawyer never had any authority to act for the client in the guardianship proceeding in the first place. The case therefore does not speak clearly to situations where the lawyer's preexisting agency was clear and there has been no subsequent judicial determination of incapacity. Moreover, the case predates both the modern law of capacity and the modern recognition of the rights of persons with diminished capacity.

²⁰ 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.

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.

(Rest.3d Law Governing Lawyers, *supra*, § 31, com. 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 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). Taken together, these authorities suggest that, absent a final judicial determination of incapacity, a lawyer's reasonable belief 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. Ultimately, though, the question of continued authority calls for a legal judgment, informed by 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, 1299 [135 Cal.Rptr.2d 888] (emphasis in original).

Even when a lawyer for a client with diminished capacity continues to have authority to act, the duties of confidentiality and loyalty will sometimes limit 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, will often 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 p. IID-034; Los Angeles County Bar Assn. Formal Opn. No. 450 (1988); San Diego County Bar Assn. 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.²¹ 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 client’s informed consent to the disclosure of confidential information is required 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.²²

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.²³

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

²¹ 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.

²² 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 for the Revision of the Rules of Professional Conduct, after careful review, also concluded that California law did not grant implied authority to disclose.

²³ 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, 236–238 [37 Cal.2d 227] (expert); *Hoiles v. Superior Court*, 157 Cal. App. 3d 1192, 1200 [157 Cal.App.3d 1192] (family members).

rule 1.7(a). (Cal. State Bar Formal Opn. No. 1989-112; Los Angeles County Bar Assn. Formal Opinion No. 450.)²⁴

6. Advance 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 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 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 the disclosure of confidential information be contemporaneous with the disclosure. California State Bar Formal Opinion No. 1989-115 (CAL 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 CAL 1989-115 relied.²⁵

Though not controlling, the standards governing advance consent to a conflict of interest that has not yet arisen are also relevant. Consistent with CAL 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

²⁴ 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 of professional conduct bar this approach.

²⁵ In *Maxwell*, the Supreme Court held that 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 621–622, 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 the criminal proceedings would place the lawyer in violation of the duties of fairness, undivided loyalty, and diligent defense arising under the professional rules and the contract of retention. *Id.* at 610 n.1.

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 CAL 1989-115 and *Maxwell*, however, even a fully informed prospective consent cannot authorize incompetent representation. *Id.* Applying these principles of California law, courts have upheld advance consents to representation adverse to a former client in the same matter²⁶ and to representation adverse to a current client in an unrelated matter.²⁷

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.²⁸ But they also point to important limitations on such consents.

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 could vary depending on the precise conditions specified for the disclosure, the specific factual issues involved, and the scope of the representation, but ordinarily 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 or 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’s reasonable beliefs concerning capacity or harm may ultimately prove to be inaccurate, 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 is revocable except to the extent it has been relied upon). In addition, the lawyer should not act on the consent if the lawyer has reason to believe that the circumstances have changed, and

²⁶ See *Zador Corp. v. Kwan*, (1995) 31 Cal.App.4th 1285 [7 Cal.Rptr.2d 754].

²⁷ 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].

²⁸ Delineating the details of the consent is beyond the scope of this opinion. Those details will vary depending on the particulars of each case. Beyond the triggering events, the consent can also specify, among other things, the steps required for the lawyer to conclude that incapacity exists, the nature, severity, and imminence of harm required to justify disclosure, whether the lawyer is required to attempt to contact the client before disclosing, and the persons or institutions to whom disclosure should be made.

that the client, if informed of those circumstances, would not have given or would have revoked the consent. *Id.* comment d.²⁹

Assuming that the client's advance 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, 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 advance consent expands the lawyer's ability to protect the client from serious harm in specified circumstances where the client is powerless to do so.³⁰ 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.

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

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 and in a separate document. The client's interest is in having the consent be enforceable, absent revocation or changed circumstances, 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 and including them in a separate document that makes both the consent and the required disclosures more salient will increase the likelihood that the consent will later be viewed as having been adequately informed. The client has a further interest in the lawyer standing on solid professional ground in taking protective action pursuant to the consent when the triggering conditions are met. That interest is also served by

²⁹ For example, the client may have authorized disclosure to a particular family member whom the client regarded as disinterested and reliable. If the lawyer now has reason to believe that the family member is no longer disinterested and reliable, and that the client would not have authorized the disclosure given those changed circumstances, the lawyer should not make the disclosure.

³⁰ This opinion does not address whether a competent client could give advance informed written consent to the lawyer 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).

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 acted properly. For all these reasons, a lawyer whose client gives informed consent to the proposed disclosures should document that consent in a separate writing.

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 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 Client's expressed objective. 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. (Rest.3d Law Governing Lawyers, *supra*, § 24, com. 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, Lawyer has reasonably concluded that Client lacks even the low level of capacity required for testamentary decisions and that Client is subject to a substantial risk of undue influence. At a minimum, Lawyer's duty at this point is to provide Client with candid advice concerning Lawyer's conclusions. If Lawyer believes it may 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 attorney-client communications, with Client's informed consent to the extent 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 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.³¹

³¹ To the extent that Lawyer entertained doubts about the client's capacity prior to undertaking the representation, 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.

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 at the nephew's hands that Client is unable to perceive or prevent. In these circumstances, Lawyer is not required to accept the 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 a 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 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, confidentiality, loyalty, and nondiscrimination. 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 be viewed as unethical simply because subsequent events prove them to have been mistaken. 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.

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This is a good start to protect clients from attorneys who do not determine the competence of clients to make changes to testamentary documents, but does not go far enough. The line of cases holding that an attorney owes no duty to non-client beneficiaries arising from a failure to determine competency before amending testamentary document (e.g., Moore v Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 CA4th 1287) essentially negates any duty to the client to confirm that a competent client's intent is accomplished. By allowing an incompetent client to make changes, the duty to protect the competent client's intent is breached. If attorneys are permitted to amend testamentary documents without any duty to beneficiaries to determine competence, there is essentially no liability because the client is deceased when the attorney's failure to exercise her/his duty is discovered. Please address this issue more specifically in the proposed changes.

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**Commenting on
behalf of an
organization**

No

Name Elaine Roberts Musser

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State California

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"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."

This is truly a recipe for disaster. What this rule is indicating is that if an incapacitated client ignores the advice of his/her attorney and chooses to be scammed, ethically the lawyer can do nothing about it. In my considered opinion, having done a great deal of pro bono work trying to protect senior citizens, I strongly believe lawyers should be mandated reporters of both physical and financial elder abuse. 16 states require reporting by any person having reason to believe elder abuse has taken place, and 4 states specifically list lawyers as mandatory reporters.

It is not uncommon for senior citizens who lack capacity to have their entire life savings wiped out because a trusted child or friend decided s/he wanted to empty the senior's bank account for personal gain. And you are asking me to allow this, even if my mentally incapacitated client is being coerced by family or friends, who have far more influence than I do as the client's lawyer? Remember, the client cannot reason properly, and may be very

much influenced by individuals who plan to take advantage of him/her, especially family members.

Even clients WITH CAPACITY can be easily duped - I had a perfectly lucid client cheated out of \$69,000 by a fake computer repair company. My own father, with dementia, was scammed out of about \$1,000. It took me many months to convince my mother to step in and take over the family finances, because clearly my father was not capable of making appropriate decisions anymore.

I DO NOT believe a lawyer should be forced to sit by and do nothing, while watching an incapacitated client allow himself/herself to be defrauded, because of the lawyers code of professional conduct that forbids the lawyer to intervene if the client doesn't want it. That doesn't sound very professional or ethical to me! For more discussion on this subject, see:
<https://ncler.acl.gov/getattachment/Legal-Training/Mandatory-Reporting-Ch-Summary.pdf.aspx>

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Professional Affiliation	Employer
Name	James Keen
City	Los Angeles
State	California
Email address	Comefindout74@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>Do not impose on someone else decisions or limited capacity. Lawyer is there to represent client in the best light possible not to become their therapist. Also start actually bring layers up on ethic violations. If your a self funded agency then why do you have regulatory powers over Public Defender's. You have swept all formal complaints under the rug in an attempt to cover up the corruption & tyranny taking place at 845 Figueroa Street & 180 Market Street. Take responsibility for your actions. Attorneys cause people irreparable harm. You have continually taken no action against rogue attorneys . Attorneys protecting attorneys since it's inception. The State Bar Of California should be ashamed & embarrassed. Audits exposed you. Roughly 16.000 complaints every year yet no action is taken against any attorneys. The State Bar Should Be Disbanded & Disbarred. How do you justify not taken any action against any attorney.</p>

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Name	Eric
City	san franciscoc
State	California
Email address	Matthew.sotorosen@sfgov.org
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August 16, 2021

Angela Marlaud
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639
Via Email: angela.marlaud@calbar.co.gov

Re: Proposed Formal Opinion No. 13-0002

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion No. 13-0002.

Founded over 100 Years ago, the OCBA has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors is made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political learnings, has approved these comments prepared by the Professionalism and Ethics Committee.

General

We appreciate that COPRAC has taken the time to address the complicated issues regarding clients and prospective clients with diminished capacity. We think that the opinion provides helpful analysis and guidance in an area that needs attention.

Length

We believe the opinion attempts to cover too much ground and, accordingly, recommend that it be shortened. Readers will benefit from a more concise opinion that makes the analysis more manageable. To do so, we suggest, among other things, that the opinion be divided into two separate opinions by keeping Scenarios 1, 2, and 3 together in one opinion, and discussing Scenario 4 and the concept of seeking an advance consent in a separate, stand-alone opinion. We feel that providing guidance to a lawyer on ethical obligations to a client or prospective client with diminished capacity as discussed within the first three scenarios, is very different from the concept, purpose, and enforceability of obtaining an advance informed consent from an existing client, as raised in the fourth scenario. The ethical considerations for disclosure and obtaining informed consent in advance are appropriate for discussion but should be addressed in a separate opinion. As for the question of enforceability of an advance consent, the probable outcome of such a consent is a legal matter not appropriate for inclusion or speculation. We urge that the opinion not attempt to suggest or predict the outcome of disciplinary action, or the enforceability of the consent.

Standard of Care

On Page 3, the opinion states that it does not address issues of the standard of care with respect to professional decisions; however, the opinion then discusses standard of care issues in the first paragraph on page 8. Because the opinion explicitly provides that it does not go into standard of care issues, we suggest that reference to two standard of care cases, *Smith v. Lewis* and *Davis v. Damrell*, be deleted. It is not the purpose of an ethics opinion to address standard of care, or to use language that could be interpreted as suggesting what the standard of care should be. To that end, language should be carefully crafted to stay within the ethical obligations and not stray into standard of care.

The Discussion of *Moore v. Andersen* at pp. 11-13 and footnote 14:

This case establishes that lawyers do not owe a duty *to beneficiaries* to assess the capacity of an individual making a will or trust. However, footnote 14 suggests that *Moore* imposes a duty *to clients* to assess capacity. But *Moore* does not say that, and reading that into the holding as an “express premise” seems like a stretch. We are concerned that this language could be interpreted as setting a standard of care, *i.e.*, that the Lawyer must assess capacity in these circumstances. We believe language that suggests expansion of the standard of care should be avoided, and for that reason, we urge that the discussion be revised.

On pg. 13, immediately prior to the citation of *Moore*, there is also a period after the word “way” but then the sentence continues. You may want to review the punctuation there.

Other Professionals

On page 8, we recommend that the opinion be clear when a statement is a best practice suggestion versus something that lawyers “should” do, which inherently imposes more of a requirement on a lawyer. An example is the last sentence of the first paragraph in footnote 9. Instead of saying the lawyer “should,” you could state that it would be best practices to consider involving medical professionals. Separately, it is unclear, at the end of the footnote, as to what “as discussed below” refers. Again, the opinion should not be a vehicle for creating or expanding the standard of care. It should be limited to the analysis of ethical obligations.

Scenarios 1 and 2 suggest that the lawyer already knows whether the client has capacity and did not need to spend any time assessing capacity. In Scenario 3, the lawyer knew the client from a previous matter, noted a decline, and, with client’s consent, retains a physician as a consultant to assess capacity. We suggest that it be clear that the client can hire the physician, instead of the lawyer having to so hire, and that the client can pay the physician’s assessments fees directly to the physician.

Nondiscrimination

On page 12, we recommend that Section 4 entitled “Nondiscrimination” and footnote 15, which discusses Rule of Professional Conduct 8.4.1(a) and the Americans with Disabilities Act, be deleted entirely because, while the treatment of an individual with diminished capacity is important, it is not

relevant to an opinion about the ethical obligations of a lawyer to assess the ability of an individual with diminished capacity to make decisions. This would also help to shorten the opinion. If Section 4 remains, then we still recommend footnote 15 be deleted. If the footnote remains, we recommend that the second sentence be deleted because the point is unclear. We also recommend that footnote 16 be deleted for the same reason.

Miscellaneous

Page 2 – footnote 4 – delete “inform and” in the last sentence, such that it reads “... may, in turn, affect ...”

Page 5 – second paragraph – change “or by another other means” to “or by any other means” when referencing Probate Code Section 812. The statute is not correctly quoted here.

Page 6 – Change Anderson to Andersen when referencing *Andersen v. Hunt*.

Page 8 – footnote 10 – this footnote seems misplaced. It refers to the point of Scenario 4, not the point of the referenced sentence, which is that the lawyer needs to obtain the client’s consent to associating in or consulting with more experienced counsel.

Page 18 - Rule 1.6 does not require that the subject consent be in writing; however, the opinion provides that it would be prudent and the better practice to obtain such consent in writing. We suggest that it be clear that this is just a practice pointer so that the opinion is not used to support the notion that the lawyer should have obtained or is ethically or legally required to obtain such consent in writing.

Fees - the suggested ethical obligations of a lawyer to assess capacity may, in some instances, require that the lawyer spend time. If the lawyer intends to be compensated for such time, the lawyer might include such assessment in the engagement letter as part of the scope of services. We recommend mentioning this as an option so that lawyers can better avoid potential fee disputes arising from time spent on capacity assessments.

Thank you for your consideration of our comments and suggestions.

Sincerely,



Larisa M. Dinsmoor
2021 President
Orange County Bar Association



Association of Discipline Defense Counsel

1010 Sycamore Avenue, Suite 308; South Pasadena, California 91030

August 23, 2021

VIA State Bar Public Comment Portal

The Committee on Professional Responsibility and Conduct
c/o The State Bar of California
180 Howard Street
San Francisco, California 94105

Dear COPRAC:

The Association of Disciplinary Defense Counsel (ADDC) has reviewed and vetted Formal Opinion Interim No. 13-0002. That Opinion addresses the ethical obligations of a lawyer for a client with a diminished capacity.

This letter is to inform you that ADDC finds the Opinion well written and that it offers helpful guidance to the practicing lawyer on the thorny issues arising when dealing with a client with lessened decision-making capabilities. We particularly found the factual hypotheticals listed as Scenarios 1-4 helpful in understanding the ethics law in this area, especially when no version of Model Rule 1.14 – regarding Clients with Diminished Capacity – was adopted in California as part of the November 1, 2018 revisions to the Rules of Professional Conduct.

One minor area that we believe can be further addressed and clarified in the Opinion is a lawyer's potential consideration to withdraw from representation per Rule 1.16, particularly in the situation addressed in the Opinion regarding the client's refusal or inability to give informed consent to the lawyer to take protective measures, which would prevent the lawyer from taking steps to protect the client against harm. We envision lawyers in such a situation contemplating whether the restriction placed on the lawyer from taking action would be adequate ground to withdraw from the client's representation, and how that may impact the client with diminished capacity.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Art Barsegyan'.

Art Barsegyan
ADDC President



LOS ANGELES COUNTY BAR ASSOCIATION

200 South Spring Street | Los Angeles, CA 90012
Telephone: 213.627.2727 | www.lacba.org

August 23, 2021

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 appreciates the opportunity to submit the following comments on proposed Formal Opinion Interim No. 13-0002 (duty to client with diminished capacity).

As we did in commenting earlier this year on COPRAC's initial draft, we acknowledge the substantial efforts on this complex topic. The proposed interim opinion certainly is the product of extensive research and analysis. While we agree with much of the proposed opinion and do agree that it addresses an important topic, we have the following comments and suggestions:

- 1) With respect to the Digest's first sentence, we have two concerns: a normal lawyer-client relationship involves more than client decision making, and that decision-making is not what is "normally reserved" to the client but what is required by the ethical limit on a lawyer's authority. We suggest the following substitute: "A lawyer for a client with diminished capacity shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client, including leaving only to the client all substantive decisions regarding the engagement." This phrasing is repeated in the last full paragraph on p. 7.
- 2) Three sentences later in the Digest ("Provided that") also has two important problems. The first is that a lawyer might be subject to discipline for a variety of reasons even if the lawyer's actions are "informed and disinterested" (assuming that "disinterested" is intended to say that the lawyer's actions are not skewed for the lawyer's own benefit). Other bases for discipline include, for example, that the lawyer violated the duty of undivided loyalty by acting for the benefit of some other person. The second issue is that the sentence speculates about the possibility of professional discipline. We think ethics committees including COPRAC, our Committee and others, have been careful to exclude from their advisory opinions any prediction about how a

disciplinary authority will act. We cannot think of any instance in which these committees have made such a prediction. Advisory ethics opinions only explain the meaning of the Rules of Professional Conduct and lawyers' underlying fiduciary duties, and in California the State Bar Act. We believe this sentence adds nothing to the proposed opinion's analysis and should be removed, and that all speculation on disciplinary consequences in the body of the proposed opinion also should be removed.

- a. The disciplinary speculation appears again in the sentence that precedes Section 4 on p. 11 and should be removed.
- 3) The first paragraph of the Introduction and Scope section raises a question that we don't believe exists, which is whether the Supreme Court's rejection of proposed rule 1.14 means that a conclusion consistent with the rejected proposal would be wrong because the proposal was rejected. We would remove n. 3 and substitute the following for the second sentence through the end of that paragraph: "Guidance is needed on this important topic because California does not have any version of Model Rule 1.14." The explanation of the rejection of proposed rule 1.14 is unnecessary and adds nothing to the opinion.
- 4) The incomplete paragraph at the foot of p. 2 should include a reference to the duty of confidentiality. We would place this in (a).
- 5) The reference to expert consulting in n. 4 is written so that, taken out of context, it could be read as saying that expert consultation is needed to meet the standard of care. That might or might not be true in any particular situation, so we would change this to say: "... other sources, including consultation with experts in appropriate situations," We note that the first full paragraph on p. 3 says that the opinion does not address the standard of care, and we agree that carve-out is right.
- 6) We have three comments on the first full paragraph on p. 3. *First*, we don't know what is meant by "the content of" in its third line. Removing those words would make the sentence more direct. *Second*, the word that follows ("the") should be "a." *Third*, we do not believe its final sentence adds anything to the analysis. It might have been intended to support the prediction of no disciplinary consequences, but that should not be part of any advisory ethics opinion.
- 7) Scenario 1, line 5, we don't understand "close friend." A friend of whom? Or is this intended to say the diagnostician is a close friend?
- 8) We have these comments on Scenario 2:

- a. We think the fact that Lawyer prepared Client's initial estate plan is intended to communicate that Lawyer knows Client well, but preparation of an estate plan does not mean that. A lawyer might properly prepare an estate plan for a client while having only a superficial knowledge of the client and the client's demeanor and conduct. Please consider: "Lawyer has known Client for many years and recently has noticed signs that Client's capacity has diminished."
 - b. In the second sentence, it is not relevant to the analysis whether the requested estate plan is a new or an initial plan, and we believe that distinction should be avoided.
 - c. Line 5 uses "lawyer" although we believe the reference is to the specific "Lawyer." This capitalization error is repeated in the second line of Section C on p. 18, the second line on p. 19, the twelfth line in the second paragraph on p. 19 (unless you were to change "the lawyer" to "a lawyer"), and in n. 29 (again unless you were to change "the lawyer" to "a lawyer").
- 9) Scenario 3, line 15, says that Lawyer "reasonably believes that the nephew lacks authority to act for Client" We believe that is the wrong standard because a lawyer in many situations will lack the information or the competence to reach that conclusion. We think it more likely that a lawyer will not be confident that a client's purported directions are the product of the client's informed decision making. We think that a lawyer's satisfaction of applicable duties, including those under rules 1.1, 1.2 and 1.4, are subject to question if there is a basis on which the lawyer might reasonably believe that the directions do not contain the client's informed decisions, so that a lawyer acts properly in declining to follow questionable directions. We further believe that this dynamic is not limited to the representation of a client with diminished capacity. Here is one of many possible examples: Corporate counsel receives call from Shareholder No. 1 directing him to amend the Shareholders' Agreement to increase his benefits and decrease those of Shareholder No. 2. We therefore suggest changing that sentence to say: "... Lawyer reasonably questions whether it would be possible to satisfy Lawyer's duties to Client, including those under rules 1.1, 1.2 and 1.4, by communicating only through the nephew."
- 10) As we noted before, this opinion is long because it attempts to address too many scenarios at one time. A second opinion on advance consent would be a better approach, and more conducive to the reader's full comprehension. We believe that Scenario No. 4 should be removed from this proposed opinion in order to shorten the opinion and make it more accessible. This would also permit a more careful analysis of the possibility of advance consent being provided. More thorough consideration might include the necessity or content of required disclosures, and whether an advance consent could become stale through the passage of time or changed circumstances. Does the client have the right to revoke and does that right vanish

when client's capacity is diminished? How can a lawyer know whether a purported revocation was informed without a court decision? And what implied authority is intended in Section 6, beginning on p. 15?

- 11) In the Discussion and Analysis section, at line 2 in the second paragraph on page 5, the quotation from Probate Code section 812 is incorrect. The words "by another other means" should read: "by any other means".
- 12) In the first line of Section B on p. 7, Rules of Professional Conduct should be capitalized.
- 13) We believe that the Restatement cite should be removed from the last full paragraph on p. 7. We don't have any version of Model Rule 1.14 so authority based on it is not applicable in California.
- 14) The paragraph that begins at the foot of p. 7 lapses into standard of care discussion. This is not appropriate in an advisory ethics opinion, and the proposed opinion at the first full paragraph on p. 3 says that it does not address the standard of care. We would remove the citations to *Smith v. Lewis* and *Davis v. Damrell*, both of which address civil liability and not ethical standards. We also would remove the Restatement reference because § 24(2) probably is based on Model Rule 1.14 and is not consistent with our rule 1.2 and underlying case law including *Anderson v. Eaton*, 211 Cal. 113 (1930). We therefore believe that this paragraph does not state any principle but does make a correct observation about the difficulties faced by any lawyer who represents an apparently diminished client.
- 15) In section 4 on Nondiscrimination, we would remove the discussion of federal law from the first complete paragraph on p. 12. It does not advance the ethics analysis and distracts from a direct focus on the opinion's subject. We would retain the first sentence and n. 15, end the second sentence with "beyond the scope of this opinion," move all citations into n. 16 for reference purposes only, and not include any legal analysis in n. 16.
- 16) The first sentence of Section 5, p. 12, asks whether a lawyer for a diminished client "continues to have authority to take protective measures in the client's best interest." Continues from what? What establishes that a lawyer has that authority in the first instance? We think from the discussion that begins with the third sentence of this section that what is intended is to ask whether the lawyer continues to represent the client. However, that question is legal, not ethical, and can be acknowledged but not answered in an advisory ethics opinion. We believe the proper ethics analysis would be to state the factors involved, but recognize that a lawyer is not the final arbiter of the client's capacity. A lawyer who unilaterally makes that decision and stops representing the client might be guilty of client abandonment. Further, in litigation the court will expect the lawyer to carry on. In a context outside of litigation, there

may need to be a determination of capacity before one can know whether the Lawyer's termination has been effected. These are not determinations that can be resolved purely from an ethics analysis. A court will ultimately need to be involved to determine whether a client's lack of capacity exists and has the effect of terminating the relationship. The opinion should address the ethical dilemma for the Lawyer in that situation but necessarily must recognize that he or she does not have the ability to make a final decision.

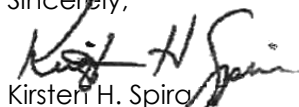
- a. For the same reason, we would remove n. 18. The opinion should not reach any conclusion on automatic termination by incapacity, so discussion of relevant authority is not appropriate. The *Sullivan* opinion is one example of the deep waters involved in the underlying legal issue because it is based in part on Civil Code § 2356(a)(3), a provision that remains in effect.

- 17) The first paragraph on p. 14 begins a new topic – confidentiality - with no introduction. It might be useful to consider subheadings to introduce the various Section 5 elements. - what about subtopic headings? The use of "would be" is too high a standard. Also in the same sentence, "whose disclosure would be harmful" is not the correct standard and also omits a client's authority to prevent disclosure even of information whose disclosure would not be harmful or embarrassing. This is more accurately stated in the second paragraph on p. 14.
- 18) The second p. 14 paragraph speculates inappropriately about how often information about a client's diminished capacity is "secret" under 6068(e)(1). The comments about frequency are speculative and unnecessary. It only need be recognized that such information might come within 6068(e)(1).
- 19) We think that Section 6 is better reserved for a separate opinion, along with Scenario 4. If it remains here, the title to Section 6, p. 15, should include "advance" rather than "advanced."
- 20) Footnote 28 says the opinion does not address whether a lawyer could obtain advance consent to personally initiate conservatorship proceedings for a client, but doesn't that question also apply to a contemporaneous consent? Isn't there a material difference between a client authorizing the disclosure of the client's personal information to others and the lawyer shifting out of the role of a client's legal advisor and becoming a party to proceedings?
- 21) The second sentence in the second full p. 18 paragraph provides a practice tip. These always have been carefully excluded from advisory ethics opinions. We would remove that sentence.

- 22) Section C, p. 18, line 9, says that Lawyer has satisfied. We think the correct statement is: "Lawyer would satisfy ... by competently explaining" We also would remove from the end of that sentence "... with the preservation of Client's liberty." There might be other alternatives, such as different conservator or limitations on the conservator's authority, that competent advice would identify and explain to the Client.
- 23) We would remove the last sentence on p. 18. We do not believe it is part of the ethics analysis and assumes facts about the Client's family members that are not Lawyer's province to make. We also would remove the Restatement citation for the reason already explained.
- 24) In the first paragraph on p. 19:
- a. The first paragraph of page 19 has the following: "We assume that Lawyer's judgment meets the applicable standard of care." Consistent with our prior comments regarding standard of care, we would suggest removal of this sentence.
 - b. The second sentence addresses Lawyer's belief. We would remove the Lawyer's belief on this point from the Facts and from this paragraph. It makes no difference whether Lawyer has an opinion or has none at all about what Client would do if able, only that Client's capacity is diminished. A lawyer in some situations will have no such belief because, for example, the lawyer has no prior relationship with the client or no independent knowledge of the client's family situation and other circumstances.
 - c. In the eighth line on p. 19, we change "would" to "might." At the end of that lengthy sentence, "as required" is surplus and should be removed.
 - d. The second following sentence ("Should Client decline") amounts to practice advice that can be read as establishing a standard of care for civil purposes and goes on to include the lawyer's belief (which as previously explained should not be part of the analysis). The ethics issue is not what a lawyer should do but only what a lawyer properly can do under governing ethical standards. This should be rewritten in ethics terms and avoid conclusions that can be used to set a standard of care.

Thank you for the opportunity to comment on Proposed Formal Opinion Interim No. 13-0002.

Sincerely,



Kirsten H. Spira
Chair, Professional Responsibility and Ethics Committee, LACBA

Public Comment - Proposed Opinion 13-0002 (60 day)

Commenting on behalf of an organization	No
Name	Mark Tuft
City	San Francisco
State	California
Email address	mtuft@cwclaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I commend the Committee on revised interim opinion 130002. The discussion provides practitioners with valuable and much needed advice in a logical format. The opinion will be a useful resource for lawyers who have struggled for years in representing clients with diminished capacity and who will learn that there can be solutions short of having to withdraw and seeing their clients suffer physical, emotional and financial harm.

August 24, 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: Proposed Formal Opinion Interim No. 13-0002:
“Client with Diminished Capacity”
Comments from California Legal Services Organizations
OPPOSE UNLESS MODIFIED**

Dear Members of the Committee:

Thank you for the opportunity to comment on Proposed Formal Interim Opinion No. 13-0002 (“the Proposed Opinion”). As further detailed below, we are submitting this letter of partial support and partial opposition.

We appreciate your positive revisions in response to the February 16, 2021, comments submitted by a coalition of elder and disability rights advocates.¹ We submit this new comment on behalf of an enlarged coalition of 21 California legal services organizations, as well as the Legal Aid Association of California (LAAC), the statewide membership organization of legal services non-profits. We strongly support much of the proposed opinion. However, for the reasons discussed herein, the signatories to this letter cannot support adoption of the Proposed Opinion as currently drafted, due to the issue of “advanced consent.”²

¹ California Advocates for Nursing Home Reform, Disability Rights California, Disability Rights Education and Defense Fund, Law Foundation of Silicon Valley, and Public Interest Law Project.

² All signatories here are funded as part of the formal California legal services system. Many signatories do high-volume direct services, which gives them deep experience with attorney-client relationships in a variety of contexts. Other signatories have significant expertise in disability civil rights, and other fields of analysis reflected in this comment.

Specifically, as discussed in Section II of this letter, the Proposed Opinion's "advanced consent" guidance is inconsistent with an attorney's ethical obligations. It leaves the door wide open for attorneys to make decisions to disclose confidential information based on stereotypes and misconceptions about the ability of people with disabilities to make decisions for themselves. In turn, this undermines clients' autonomy and violates attorneys' ethical obligations.

Accordingly, we urge the Committee to adopt a modified version of the Proposed Opinion that does not include the current version's discussion of advanced consent. To the extent the Committee wishes to offer advanced consent guidance to the California legal community, it should be adopted after a separate process with an additional public comment period.

I. The Undersigned Support Significant Portions of the Proposed Opinion.

We thank the Committee for incorporating feedback provided in the February 16, 2021, comments from elder and disability rights advocates on the previous draft of the Proposed Opinion ("Advocate Comments"). We especially appreciate the Proposed Opinion's emphasis on the attorney's obligation of nondiscrimination and how that obligation—in particular the duty to provide reasonable accommodations—impacts the relationship between an attorney and a client who has diminished capacity because of a disability. Proposed Opinion, 11-12. Highlighting the duty of nondiscrimination in the attorney-client relationship alongside the duties of competence, communication, and loyalty provides the appropriate analysis. Inclusion of the critical role of nondiscrimination, and discussion of the concepts of accommodations and modifications for people with disabilities, reminds attorneys that some people with disabilities may require them to

make changes to their usual practice in order to ensure that clients have equal access to services.

Another strength of the Proposed Opinion is the clear explanation that capacity is decided on an issue-by-issue basis (comparing legal standards for marital and testamentary capacity, for example). Capacity is situational and not static. The Proposed Opinion includes a helpful explanation that a client's capacity may vary based not only on the particular decision to be made, but even the time of day when they are asked to make a decision. "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." Proposed Opinion, 6. We also support the discussion of the fact that competence is to be presumed.

We also appreciate the Proposed Opinion's clear statement that "[t]he lawyer's ethical obligations to [a client with diminished capacity do not change]" and reminder that "the duties of competence, communication, loyalty, and nondiscrimination may require additional measures to ensure that the client's decision-making authority is preserved and respected." Proposed Opinion, 1. As attorneys who represent senior and disabled clients, we agree with this approach, which directs attorneys to carry out their ethical obligations—including the duties of loyalty and confidentiality—rather than attempting to create exceptions to those obligations for situations where the attorney perceives that the client has diminished capacity.

The Proposed Opinion offers practical guidance to help attorneys navigate difficult situations in ways that maintain their clients' confidences, protect

their clients' autonomy, and comport with the attorneys' ethical obligations, including through its analysis of the first three hypothetical fact Scenarios.

However, the Proposed Opinion's discussion of Scenario 4, and of advanced consent more broadly, raises serious concerns. Proposed Opinion, 1, 4, 15-20. For the reasons detailed below, we urge the Committee to amend the Proposed Opinion to remove those portions.

II. The Signatories to this Letter Oppose Adoption of the Proposed Opinion with the Advanced Consent Provisions as Written.

The Proposed Opinion's conclusion regarding Scenario 4 and in section B.6. of the analysis—that an attorney may disclose confidential information if a client has provided an earlier advanced consent to do so—raises serious problems that cannot be reconciled with other portions of the Proposed Opinion. The current draft of the Proposed Opinion does not go far enough to address the concerns raised in the earlier Advocate Comments, and we urge the Committee to remove the advanced consent discussion from the Proposed Opinion. If, however, the Committee decides to finalize advanced consent guidance in this Opinion, the Proposed Opinion should, at a minimum, be modified to address the following issues.

A. Before invoking an advanced consent to release confidential information, an attorney must provide the client with notice and an opportunity to oppose.

The Proposed Opinion does not require attorneys to notify clients of their intent to disclose confidential information before they make the disclosure. Without such a requirement, the client does not have a meaningful opportunity to revoke the advanced consent. To protect the rights of clients,

as well as the propriety of the legal profession, the Committee must change the Proposed Opinion to require an attorney to provide notice and opportunity to object before disclosing confidential information pursuant to an advanced consent.

As discussed at length in the Advocate Comments, California law is clear that, until a person has been *judicially determined* to have lost capacity, they retain the right to modify prior orders or overrule their agents. See Advocate Comments, 11-12. Although this version of the Proposed Opinion references the client's ability to revoke an advanced consent at any time, it does not specifically state that the client retains this right unless a court determines that the client lacks capacity to exercise it.

Recently, the California Court of Appeal held that nursing home residents whom medical professionals deem incapacitated to make decisions about their care retain the right to object to treatment, absent a judicial determination of incapacity to do so. *California Advocates for Nursing Home Reform v. Smith* (2019) 38 Cal.App.5th 838, 881. In that case, the Court reasoned that, to the extent that residents are competent enough to want to challenge determinations made for them and about them, notice and opportunity to object allows them to keep their decision-making capacity intact. *Id.* at 870. The same rationale applies here: before an attorney makes a decision for or about a client—namely, to disclose confidential information pursuant to an advanced consent—the client must be provided the opportunity to object.

Requiring notice of intent to disclose confidential information pursuant to an advanced consent also protects attorneys in the event of a future dispute with a client over the propriety of a disclosure. Before disclosing any confidential information pursuant to a client's advanced consent, the attorney should provide notice to the client in writing, with a clear

description of the information to be disclosed and to whom, and with a reference to the original advanced consent.

B. As written, the Proposed Opinion's advanced consent guidance violates existing Rules of Professional Conduct.

The Proposed Opinion's advanced consent guidance violates California rules on an attorney's duties of communication, confidentiality, and loyalty. In accordance with the discussion above, the Committee must add a requirement for notice and an opportunity to object in order to comply with existing rules.

First, the advanced consent guidance violates Rule of Professional Conduct 1.4—Communication with Clients—because it allows attorneys to circumvent their duty to communicate with their clients about decisions necessitating the client's informed consent and consultation. This includes decisions about the means by which the attorney will accomplish a client's objectives for representation and significant developments relating to the representation. See Rule of Professional Conduct 1.4(a)(1)-(3). We submit that an attorney's determinations that: (1) their client has lost capacity; (2) is exposed to harm; and therefore (3) it is necessary to invoke an advanced consent to reveal otherwise confidential information, are all very significant developments that must be communicated to the client.

The Proposed Opinion acknowledges that a client's diminished capacity does not absolve the attorney of the duty of communication. To the contrary, a client's disability may require an attorney to make accommodations in order to effectively fulfill their duty of communication under Rule 1.4. Proposed Opinion, 9. The same must apply in the context

of ensuring that clients know they have the right to revoke an advanced waiver before the attorney exercises it.

Second, the advanced consent guidance violates Rule of Professional Conduct 1.6—Confidential Information of a Client. Informed consent to release confidential information under Rule 1.6(a) is not meaningful unless a client is reminded of the opportunity to revoke it. Prior to acting on a previously-given advanced consent, it is imperative to require an attorney to seek contemporaneous consent from a client who has not been judicially determined to lack capacity.

Moreover, the advanced consent provisions of the Proposed Opinion are inconsistent with the steps an attorney must take to disclose confidential information without consent under Rule 1.6(c). Disclosure without consent is permitted only in extreme situations. It applies when an attorney believes that the client is about to commit a crime that is likely to result in death or substantial bodily harm. Even in those circumstances, the attorney must first make a good faith effort to persuade the client not to commit the crime. See Rule 1.6(c)(1).

Third, the advanced consent provisions, as written, violates an attorney's duty of loyalty. As the Proposed Opinion states, the "duty of loyalty requires that the lawyer act solely in the client's interest and 'protect [the] client in every possible way.'" Proposed Opinion, 10 (internal citation omitted). The duty of loyalty requires that an attorney believe a client when the client says they do or do not want to follow advice about aspects of the representation.³ It requires an attorney to allow the client to make their own

³ The duty of loyalty is universal throughout the United States and gives control over legal representation to the clients in all cases. "It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow

decisions about what is or is not adverse to them, after the attorney has given candid and competent advice about the potential outcomes of a course of action. As written, the Proposed Opinion allows attorneys to substitute their own judgment in the place of a client's, even if the client has not been judicially found to lack capacity. This is the opposite of loyalty.

C. Any final Opinion must align with the logic and analysis governing attorney withdrawal.

Pursuant to long-standing California analysis—under both prior and current rules of professional conduct—the breakdown of an attorney-client relationship is appropriate grounds for an attorney to withdraw, regardless of who or what caused the breakdown. See *Velle v. Velle* (Super. Ct. Los Angeles 2019), 2019 LEXIS 12464.⁴ Given the availability of withdrawal, there is no need for attorneys to draw on the much more draconian method of using advanced consent to violate confidentiality. Significantly, long-standing analysis specifies that the attorney cannot violate client confidence in withdrawing, further underscoring the preeminence of client's privacy and decision-making authority.

To the extent that an attorney is concerned about a client's chosen course of action, notice of potential withdrawal provides an excellent opportunity

the client to determine what is in the client's best interests." *Orr v. Knowles* (Neb. 1983) 337 N.W.2d 699, 702. "The governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences." *Gross v. Rell* (Conn. 2012) 40 A.3d 240, 269.

⁴ *Velle* considered both Code of Civil Procedure section 284 and current Rule of Professional Conduct 3.1362. This ruling also reaffirmed case law analysis developed under California's prior rules, including prior Rule of Professional Conduct 2-111.

for memorializing the attorney's concern. The fact that withdrawal rules exist underscores that disagreements with a client can be addressed—indeed, are anticipated—without the need to wrest control from the client or disclose client confidences.

Given the long-standing structure governing attorney rights and responsibilities as to withdrawal, there is no need graft a new "disability" rule to deal with what is already a clearly established framework for ethics-related decision-making as to the protection of client confidences.

D. Any final Opinion must address the fallibility of capacity determinations.

The process of determining incapacity is far from an exact science. In our previous comments, we cited to studies showing the unreliability of capacity determinations. See Advocate Comments, 10, 14. A recent article illustrates this concept in vivid detail. On the same day, two different doctors evaluated one person in the context of a guardianship proceeding. One doctor found that the person's prognosis was good and he did not need to be under a guardianship. The other doctor recommended a full guardianship for the man, stating that he had impaired abilities to make informed decisions in all areas of his life.⁵ The opposite findings by two different doctors, on the same day, about the same person underscore the challenges of determining capacity to direct one's own affairs.

The current version of the Proposed Opinion makes no reference to the fallibility of capacity determinations and the caution that must be exercised when relying on them. As such, the Proposed Opinion is incomplete, and

⁵ Cara Bayles, *'More Art' Than Science: Incapacity Findings Prone to Abuse*, Law 360, July 11, 2021, <https://www.law360.com/access-to-justice/articles/1401418/-more-art-than-science-incapacity-findings-prone-to-abuse/>.

provides insufficient guidance to attorneys about the pitfalls of capacity determination.

E. In 2018, the California Supreme Court rejected the adoption of Rule 1.14, which contained an advanced consent provision.

In May 2018, the California Supreme Court approved 69 out of 70 amendments to the California Rules of Professional Conduct proposed by the State Bar's Board of Trustees. The single rule that the Court declined to adopt was proposed Rule 1.14, Client with Diminished Capacity. The Court did not provide a rationale for its decision to reject Rule 1.14 in its entirety. However, proposed Rule 1.14 did contain an advanced consent provision similar to the position advanced by the Proposed Opinion at issue today. While we do not know the Court's reasons for rejecting Rule 1.14 in its entirety, the possibility that the Court found the advanced consent provision inapposite with existing law and ethical rules cannot be discounted.

III. Any Opinion Addressing Advanced Consent Should be Deferred to a Separate Process.

To the extent that the Committee wishes to offer advanced consent guidance to the California legal community, that guidance should be separated from the diminished capacity guidance and adopted after an additional public comment period. A separate process will enable a fuller treatment that incorporates disability nondiscrimination analysis, contemplates a wider range of attorney practice areas, and draws on existing analysis and resources about what is known as "supported decision-making."

A. A separate process will provide opportunity for full consideration of nondiscrimination obligations

As referenced in the Proposed Opinion, a proper analysis of advanced consent must account for disability nondiscrimination requirements applicable to attorneys. See Proposed Opinion, 12. As the Opinion notes, applicable disability rights laws include the Title III “public accommodations” provisions of the Americans with Disabilities Act (ADA) of 1990, as amended, and its implementing regulations.⁶

Further, California attorneys in private practice are subject to state law statutory prohibitions against discrimination, including those in the California Unruh Civil Rights Act and the California Disabled Persons Act.⁷ Attorneys acting in a California state or local governmental capacity—for example, attorneys general, city attorneys, district attorneys, and public defenders—are additionally subject to Title II of the ADA and its implementing regulations.⁸ California Government Code section 11135 also applies to California attorneys working in a state or local government capacity, or in practice settings funded by the state. The “federally assisted” provisions of Section 504 of the Rehabilitation Act of 1973, as amended, apply to both private and public California attorneys who practice in agencies or organizations that receive federal funding.⁹ Attorneys working

⁶ See 42 U.S.C. §§ 12181 *et seq.*, and 28 C.F.R. Part 36.

⁷ See Cal. Civ. Code §§ 51 *et seq.* (Unruh Act), and Cal. Civ. Code §§ 54 *et seq.* (CDPA).

⁸ See 42 U.S.C. §§ 12131 *et seq.* and 28 C.F.R. Part 35 (ADA Title II, Subpart A).

⁹ See 29 U.S.C. § 794; Exec. Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980) (giving the U.S. Department of Justice the authority to coordinate the development of Section 504 regulations); and 28 C.F.R. Part 41 (U.S. DOJ regulations applicable to “federally assisted” grantees).

in federal government executive offices in California—for example, federal agency counsel or federal public defenders—are subject to Section 504 regulations relevant to federal executive agencies.¹⁰

Full and thoughtful consideration of disability rights implications of attorneys using advanced consents is particularly relevant in the “diminished capacity” context because disability discrimination often manifests as paternalism. Many attorneys who believe they are acting in well-intentioned ways to protect client interests may, in fact, be inappropriately substituting their judgment for the client’s judgment on the basis of deeply embedded stereotypes. Both the U.S. Congress and the U.S. Supreme Court have explicitly recognized this risk. *See, e.g., Sch. Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 284 (“Congress acknowledged that society’s accumulated myths and fears about disability are as handicapping as are the physical limitations that flow from actual impairment”).¹¹

¹⁰ See 29 U.S.C. § 794, and 28 C.F.R. Part 39 (U.S. DOJ regulations applicable to “federally conducted” activities).

¹¹ While offering a compelling statement as to the nature of disability discrimination, this passage also demonstrates the degree to which understanding of disability discrimination and its history is highly nuanced and evolves over time. It thus merits constant careful consideration, with the broadest possible opportunity for public input into mandates, policies and guidance that have disability implications. With the passage of the ADA, Congress adopted the widespread terminology switch from “handicap” to “disability.” See, H. Rep. 101-485(III), at 26-27, *reprinted in* 1990 U.S.C.C.A.N. 445, 449 (“The use of the term ‘disabilities’ instead of the term ‘handicaps’ reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than ‘handicapped’ as used in previous laws, such as the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988. By this change in phraseology, the Committee does not intend to change the substantive definition of handicap”).

B. A separate process provides opportunity to solicit input from other stakeholders and attorneys in a broader range of practice areas.

The Committee has acted appropriately in contemplating scenarios arising in the context of estates and trusts. This is a practice area in which attorneys have long-term, often multi-year relationships with clients, who may acquire disabilities over time. We recognize that the Committee has also contemplated scenarios arising in other practice area contexts. However, those additional contexts have not been treated as fully as they could be, given the diversity of other issues the Committee has needed to consider to date. An additional process as to advanced consent will enable the Committee to solicit additional input from prior commenters, as well as wider input from new commenters.

In particular, the Committee should request input from, and underscore the value of, non-attorney stakeholders. Such stakeholders include disability community individuals and organizations, as well as older Californians and organizations working on issues related to seniors. Such outreach is especially important in light of the imbalance of power in attorney-client relationships. Attorneys have more knowledge of the law and, often, more control over the terms of the representation. Advanced consent guidance must be carefully crafted to discourage attorneys from making advanced consents boilerplate terms of retainer agreements or using them coercively.

C. A separate process provides opportunity to draw on existing analysis and resources as to “supported decision-making.”

In the context of the current process, the Committee has not had full benefit of analysis and resources related to what is known as “supported decision-making” (SDM), which is given only a passing reference in a footnote.

Proposed Opinion, 9. SDM enables clients with disabilities to retain legal autonomy by drawing on trusted advisors that they select themselves. Such advisors assist a client in reaching—but do not override—the client’s decisions. As such, SDM is not a form of substituted judgment but, rather, a tool that enables clients to remain in control. This tool has been available for a number of years, and there is now significant real-world experience with SDM, as well as a range of available resources.¹² The Committee should not issue advanced consent guidance without a thorough exploration of how SDM might be used to ensure that clients retain legal capacity, even in the context of alleged “diminished capacity.”

IV. Conclusion

Again, we thank the Committee for all of the work it has done to draft a Proposed Opinion that thoughtfully explores many of the nuances involved in representing the diverse and vibrant community of people with disabilities who may require accommodations in order to participate in the attorney-client relationship.

However, we cannot support adoption of the Proposed Opinion with the as-written provisions regarding advanced consent to disclose confidential

¹² See, e.g., the 2016 Joint Position Statement on “Autonomy, Decision-Making Supports and Guardianship,” issued by the American Association on Intellectual and Developmental Disabilities (AAIDD) and The Arc, available at https://aaid.org/news-policy/policy/position-statements/autonomy-decision-making-supports-and-guardianship#.WBewP_orLIU; resources available from the “Jenny Hatch Justice Project” (JHJP) which is sponsored by the Quality Trust for Individuals with Disabilities (QT) and the Burton Blatt Institute (BBI) at Syracuse University, available at <http://www.jennyhatchjusticeproject.org/>; and publications available from the Spectrum Institute, which is dedicated to ensuring protection of the legal rights of individuals with developmental disabilities, available at <https://spectruminstitute.org/publications/>.

information. Without a requirement for the attorney to notify the client of the intent to disclose information pursuant to a previously-given advanced consent and provide an opportunity to object by revoking the consent, the Proposed Opinion would violate existing California laws and ethical rules. At a minimum, those deficits should be corrected. But for the reasons above, the undersigned organizations respectfully urge the Committee to defer further consideration of “advanced consent” to a separate process.

AIDS Legal Referral Panel

Bay Area Legal Aid

California Advocates for Nursing Home Reform

California Rural Legal Assistance

Central California Legal Services

Community Legal Aid SoCal

Contra Costa Senior Legal Services

Disability Rights California

Disability Rights Education & Defense Fund

Disability Rights Legal Center

Elder Law & Advocacy

Justice in Aging

Law Foundation of Silicon Valley

Legal Aid Association of California

Legal Aid at Work

Legal Assistance for Seniors

Legal Services of Northern California

Mental Health Advocacy Services

National Health Law Program

National Housing Law Project

Public Interest Law Project

Public Law Center

August 23, 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 Trusts and Estates Section's Executive Committee, in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Formal Opinion Interim No. 13-0002 and appreciate the opportunity to comment on the proposed opinion.

In general, we approve of the opinion and believe that it provides helpful guidance. However, we offer suggestions for revision with the intent of improving the opinion.

The Presumption of Capacity and Diagnosis of a Mental or Physical Disorder

To help eliminate the possibility of misinterpretation, the sentence on page 5 reading "The presumption of capacity is not overcome by evidence of a mental or physical disorder" should be changed to: "The presumption of capacity is not overcome by the diagnosis of a mental or physical disorder." This change would better mirror the language in Probate Code section 810, subdivision (c).

In its discussion of Probate Code section 810, the opinion states: "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." This statement addresses the existence of a rebuttable presumption of capacity to make decisions that must be overcome by evidence demonstrating lack of capacity. In the following sentence, the opinion provides: "The presumption of capacity is not overcome by evidence of a mental or physical disorder." This latter statement is not necessarily inaccurate but could be made clearer to readers.

Specifically, this second sentence appears to rely on Probate Code section 810, subdivision (c). Subdivision (c) reads: “A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, *should be based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.*” (Prob. Code § 810(c) [emphasis added].) The statute makes plain that the presumption of capacity is overcome based on evidence of a person’s mental functions and not simply the fact that a person has been diagnosed with a mental or physical disorder. (See *Marriage of Greenway* (2013) 217 Cal.App.4th 628, 646 [“As mandated by Probate Code section 810, Lyle’s diagnosis of dementia is not sufficient in and of itself to support a determination he was of unsound mind or lacked the mental capacity to end his marriage.”].) While the opinion seemingly intends to make this distinction, its choice to use the term “*evidence of a mental or physical disorder*” may confuse the matter, even if it is somewhat clarified in the following sentences. Evidence of a mental or physical disorder could also be evidence of “a deficit in one or more of the person’s mental functions” depending on the type of evidence involved and the circumstances of the case.

***Andersen v. Hunt* and Capacity Being Determined Based on the Particular Act Involved (page 6)**

The fact that a determination of capacity is dependent on the specific act in question is of underlying importance to the discussion in the opinion as a whole and educating readers on substantive capacity law. In the opinion’s discussion of the different standards of capacity involved for certain actions such as marriage and creation of a will, it may be beneficial to expand upon the opinion’s discussion of *Andersen v. Hunt* (2011) 196 Cal.App.4th 722 and the capacity standard for making a trust. In *Andersen*, the Court of Appeal recognized that Probate Code section 6100.5’s specific standard for mental competency to make a will did not expressly apply to testamentary transfers generally and that capacity to make a trust must be evaluated under the standard set forth in Probate Code sections 810 through 812. (*Andersen, supra*, 196 Cal.App.4th 722, 730.) Yet, the Court also noted that sections 810 through 812 “do not set out a single standard for contractual capacity” and emphasized that a person’s ability to appreciate the consequences of an act is dependent on the particular act involved. (*Id.*) Accordingly, in evaluating capacity to “execute a trust amendment that, in its content and complexity, closely resembles a will or codicil,” the Court saw appropriate to look at the standard set forth in section 6100.5 in making a capacity determination under the sliding- scale contractual standard of sections 810 through 812 in that particular case. (*Id.* at 731.) “In other words, while section 6100.5 is not directly applicable to determine

competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils.” (*Id.*)

Accordingly, *Andersen* provides an excellent example of demonstrating how capacity is determined based on the particular act in question where, in the case of trusts, the mental competency required to execute a relatively simple trust similar to a will is not the same as the competency required to execute a more complex trust. (See *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1352-53 [adopting the reasoning of *Andersen* but finding that the trust at issue was too complicated to rely on the section 6100.5 standard].) So, a further discussion of *Andersen* would both provide another example of capacity as it relates to a specific act but also elaborate on the very next subject discussed in COPRAC’s opinion that capacity “is decided on an issue by issue basis and is situational.”

On this topic though, COPRAC may want to consider moving its general discussion on capacity being decided “on an issue by issue basis” more towards the beginning of the opinion’s review of capacity law. Highlighting that a determination of capacity is based on the specific act at issue would help inform the opinion’s discussion of the standard as it relates to marriage or creation of a will rather than how it is currently where these specific standards are discussed without first making the general standard fully clear.

Advance Consent

Based on the language used in the opinion, there may be some confusion regarding whether its discussion on advance consents involves a client with some distinct expected future possibility of losing capacity or whether it pertains to any possible competent client. In the digest of the opinion, it states: “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*.” (Emphasis added.) This statement by its language could be interpreted as discussing a situation where some type of specific incapacity is expected in the future and the lawyer and client are planning with this expectancy in mind. If the statement is intended to apply to any competent client, then the language “who may later become incapacitated” would seemingly be redundant as any person may possibly become incapacitated at some point in the future. On page 18 though, the opinion provides: “[I]n assisting a competent client *to plan for potential future incapacity*, a lawyer may properly invite the client to consider an advance consent to disclosure that meets the above standards, along with other means of addressing such incapacity, such as springing powers of attorney and structured decision-making, and, if consistent with the client’s expressed interests and the applicable standard of care, may recommend the use of such a consent.” (Emphasis added.) This language could be interpreted more generally

as applying to any competent client. It would be beneficial to clarify the position taken by the opinion on this point.

In the same sentence from page 18 discussed above, the opinion references the lawyer “invit[ing]” the idea of an advanced consent and then later discusses the lawyer “recommend[ing]” such consent if appropriate. The opinion may want to further elaborate on what it means by “inviting” as opposed to “recommending.” But we also suggest considering whether this topic is best addressed in this current opinion or whether scenario 4 and the advance consent discussion be severed and reconsidered in a separate opinion.

Professional Assistance

In footnote 9 on page 8, the opinion states that a lawyer may sometimes be able to address capacity issues based on the lawyer’s own observations and expertise but, where capacity depends on medical or psychological issues outside the lawyer’s expertise, the lawyer should involve other professionals. This discussion may be interpreted as requiring the lawyer to engage other professionals when it is not in fact required. As the vast majority of lawyers are not medical or psychological professionals, to some degree any issue of capacity will fall outside their expertise. A lawyer should assess capacity issues based on the lawyer’s own observations *as well as* the lawyer’s understanding of substantive capacity law. Specifically, it should be noted that persons are presumed to have capacity to make decisions. (Prob. Code § 810(a).) While involvement of other professionals, whether legal or medical, may be prudent depending on the circumstances, the opinion could be interpreted as being “too strong” on this point in its commentary.

Scenario 2

In the opinion’s discussion of Scenario 2 on page 19, the opinion references the lawyer as concluding the client “lacks even the low level of capacity required for testamentary decisions” yet later discusses the lawyer involving other persons in the attorney-client communications with the client’s informed consent. As discussed in the opinion, capacity is based on the particular act involved as it is determined on an issue-by-issue basis. It would be helpful for the opinion to further elaborate on this distinction where the lawyer believes the client lacks capacity to make a will but has capacity to give informed consent to disclosure of attorney-client privileged communications.

Other Comments

In the discussion concerning bringing in other professionals, on page 8, the general point should be that lawyers should familiarize themselves with the law of capacity.

We have continuing concern about involving others in confidential client communications, especially in instances where family, friends, etc. may have undue influence. The opinion provides a quick example of a situation that requires some considerable thought and that is not really articulated here.

The discussion on communication could be a better developed to get across the concept that in all situations, communications should be packaged in a way that fits the clients' needs and preferences.

It is not clear what "conventional prejudices associated with a client's condition" might be as referenced on page 10. It would be helpful to know what COPRAC is referring to, and we request that further detail be provided.

The discussion of the duty of loyalty may be misleading for clients with diminished capacity. It certainly suggests that the lawyer may elect not to follow express instructions in some situations. But the rationale given for that seems to be based on situations where the client lacks capacity. Either clients have capacity to make decisions or they don't. Inevitably, each client has different needs though when it comes to getting to the point where they are best equipped to make decisions.

The ADA analysis feels out of place and incredibly brief. It does not appear to add anything to the opinion. COPRAC should consider whether to expand it so that it provides more meaningful guidance or perhaps taking it out.

On page 5, the reference in "Instead, there must be evidence of a deficit in one or more of the person's mental functions, 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.' Probate Code section 810(b)" should be changed from "Probate Code section 810(b)" to "Probate Code section 811(b)."

As a way of including additional California-based resources for practitioners to reference, with the sentence "As the foregoing discussion makes clear, capacity is presumed and is defined by standards that often require both legal and factual judgment in application," a footnote can be added reading: "See generally Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal. CEB Action Guide 2020)."

Andersen v. Hunt (2011) 196 Cal.App.4th 722 is misspelled using “Anderson.”

Footnote 6 on page 5 appears to contain an error in using the word “noninclusive” rather than “nonexclusive.”

Thank you for the opportunity to comment on this draft opinion.

Sincerely,

David M. Majchrzak
Co-Chair
California Lawyers Association Ethics
Committee