

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