

February 16, 2021

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

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

Dear Members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Scenario 1

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

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

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

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

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

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

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

B. Scenario 2

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

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

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

C. Scenario 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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

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

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

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

Sincerely,

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