

Practical Guidance and Ethics in Representing Disabled Clients

Including Clients with Diminished Capacity



Claudia Center, DREDF Legal Director
Ayesha Lewis, DREDF Staff Attorney

January 29, 2024



Topics to Be Covered

- Overview of ethical and legal principles – Claudia
- Practical application: tips and tools – Ayesha
- Capacity, communication, and supported decision-making – Ayesha
 - AB 1663 (2022)
 - Cal. Stats. 2022 Ch. 894
- Additional issues – Claudia
 - Third party supporters and attorney-client privilege
 - “Protective action,” Ethics Opinion No. 2021-207
- Questions and Answers

Overview of Ethical and Legal Principles in Representing Clients with Disabilities



Overview of Ethical and Legal Principles

Clients with disabilities are...



Not just people in wheelchairs!



**Not just blind people with canes
and guide dogs!**

Overview of Ethical and Legal Principles

Clients with disabilities include people with...

Psychiatric disabilities:

- PTSD
- Bipolar disorder
- Schizophrenia
- Depression
- Anxiety
- OCD

Mobility disabilities

Traumatic brain injury

Autism, neurodiversity

Chronic illnesses like:

- Asthma
- COPD
- Diabetes
- High blood pressure
- Kidney disease
- History of Cancer

Dementia, Alzheimers

Sensory disabilities:

- Deafness
- Blindness

Learning disabilities:

- Dyslexia
- Dysgraphia

ADHD

Intellectual & developmental disabilities



Overview of Ethical and Legal Principles

Do any of my clients have disabilities?

Probably!

- 1 in 4 adults nationwide have disabilities
- Higher rates of disability
 - Black & Indigenous people
 - People living in poverty
 - People in jail or prisons (2-3x rate of general population)
 - Seniors
 - Veterans



Trauma is endemic to many of our clients' lives. Trauma, poverty, and disability are inextricably intertwined.



Image credit:
T.L. Lewis

Overview of Ethical and Legal Principles

Disability Nondiscrimination Laws

Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

- Title II – State Courts, see also Cal. Rules of Court, Rule 1.100
- Title III – Law Firms and Nonprofits

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794

- Federal agencies and federally funded entities

Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq.

Cal. Gov. Code § 11135

- State agencies and state funded entities



Overview of Ethical and Legal Principles

Nondiscrimination Laws – Core Principles



Nondiscrimination

- No garden variety “intentional” discrimination
- No policies or practices that screen out disabled clients

Reasonable Accommodation

Effective communication

- Auxiliary aids and services

See also “program access” standard

- Title II and Section 504 entities

Overview of Ethical and Legal Principles

California Rules of Professional Conduct

Core requirements

- Lawyer may not discriminate based on disability, 8.4.1
- Lawyer must perform with competence, 1.1
- Client is in charge of decisions, 1.2
- Lawyer must communicate with client, 1.4
- Lawyer must keep communications confidential, 1.6
- No “protective action” without informed consent
 - California Supreme Court rejected Rule 1.14
 - See also Ethics Decision No. 2021-207



Overview of Ethical and Legal Principles

California Rules of Professional Conduct

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- In representing client (or refusing to represent or terminating representation) “a lawyer shall not ... unlawfully discriminate against persons on the basis of any protected characteristic”
- Protected characteristic includes physical disability, mental disability, “or other category of discrimination prohibited by applicable law, whether the category is actual or perceived[.]”
- Can still decline or withdraw consistent with Rule 1.16

Overview of Ethical and Legal Principles

California Rules of Professional Conduct

Rule 1.2 Scope of Representation and Allocation of Authority



- Subject to rule 1.2.1 [re violation of law], a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4 [Communications with Clients], shall reasonably consult with the client as to the means by which they are to be pursued.

Overview of Ethical and Legal Principles

California Rules of Professional Conduct

Rule 1.4 Communication with Clients

- Promptly inform client when disclosure or informed consent required
- Explain matters as reasonably necessary to permit informed decisions
- Keep client reasonably informed re significant developments; promptly comply w/ reasonable requests for information
- Reasonably consult w/ client re means to accomplish client objectives



Overview of Ethical and Legal Principles

California Rules of Professional Conduct

Rule 1.0.1 Terminology

- (e) “Informed consent” means a person’s agreement to a plan of action after the lawyer has communicated and explained (i) relevant circumstances and (ii) material risks, including any actual or reasonably foreseeable adverse consequences of the plan.



Practical Tips and Tools for Representing Clients with Disabilities



Practical Application – Tips and Tools

Readily Accessible Lawyering



Ed Roberts Campus,
Berkeley, CA

“Universally designed” building to
be accessible to people with a
wide range of disabilities

Practical Application – Tips and Tools

Readily Accessible Lawyering

- Make your default practices accessible for wide range of clients
- Employ regardless of whether client known to have disability
- What does it look like?
 - Plain language, avoid legalese
 - Make implicit explicit – don't assume background knowledge
 - Humility, curiosity, attentiveness to clients
 - Trauma awareness



Practical Application – Tips and Tools

Readily Accessible Lawyering



- Beneficial for:
 - Clients with disabilities
 - Clients who are not fluent in English
 - Clients in crisis or with limited bandwidth (in jail, in the midst of trauma, facing extreme and complex situations, undocumented)
 - Clients who are children
 - Mitigating the power differential between lawyer and client
 - Building trust
- Harmful for:
 - ... No one!

Practical Application – Tips and Tools

Talking to Clients about Disabilities

Be straightforward and concrete.

- Most people with disabilities (whether or not they self-identify as disabled) view their disabilities as an everyday part of their lives. Not horrible or shameful, not “triggering” or embarrassing.
- The less apologetic and uncomfortable you are, the better.



Avoid: “I’m really sorry to be asking but would you mind, if it’s ok, if I ask, if you don’t mind me asking, if you have ever been diagnosed with any mental illness”?

Try: “Do you have any mental illnesses or conditions like PTSD, depression, or bipolar disorder?”

Practical Application – Tips and Tools

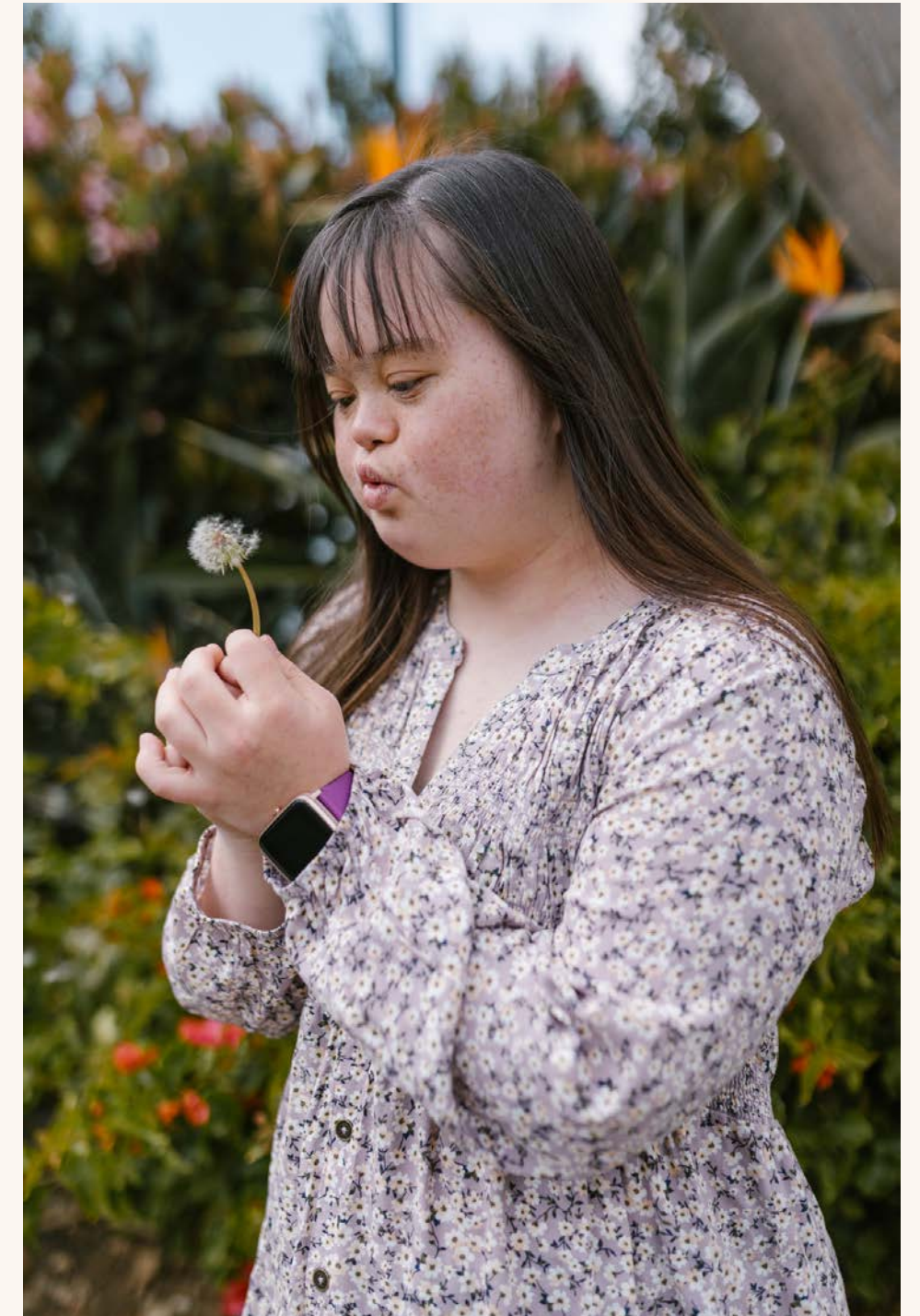
Talking to Clients about Disabilities

- Ask about disability accommodations in simple, nonjudgmental way:
 - Is there anything I can do to help us communicate clearly or help you access this meeting fully?
 - Sometimes people have trouble keeping track of dates and times for meetings – would it help if I send you a text reminder the day before we meet?
- Listen to what the person says! They usually know what works
- But some people have not yet had a chance to get good accommodations, so take “I’m not sure” seriously and try to brainstorm solutions

Practical Application – Tips and Tools

Plain Language

- Simple, plain language is “readily accessible lawyering”
- Helps people with disabilities and everyone else
- Avoid legalese!
- Beneficial for people experiencing trauma, information overload, drug or alcohol withdrawal, great transition, etc. (i.e. many clients, regardless of disability)
- Helps reduce huge power disparity between you and client
- Best practice even before you’ve discussed or identified disability

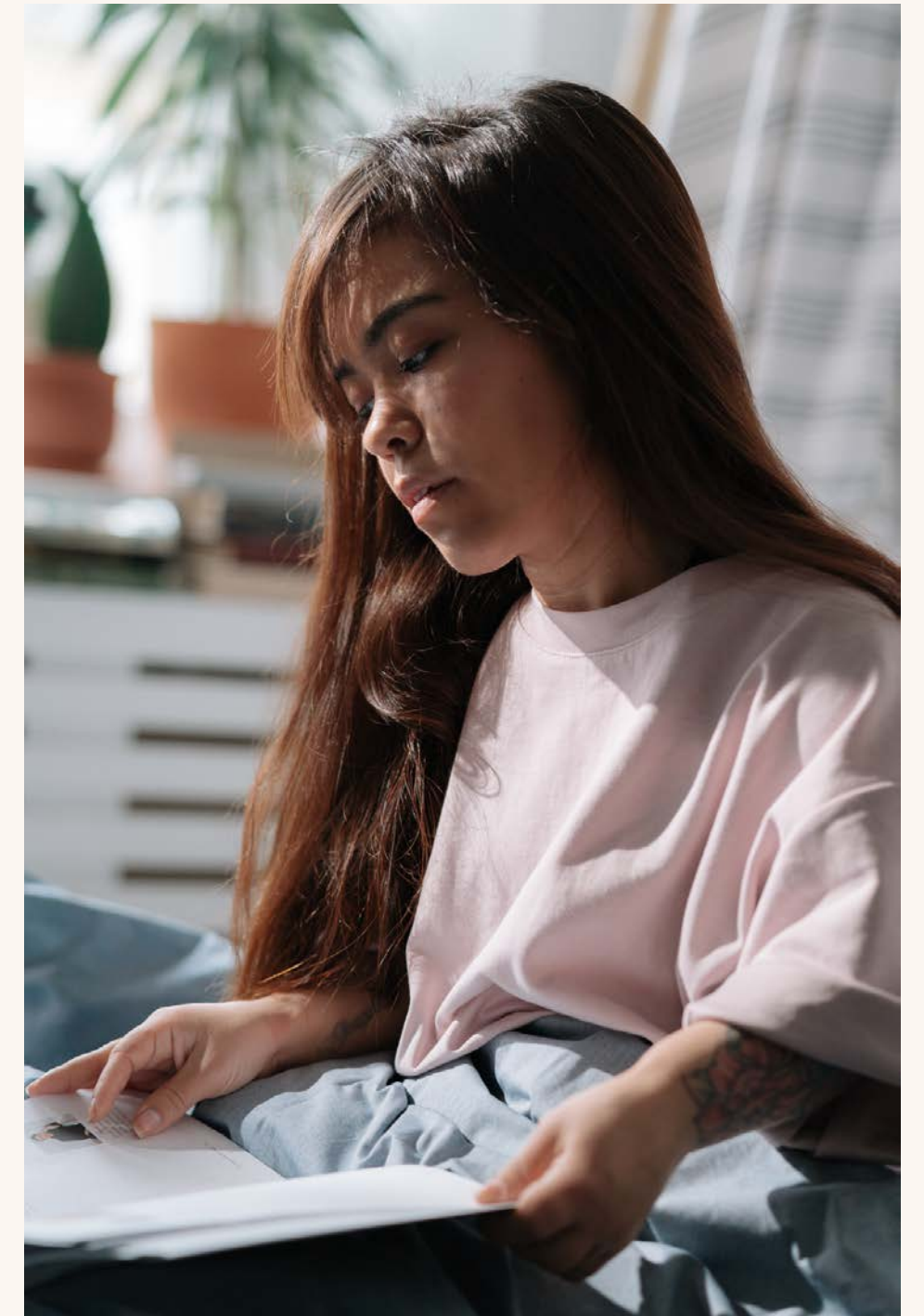


Practical Application – Tips and Tools

Plain Language

Plain language unpacks and explains implied knowledge, using clear, common words.

- **Instead of:**
 - “This case is seeking injunctive relief only.”
- **Try:**
 - “In some kinds of lawsuits people are asking for money because of something unfair that happened to them. But in this case we are not asking for money. We are just asking for changes in the jail to protect people. We will not ask you for money, but we want to make sure you understand that you won’t get any money from this case.”



Practical Application – Tips and Tools

Plain Language Retainers

This document says how Disability Rights Education and Defense Fund (DREDF) and **Client** will work together on a case against **Defendant** for **Case Description**. After DREDF and I sign this document, DREDF will be my lawyers.

I, **Client**, agree that DREDF will bring a case for me against **Defendant** for **Case Description** in **Court**. DREDF will be my lawyers in the case. I know that DREDF is only agreeing to bring a case for me against **Defendant** in Court for **Case Description**. DREDF is not bringing any other case for me.

[IF INJUNCTIVE RELIEF ONLY] I know that this case is not asking for any money for me. This case is only asking that **Defendant** change how it does things.

Practical Application – Tips and Tools

Plain Language Declarations

- More compelling to court
- More meaningful to client
- Opportunity for client to tell their story
- Opportunity to build and demonstrate trust with client



Practical Application – Tips and Tools

Plain Language Declarations

9. I take medication for mental illness. I sometimes hear voices that other people do not hear. Sometimes I hear the small computer tablets talking to me. The doctors here give me medication, but I have questions about it. It is hard to talk to the doctors because I cannot hear them well. I am afraid that the medication I take now will hurt me. I do not trust the doctors or nurses here. I think they are trying to manipulate me. A mental health advisor asked me to sign a form even though it was ~~wrong~~^{improper}. I do not know why they are doing this. I would ask more questions but I cannot hear the answers well. .

10. It would be easier to communicate with the doctors if they used machines to help me hear them. When my lawyers visit, for example, they bring a little machine called a “pocket talker.” The lawyer talks into a small microphone and I wear headphones. The lawyer’s voice is amplified for me ^{very clearly.} With this simple machine, I can understand everything my lawyers are saying, even in loud places. If my doctor used a pocket talker, I would be able to communicate with my

Using language client actually uses, and relying on client input on how best to say something, deferring to client on their story.

Capacity, Communication & Supported Decisionmaking



Client Capacity

- **Capacity is spectrum – not yes/no question**
 - Changes with context, topic, emotional & physical state, etc.
 - Capacity for representation does not require a client to fully understand all of the nuances of litigation
- **Capacity is changeable – it can be strengthened**
 - “Readily accessible lawyering” with plain language
 - Reasonable accommodations:
 - time of day; format, duration, location of meetings; breaks; repetition
 - Supported decision-making
- **Assess capacity with supports**



≡ What is Supported Decisionmaking? ≡

An individualized arrangement in which an adult with a disability chooses one or more people they trust as supporters to help them understand, make, communicate, implement, or act on, their own choices.

An alternative to conservatorship or guardianship that can strengthen the capacity of a person with disabilities and avoid the need for conservatorship or guardianship.



How does supported decisionmaking affect representation of clients with disabilities?

A client with disabilities may use formal or informal supported decisionmaking.



They may have trusted, chosen supporters who help them understand, consider, or communicate choices, including choices relating to representation.

SDM can help client to strengthen their capacity.

What does SDM in representation look like?

Representation of a client using SDM could look like:

- Client requests that supporter join client in attorney meetings (but note privilege issues, coming soon!)
- Supporter assists client in logistics such as scheduling meetings and arranging transportation
- Supporter helps client communicate – for example, supporter re-speaks the client's words if speech is difficult to understand
- Supporter helps client understand complicated legal concepts (but remember readily accessible lawyering to minimize complicated obtuse terms)

☰ What are attorney's obligations and responsibilities with a client using SDM?

- A new law in California – AB 1663 – formally recognizes SDM
- SDM can be a “reasonable accommodation” – a change to standard practice to ensure that disabled clients have equal access to representation
- **Remember:** assess capacity with supports

AB 1663 (2022) ≡ The Probate Conservatorship Reform and Supported Decision-Making Act



- Recognizes SDM as valid way for people with disabilities to strengthen capacity and make choices, see Welf. & Inst. Code § 21000 (findings)
- SDM means an individualized process of supporting and accommodating an adult with a disability to enable them to make life decisions, Welf. & Inst. Code § 21001(c)

AB 1663 (2022) ≡ The Probate Conservatorship Reform and Supported Decision-Making Act (cont.)

SDM agreement:

- Voluntary, written agreement, written in plain language accessible to the disabled adult
- Signed by disabled adult and each supporter
- Signed by notary public or two neutral witnesses
- Should be reviewed every two years

Welf. & Inst. Code §§ 21001(c), 21005

AB 1663 (2022) ≡ The Probate Conservatorship Reform and Supported Decision-Making Act (cont.)

- Upon appropriations, creates program to educate and provide information about alternatives to conservatorship like SDM, Health & Safety Code § 1836
 - To be housed at Superior Court self-help centers
- Requires consideration of alternatives to conservatorship such as SDM at various points in conservatorship process (petition, annual review)

AB 1663 (2022) ≡ The Probate Conservatorship Reform and Supported Decision-Making Act (cont.)

- Makes it easier for people in conservatorships to get out, including by appointing counsel in termination, and allowing for uncontested terminations
- Requires conservators to keep conservatee informed of choices, rights retained, and, as far as possible:
 - use SDM within conservatorships and
 - make choices aligned with conservatee's wishes

AB 1663 (2022) ≡ The Probate Conservatorship Reform and Supported Decision-Making Act (cont.)

Key provisions of AB 1663 related to SDM:

- Probate Code §§ 1800(e), 1800.3(c), 1821(a)(1)(C)(i), 1836(b)(1), (d)(3), (4), 2113
- Cal. Welf. & Ins. Code § 21000 to 21008

Additional Issues – Third Party Supporters and Privilege



Third Parties and Privilege

Rule 1.6 Confidential Information of a Client

A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule [re prevention of certain crimes].

Third Parties and Privilege (cont.)

Cal. Bus. & Prof. Code § 6068(e)

Duty of lawyer to “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client” [unless exception to prevent certain crimes applies].



Third Parties and Privilege (cont.)

Cal. Evid. Code §§ 952, 954, client has privilege to refuse disclosure of “confidential communication between client and lawyer” –

- Transmitted between client and lawyer
 - within relationship and in confidence
- By means disclosing information to **no third persons other than:**
 - those present to **further the interest of the client in the consultation** or
 - those to whom **disclosure reasonably necessary** for the transmission of the information or accomplishment of purpose of consultation

Third Parties and Privilege (cont.)

Law Revision Commission Comments, Cal. Evid. Code § 952:

- The words “other than those who are present to further the interest of the client in the consultation” indicate that a communication to a lawyer is **nonetheless confidential even though it is made in the presence of another person—such as a spouse, parent**, business associate, or joint client—**who is present to further the interest of the client in the consultation. ...**
- This may change existing law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client.

Overview of Ethical and Legal Principles

Principles from Model Rule 1.14



Comment to ABA Model Rule 1.14*

- “The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.”
- Lawyer must look to the client, not family members, for decisions

***This rule was rejected by California Supreme Court in 2018, likely due to its core provision allowing unconsented “protective action” using privileged information**

Third Parties and Privilege (cont.)

Case law:

People v. Carasi , 44 Cal. 4th 1263 (2008) (reviewing two clauses from section 952 and Commission comment in context of attorney-client meeting with putative spouse present, but finding no need to decide question)

Stevens v. Brigham Young Univ.-Idaho, No. 4:16-cv-00530-DCN, 2018 U.S. Dist. LEXIS 100491 (D. Idaho June 11, 2018) (finding that communications at attorney-client meeting with client's supporter present were protected where attorney reasonably believed supporter's presence necessary for client with anxiety)

Third Parties and Privilege (cont.)

Case law:

- Fox v. Alfini, 2018 CO 94, 432 P.3d 596 (Colo. 2018) (ordering production of tape recording of initial legal consultation with medical malpractice plaintiff where parents were present, rejecting plaintiff's argument that parents were necessary due to diminished capacity caused by stroke, and finding that plaintiff did not demonstrate that her parents were objectively necessary to consultation)



Third Parties and Privilege (cont.)

Practical tips for meeting with clients who may want or need participation of supporters:

- Meet with client alone to determine their preferences
- Make your own assessment re whether participation of supporter(s) is necessary or would advance interest of client in representation
- If you allow supporter(s), clearly state to client and supporter that:
 - All information and communications confidential
 - Client makes all decisions
- Can consider confidentiality agreement for supporter – pros and cons
- Think twice re: supporter plus audio recording
- Document basis for participation of supporter(s)

Additional Issues – “Protective Action”



“Protective Action” & State Bar Ethics Opinion No. 2021-207

What can you do in California if you think your client has diminished capacity and it’s hurting the representation?

- Continue to represent the client, following the Rules
 - provide reasonable modifications to support capacity
- Terminate representation consistent with Rule 1.16

No option in Rules to initiate “protective action” (e.g. seek appointment of conservator) without consent to protect client, California Supreme Court rejected Rule 1.14

“Protective Action” & State Bar Ethics Opinion No. 2021-207

2021 Ethics Opinion:

- Lawyer may obtain advanced consent from client to the lawyer’s disclosure of confidential information in the future – in the event that client’s future diminished capacity exposes client to harm that could be prevented by such disclosure
- Client’s advanced consent must be informed with review of relevant circumstances, benefits, risks

“Protective Action” & State Bar Ethics Opinion No. 2021-207

2021 Ethics Opinion (cont.):

- Advanced consent is revocable, if client retains legal capacity to revoke
- Lawyer should not act on advanced consent if client would not have agreed or would have revoked given changed circumstances
- Should be memorialized in writing



“Protective Action” & State Bar Ethics Opinion No. 2021-207

Critique of 2021 Ethics Opinion:

- Allows lawyers to disclose confidential information based on stereotypes and misconceptions about capacity
- Violates ethical rules and is inconsistent with California Supreme Court’s rejection of Rule 1.14
- Ignores alternatives such as SDM

“Protective Action” & State Bar Ethics Opinion No. 2021-207

Critique of 2021 Ethics Opinion (cont.):

- To comply with Rules, lawyer should be required to inform client of intent to disclose confidential information at time of disclosure
- Client should then have opportunity to object and revoke the consent (absent judicial finding of incapacity)



Questions and Answers

