

RE: T&E Proposal 2005-02 [ABA MR 1.4]
6/10/05 Commission Meeting
Open Session Item III.F.

-----Original Message-----

From: Linda Q. Foy [mailto:lfoy@howardrice.com]
Sent: Monday, May 23, 2005 8:50 AM
To: William J. Caldarelli; Barry Fitzpatarick; Greg Herring; J. Timothy Maximoff; Kim Kupferer; Peter S. Stern; Richard D. Kaplan; Tracy M. Poptts; Difuntorum, Randall; Hollins, Audrey; McCurdy, Lauren; trothschild@lafla.org; Kevin_e_mohr@compuserve.com or kevinm@wsulaw.edu; mlodise@trustlitigation.la
Cc: CommissionerJ1@aol.com; pecklaw@prodigy.com; Hollins, Audrey
Subject: REMINDER: May 26, 2005 Video-conference re proposed Rule of Professional Conduct (representation of impaired client)

To all:

Just a reminder regarding the video conference to take place this Thursday at the San Francisco and Los Angeles offices of the State Bar. If you plan to attend, please send confirmation to me and to Audrey Hollins at the State Bar (audrey.hollins@calsb.org) so that your name can be given in advance to the security at the front desk. Please forward this information to others you think may be interested in attending.

Thank you,
Linda Foy

VIDEO-CONFERENCE PUBLIC HEARING RE PROPOSED RULE (REPRESENTATION OF IMPAIRED CLIENT)

The Rules Revision Commission of the State Bar is considering adoption of a proposed new rule regarding the representation of clients who are substantially impaired. On May 26, 2005, a sub-committee of the Commission will be hosting a session by video-conference linking the Los Angeles and San Francisco offices of the State Bar to provide interested persons and stakeholders with an opportunity to provide input on the issues to be addressed by such a rule and the contours of such a rule.

We invite your attendance in your capacity as chairs or officers of State Bar Committees representing constituencies of likely stakeholders, as well as other interested parties, and request that you forward this information to others who might wish to provide input to the Commission. Attached for your review are materials that were prepared for the Commission's agenda in response to the proposal of the Trusts and Estates Committee of the State Bar requesting development of such a rule

(apologies for the earlier, premature distribution of same).

Meeting re Proposed Rule (Impaired Client)
May 26, 2005 9 a.m.-noon

San Francisco
180 Howard Street
San Francisco, CA 94105
(415) 538-2167

Los Angeles
1149 South Hill Street
Los Angeles, CA 90015
213) 765-1000

We look forward to your participation and receiving your input on May 26.

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REST 3d LGOVL S 24

Restatement (Third) of Law Governing Law. § 24 (2000)

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<KeyCite Citations>

Restatement (Third) of The Law Governing Lawyers
Current through September 2004

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Chapter 2. The Client-Lawyer Relationship
Topic 3. Authority To Make Decisions

§ 24. A Client With Diminished Capacity

[Link to Case Citations](#)

(1) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2).

(2) A lawyer representing a client with diminished capacity as described in Subsection (1) and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

(3) If a client with diminished capacity as described in Subsection (1) has a guardian or other person legally entitled to act for the client, the client's lawyer must treat that person as entitled to act with respect to the client's interests in the matter, unless:

- (a) the lawyer represents the client in a matter against the interests of that person; or
- (b) that person instructs the lawyer to act in a manner that the lawyer knows will violate the person's legal duties toward the client.

(4) A lawyer representing a client with diminished capacity as described in Subsection (1) may seek the appointment of a guardian or take other protective action within the scope of the representation when doing so is practical and will advance the client's objectives or interests, determined as stated in Subsection (2).

Comment:

a. Scope and cross-references. This Section recognizes adjustments to the client-lawyer relationship that are required when a client has diminished capacity to make decisions in the representation. See also § 31, Comment e, stating that a client's incompetence does not automatically terminate a lawyer's authority, and § 14, Comment c, on the liability of an incompetent client to pay for legal services constituting "necessaries." On the role of lawyer and client in defining the scope of the representation, see § 19.

b. Rationale. An unimpaired client can define the client's own objectives (see § 19), confer with counsel (see § 20), and make important decisions (see §§ 21 & 22). To the extent a client is incapable of doing so and no other person is empowered to make such decisions, the lawyer's role in making decisions will increase. An alternative is to appoint a guardian for the client, but that may be expensive, not feasible under the circumstances, and embarrassing for the client. In some cases, different views about the client's welfare may be presented by opposing counsel for a tribunal's decision. This Section recognizes that a lawyer must often exercise an informed professional judgment in choosing among those imperfect alternatives. Accordingly, each Subsection applies based on the reasonable belief of the lawyer at the time the lawyer acts on behalf of a client described in Subsection (1).

c. Maintaining a normal client-lawyer relationship so far as possible. Disabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times; and they may be caused by childhood, old age, physical illness, retardation, chemical dependency, mental illness, or other factors. Clients should not be unnecessarily deprived of their right to control their own affairs on account of such disabilities. Lawyers, moreover, should be 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.

When a client with diminished capacity is capable of understanding and communicating, the lawyer should maintain the flow of information and consultation as much as circumstances allow (see § 20). The lawyer should take reasonable steps to elicit the client's own views on decisions necessary to the representation. Sometimes the use of a relative, therapist, or other intermediary may facilitate communication (see §§ 70 & 71). Even when the lawyer is empowered to make decisions for the client (see Comment *d*), the lawyer should, if practical, communicate the proposed decision to the client so that the client will have a chance to comment, remonstrate, or seek help elsewhere. A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully (see § 20, Comment *b*, & § 46, Comment *c*).

A lawyer for a client with diminished capacity may be retained by a parent, spouse, or other relative of the client. Even when that person is not also a co-client, the lawyer may provide confidential client information to the person to the extent appropriate in providing representation to the client (see § 61). If the disclosure is to be made to a nonclient and there is a significant risk that the information may be used adversely to the client, the lawyer should consult with the client concerning such disclosure.

A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so. The lawyer should adhere, to the extent reasonably possible, to the lawyer's usual function as advocate and agent of the client, not judge or guardian, unless the lawyer's role in the situation is modified by other law. The lawyer should, for example, help the client oppose confinement as a juvenile delinquent even though the lawyer believes that confinement would be in the long-term interests of the client and has unsuccessfully urged the client to accept confinement. Advancing the latter position should be left to opposing counsel.

If a client with diminished capacity owes fiduciary duties to others, the lawyer should be careful to avoid assisting in a violation of those duties (cf. § 51(4)).

d. Deciding for a client with diminished capacity. When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided. Because a disability might vary from time to time, the lawyer must reasonably believe that the client is unable to make an adequately considered decision without prejudicial delay.

A lawyer's reasonable belief depends on the circumstances known to the lawyer and discoverable by reasonable investigation. Where practicable and reasonably available, independent professional evaluation of the client's capacity may be sought. If a conflict of interest between client and lawyer is involved (see § 125), disinterested evaluation by another lawyer may be appropriate. Careful consideration is required of the client's circumstances, problems, needs, character, and values, including interests of the client beyond the matter in which the lawyer represents the client. If the client, when able to decide, had expressed views relevant to the decision, the lawyer should follow them unless there is reason to believe that changed circumstances would change those views. The lawyer should also give appropriate weight to the client's presently expressed views.

A lawyer may bring the client's diminished capacity before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests as the client would define them if able to do so rationally. A

proceeding seeking appointment of a guardian for the client is one example (see Comment e). A lawyer may also raise the issue of the client's incompetence to stand trial in a criminal prosecution or, when a client is incompetent to stand trial, interpose the insanity defense. In such situations, the court and the adversary process provide some check on the lawyer's decision.

In some jurisdictions, if a criminal defendant's competence to stand trial is reasonably arguable, the defendant's lawyer must bring the issue to the court's attention, whether or not the lawyer reasonably believes this to be for the client's benefit. That should not be considered a duty to the client flowing from the representation and is not provided for by this Section.

A lawyer must also make necessary decisions for an incompetent client when it is impractical or undesirable to have a guardian appointed or to take other similar protective measures. For example, when a court appoints a lawyer to represent a young child, it may consider the lawyer to be in effect the child's guardian ad litem. When a client already has a guardian but retains counsel to proceed against that guardian, a court often will not appoint a second guardian to make litigation decisions for the client. Other situations exist in which appointment of a guardian would be too expensive, traumatic, or otherwise undesirable or impractical in the circumstances.

It is often difficult to decide whether the conditions of this Section have been met. A lawyer who acts reasonably and in good faith in perplexing circumstances is not subject to professional discipline or malpractice or similar liability (see Chapter 4). In some situations (for example, when a lawyer discloses a client's diminished capacity to a tribunal against a client's wishes), the lawyer might be required to attempt to withdraw as counsel if the disclosure causes the client effectively to discharge the lawyer (see § 32(2)(c)).

e. Seeking appointment of a guardian. When a client's diminished capacity is severe and no other practical method of protecting the client's best interests is available, a lawyer may petition an appointment of a guardian or other representative to make decisions for the client. A general or limited power of attorney may sometimes be used to avoid the expense and possible embarrassment of a guardianship.

The client might instruct the lawyer to seek appointment of a guardian or take other protective measures. On the use of confidential client information in a guardianship proceeding, see § 61 and § 69, Comment *f*.

A lawyer is not required to seek a guardian for a client whenever the conditions of Subsection (4) are satisfied. For example, it may be clear that the courts will not appoint a guardian or that doing so is not in the client's best interests (see § 16 & Comment *d* hereto).

f. Representing a client for whom a guardian or similar person may act. When a guardian has been appointed, the guardian normally speaks for the client as to matters covered by the guardianship. (When under the law of the jurisdiction a client's power of attorney remains in effect during a disability, the appointee has such authority.) The lawyer therefore should normally follow the decisions of the guardian as if they were those of the client. That principle does not apply when the lawyer is representing the client in proceedings against the guardian, for example, in an attempt to have the guardianship terminated or its terms altered. The law sometimes authorizes the client to bypass a guardian-- for example, when a mature minor seeks a court order authorizing her to have an abortion without having to disclose her pregnancy to her parents or guardians. The lawyer may also believe that the guardian is violating fiduciary duties owed to the client and may then seek relief setting aside the guardian's decision or replacing the guardian (see also § 51(4)). If the lawyer believes the guardian to be acting lawfully but inconsistently with the best interests of the client, the lawyer may remonstrate with the guardian or withdraw under § 32(3)(d) (see § 23, Comment *c*).

When a guardian retains a lawyer to represent the guardian, the guardian is the client.

REPORTER'S NOTE

Comment c. Maintaining a normal client-lawyer relationship so far as possible. ABA Model Rules of Professional Conduct, Rule 1.14(a) (1983) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with

the client"); see ABA Model Code of Professional Responsibility, EC 7-12 (1969); Institute of Judicial Administration-ABA, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 3.1(b), 3.5 (1980) (decisionmaking and informing client); *Alvord v. Wainwright*, 731 F.2d 1486 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984) (lawyer bound to follow wish of defendant found competent to stand trial to raise alibi but not insanity defense); *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D.Wis.1972) (defendant in civil commitment proceeding constitutionally entitled to advocate, not merely guardian who decides what is best for defendant); *In re Crane*, 449 N.E.2d 94 (Ill.1983) (discipline of lawyer who failed to explain basis of large fees to clients who had recently come of age); *In re M.R.*, 638 A.2d 1274 (N.J.1994) (lawyer for retarded person must advocate client's stated custody preference); *Quesnell v. State*, 517 P.2d 568 (Wash.1973) (lawyer in civil commitment proceeding may not waive jury trial for client and should communicate with client).

Comment d. Deciding for a client with diminished capacity. ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [2] (1983) (lawyer must sometimes act as de facto guardian); ABA Model Code of Professional Responsibility, EC 7- 12 (1969) (lawyer compelled to decide should act to advance client interests); see Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515. For examples of lawyer decisionmaking, see *People v. Bolden*, 160 Cal.Rptr. 268 (Cal.Dist.Ct.App.1979) (lawyer, in best interests of client, may argue client's incompetence to stand trial even though client disagrees); *State v. Aumann*, 265 N.W.2d 316 (Iowa 1978), reh'g denied, 268 N.W.2d 288 (Iowa 1978) (proper for lawyer to appeal incompetence-to-stand-trial issue against client's wishes); *State ex rel. A.E.*, 448 So.2d 183 (La.Ct.App.1984) (proper to proceed with hearing to terminate parental rights of comatose mother represented by counsel); Juvenile Justice Standards, Reporter's Note to Comment c, supra, § 3.1(b)(c)(3) (lawyer representing juvenile incapable of considered judgment may stay neutral or support least intrusive intervention warranted by circumstances); see *United States v. Marble*, 940 F.2d 1543 (D.C.Cir.1991) (where client competent to stand trial, client and not court decides whether to plead guilty by reason of insanity); Uniform Probate Code §§ 4-407 & 5-303 (appointed lawyer in guardianship or conservatorship proceeding has authority and duties of guardian ad litem); C. Wolfram, *Modern Legal Ethics* 159-163 (1986).

On the duty of defense counsel in some jurisdictions to raise the issue of incompetence to stand trial regardless of the impact on the client, compare *State v. Haskins*, 407 N.W.2d 309 (Wis.Ct.App.1987) (lawyer must raise issue); ABA Standards Relating to the Administration of Criminal Justice § 7- 4.2(c) (2d ed. 1982) (same) with *Enriquez v. Proconier*, 752 F.2d 111 (5th Cir.1984), cert. denied, 471 U.S. 1126, 105 S.Ct. 2658, 86 L.Ed.2d 274 (1985) (tactical reasons may warrant not raising issue).

Comment e. Seeking appointment of a guardian. ABA Model Rules of Professional Conduct, Rule 1.14(b) (1983) ("A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest"); Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515, 559-567 (discussing pros and cons of seeking guardianship). At times, a tribunal may require the appointment of a guardian ad litem. E.g., *Noe v. True*, 507 F.2d 9 (6th Cir.1974); *Pettengill v. Gilman*, 232 A.2d 773 (Vt.1967). For the lawyer's duty to defer in most circumstances to decisions made for the client by the guardian, see ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [3] (1983); ABA Model Code of Professional Responsibility, EC 7-12 (1969); Juvenile Justice Standards, Reporter's Note to Comment c, supra, at 3.1(b)(c)(1); *Brode v. Brode*, 298 S.E.2d 443 (S.C.1982) (criticizing lawyer's appeal from order approving sterilization of retarded minor, to which guardian had consented on showing of medical and other dangers).

Comment f. Representing a client for whom a guardian or similar person may act. See *Metropolitan Life Ins. Co. v. Carr*, 169 F.Supp. 377 (D.Md.1959) (lawyer or guardian may apply to the court for instructions if there is doubt as to the facts to which guardian may properly stipulate); *In re Sippy*, 97 A.2d 455 (D.C.1953) (lawyer retained by mother cannot represent minor daughter in disobedient child-commitment proceeding initiated by mother, when daughter has retained other counsel); *In re Fraser*, 523 P.2d 921 (Wash.1974) (when guardian improperly seeks pay out of ward's funds, lawyer may disobey guardian's order to withdraw, until replacement lawyer is found); ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [4] (1983) (lawyer representing guardian who acts adversely to ward may have duty to prevent or rectify that misconduct).

Research References

1. Digest System Key Numbers

West's Key No. Digests, Attorney and Client k 77-81.

Case Citations

Case Citations through June 2003

Case Citations through June 2003:

Mass.2003. Cit. in disc., quot. in ftn. In a child-dependency proceeding, the juvenile court terminated father's parental rights as to two daughters, and placed two other daughters in the permanent custody of the Department of Social Services. Daughter who had expressed a preference to be returned to father's custody moved for a new trial on the ground of ineffective assistance of counsel. The appeals court affirmed. Affirming, this court held, inter alia, that daughter failed to demonstrate that her trial counsel's failure to advocate her wishes was prejudicial in light of overwhelming evidence of father's unfitness, which no measure of zealous advocacy could have overcome. In re Georgette, 439 Mass. 28, 41, 785 N.E.2d 356, 365.

(2000)

REST 3d LGOVL § 24

MEMORANDUM

TO: Members of the Rules Revision Commission

FROM: Linda Foy

DATE: January 13, 2005

RE: Board Referral of Trust & Estates Section Legislative Proposal 2005-02 (re Impaired Client) [ABA MR 1.14]

I. Charge to the Rules Revision Commission

At its December 4, 2004 meeting, the Board of Governors referred the proposal of the State Bar Trusts and Estates Section 2005-02 ("Confidentiality Exception: Mentally Impaired Clients") to the Rules Revision Commission for consideration. This subcommittee has been asked to make an initial recommendation to the Commission on the issue whether the policy reform proposed by the Trust and Estates Section would require a change in statutory law (e.g., in the form of amendment to Business and Professions Code section 6068(e)), should be addressed in changes in the Rules of Professional Conduct, both or otherwise.

II. Background

A. State Bar Trust and Estates Section Proposal [memo attached]

Over the years¹, the California State Bar Trust and Estates Section has identified particular ethical issues encountered by trusts and estates practitioners and problems conforming their practices to the California Rules of Professional Conduct, as well as difficulties in reconciling the requirements of the duty of confidentiality (particularly as embodied in Business and Professions Code section 6068(e)), the duty of loyalty, the duty to avoid conflicts and the lawyer's obligation to act in the best interest of the client. In its October 25, 2003 proposal ("T&E Memo"), the Executive Committee of the Trust and Estates Section of the State Bar (T&E Exec. Comm.) expressed a concern that California has no rule that specifically addresses the obligations of an attorney who represents a mentally impaired client but observed that California statutory and case

¹See *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* ("T&E Ethics Guide"), published by the Trust and Estates Section in 1997.

authority (including ethics opinions of local bar associations) tend towards prohibiting an attorney from taking any action, even to protect the best interests of the client, that would require disclosure of client confidences.

Noting that the ABA Model Rules and the Restatement of the Law Governing Lawyers expressly sanction such action by an attorney and that the near absolute prohibition against disclosure in Business and Professions Code section 6068(e) is inconsistent with the many exceptions to confidentiality contained in Evidence Code section 950 *et seq.*, the T&E Exec. Comm. voted to support an amendment to the Business & Professions Code to add section 6068.5 that would permit an attorney to make limited disclosure of client confidences in order to protect the interests of an impaired client, but would not go as far as ABA Model 1.14(b) in permitting the attorney to take protective action in the form of seeking the appointment of a guardian ad litem, conservator or guardian for an impaired client. The proposed legislative amendment is as follows:

“6068.5. Notwithstanding subdivision (e) of Section 6068:

- (a) If a client’s capacity to make adequately considered decisions in connection with a representation is significantly impaired, the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.
- (b) If the attorney reasonably believes that the client has significantly impaired capacity and as a result thereof 1) is at risk of substantial physical, financial, or other harm unless action is taken, and 2) cannot adequately act in the client’s own interest, the attorney may, but is not required to, notify those individuals or entities that have the ability to take action to protect the client.
- (c) If an attorney takes action pursuant to paragraph (b), above, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.
- (d) Nothing in this section permits an attorney to file, or represent a person filing, a conservatorship petition or similar action concerning the attorney’s client, where

the attorney would not otherwise be permitted to do so, nor to take a position adverse to the client beyond the notification permitted in paragraph (b), above.

- (e) "Significantly impaired capacity" as used in this section shall mean that the client suffers from an impairment that would be sufficient to support a determination of incapacity under Probate Code Section 811(a) and (b).
- (f) An attorney shall not be held liable for taking or forbearing to take the actions authorized by this section."

B. Comparison with ABA Model Rules [MR1.6, 1.14 attached]

Model Rule 1.6 (Confidentiality of Information) prohibits an attorney from disclosing information relating to a representation "unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." MR 1.6(a). The exceptions enumerated in subsection (b) (where lawyer reasonably believes disclosure is necessary to prevent reasonable certain death or substantial bodily harm, prevent or mitigate substantial injury to financial interests of another etc.) do not include the situation of a client whose impairment poses a risk to the client's own legal or financial interests.

Model Rule 1.14 (Client with Diminished Capacity) provides that "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." MR1.14(b). In contrast, the proposed section 6068.5 does not allow an attorney to take steps to conserve a client, protecting California's strict prohibition against taking a position adverse to a client. It will permit the attorney only to notify appropriate persons or entities of limited facts necessary to protect an impaired client where the attorney reasonably believes that the client is at risk of substantial physical, financial or other harm due to the impairment.

Secondly, Model Rule 1.14(c) expressly provides that "[i]nformation relating to the representation of a client with diminished capacity is protected by Rule 1.6," but notes that "[w]hen taking protective action pursuant to paragraph (b), *the lawyer is*

*impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests [emphasis added].*²

Thus, the Model Rules are interpreted to permit a lawyer to reveal client confidential information to protect the client's own interests under the "implied authorization" language of MR 1.6. In contrast, the T&E Exec. Comm.'s legislative proposal contemplates that permitting an attorney to disclose client confidences in the service of acting to protect the interests of an impaired client will require an amendment to section 6068(e).

C. California Ethics Opinions.

The Rules of Professional Conduct have been interpreted to prohibit any action by an attorney to protect the interests of an impaired client that would require disclosure of client confidences. See COPRAC Formal Op. 1989-112 (unethical for attorney to institute conservatorship proceedings against client's wishes because in doing so, attorney will disclose client confidences and represent either conflicting or adverse interests); San Diego County Bar Assn. Op. 1978-1 (attorney cannot initiate conservatorship proceedings nor cause them to be initiated by others because such action would require revealing client confidences); Los Angeles Bar Assn. Op. #450 (1988) (attorney cannot seek conservatorship for own client because such proceeding would be adverse to the client). Although the T&E legislative proposal would not permit an attorney to institute conservatorship proceedings even where it is believed to be in the best interests of the client, the proposal permits other courses of action (e.g., notifying third parties who have the ability to take protective action) that could require disclosure of client confidences.

The Bar Association of San Francisco ethics committee reached a contrary conclusion. BASF Opinion 1999-2 first observed that because California has no rule directly on the subject of attorney obligations to impaired clients, courts can look to ABA Model Rules and published California ethics opinions for guidance, but noted that those authorities are in conflict. However, observing that California ethics opinions prohibiting an attorney from initiating conservatorship proceedings leave the attorney with no way to

²As of the date of the T&E Memo, it is reported that ethics rules revision committees in nineteen states had recommended adoption of the text of Model Rule 1.14; eight states have revised their rules to incorporate the language of Model Rule 1.14, including its exception to the rule of confidentiality.

protect the client, BASF Opinion 1999-2 ultimately concluded that in appropriate circumstances, an attorney may recommend appointment of a trustee, conservatorship or guardian ad litem on the theory (articulated in Model Rule 1.14(b) that the attorney has the implied authority and discretion to make limited disclosures necessary to achieve the best interests of his or her client and that in proposing investigation into a possible conservatorship, the attorney is seeking to preserve the client's estate, not acting adverse to the client. However, BASF Op. 1999-2 focused on the view that permitting an attorney to initiate conservatorship proceedings would not necessarily involve action adverse to the client and did not address the view that such conduct would require disclosure of client confidences in violation of Business and Professions Code section 6068(e).

III. Discussion and recommendation

To the extent that the T&E Exec. Comm. proposal seeks to authorize an attorney to reveal client information in order to notify third parties of the need to protect the client from financial or personal harm, the T&E proposal assumes that the recommended policy reform would require creating an exception to Business and Professions Code section 6068(e) along the lines of proposed section 6068.5.

First, in comparison with section 6068(e), Model Rule 1.6 contains an express provision that an attorney may disclose information relating to the representation of a client where "the disclosure is impliedly authorized in order to carry out the representation" and therefore does not require amendment to accommodate the permissive conduct sanctioned in Model Rule 1.14, which is interpreted to involve an exercise of such "implied authority." In contrast, Business and Professions Code section 6068(e) states a duty of confidentiality that is unconditional (subject only to exceptions not relevant here). There is no reference to an attorney's "implied authority" to reveal client confidences in order to carry out the representation or as necessary to further the best interests of an impaired client.

However, there are other statutory sources of an attorney's implied authority to disclose client confidences, notwithstanding the absolute language of section 6068(e). For example, Evidence Code section 952 defines confidential attorney-client communications to include disclosures "to third persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted." This is narrower than permission to make disclosure necessary to protect the interests of the impaired client that may be broader the "the purpose for which the lawyer is consulted," unless "purpose" is read very broadly or it is assumed that any financial or

personal harm to an impaired client that could otherwise be avoided by notification of an appropriate third party would frustrate the purpose of any legal representation.

In addition, not only may the proposed amendment be unnecessary to permit the attorney to notify third parties as described; there is an additional question whether the amendment would be sufficient to implement the desired policy. The California Supreme Court has repeatedly affirmed its ultimate authority to regulate attorney conduct, notwithstanding legislative enactments. Just as enactment of AB1011 to create a death/substantial bodily harm exception to section 6068(e) prompted the legislature to request the State Bar to develop a companion Rule of Professional Conduct for Supreme Court approval, several provisions of proposed section 6068.5 implicate specific Rules of Professional Conduct. Thus, subsection (b) (permitting the attorney to disclose confidential information to appropriate third parties in appropriate circumstances) will require a corresponding change to new RPC 3-100 (Confidential Information of a Client) [text attached]; subsections (a) and (b) may implicate an attorney's duty to keep the client reasonably informed about significant developments relating to the employment and the attorney's right of permissive withdrawal; and subsection (d) (prohibiting the filing of a conservatorship petition or other position "adverse to the client beyond the notification permitted in paragraph (b)") may raise conflict issues under Rule 3-310.

The T&E Executive Committee recognizes that in view of the recent passage of AB 1101, this may be an opportune moment for the committee to press its case for proposed section 6068.5 and an additional statutory exception to the unequivocal language of Section 6068(e). If, as suggested, amendment to the statute can be avoided by construing an attorney who contacts a third party regarding an impaired client to be acting with implied authority within the meaning of Evidence Code section 952, there does not appear to be any comparable concept of implied authority in the Rules of Professional Conduct, nor particularly in the new Rule 3-100, where it might otherwise be expected to appear.



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CLIENT-LAWYER RELATIONSHIP

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

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Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP RULE 1.6 CONFIDENTIALITY OF INFORMATION

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no

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reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is

not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such

disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] 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. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot

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be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

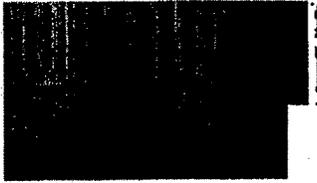
[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal

action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

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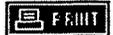
Rules of Professional Conduct

Current Rules

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CURRENT RULES



Rule 3-100. Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In *Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information

contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith

effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

1. the amount of time that the member has to make a decision about disclosure;
2. whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
3. whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
4. the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
5. the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
6. the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

1. whether the client is an experienced user of legal services;
2. the frequency of the member's contact with the client;
3. the nature and length of the professional relationship with the client;
4. whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
5. the likelihood that the client's matter will involve information within paragraph (B);
6. the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
7. the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to

augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)

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T&E - 2005 -02

TO: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

RE: Confidentiality Exception: Mentally Impaired Clients (ABA MRPC 1.14)
Project No. 2003-04

Section Action:

Date of Approval by Trusts and Estates Section Executive Committee:

Approval Vote: 10/25/03, 22 for, 1 against

Date of Approval by Trusts and Estates Section Incapacity Committee: Approval Vote: 8/25/03;
10/20/03 (minor modifications), unanimous.

Section/Committee and Contact:

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Digest:

California currently has no rule that specifically addresses the obligations of a lawyer who represents a mentally impaired client, and, to the extent that statutory and case authority address the issue, they tend to conflict with a growing number of other jurisdictions, as well as to be internally contradictory.

Business and Professions Code Section 6068(e) currently provides:

It is the duty of an attorney to do all of the following: . . . (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Evidence Code Sections 952 and 954 define and provide for the protection of disclosure of confidential information communicated from a client to an attorney, with exceptions in the case of the commission of a crime or a fraud or to prevent a client from committing a crime.

The American Bar Association recently revised Rule 1.14 of its Model Rules of Professional Conduct to provide as follows:

“MRPC 1.14 - Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Ethical rules revision committees in 19 states,¹ not including California, have written reports and have all recommended adoption of the revised text of Rule 1.14 as set forth above. All eight states (Arizona, Delaware, Idaho, Montana, New Jersey, North Carolina, South Dakota, and Virginia) which have revised their rules since the development of the ABA revision have adopted the new rule language, including the confidentiality exception included in subdivision (c).

Ethics opinions from the California State Bar and from the Bar Associations of San Diego, Los Angeles and San Francisco interpret the provision of the current statutory framework differently, with the State Bar, San Diego and Los Angeles concurring that an attorney with a mentally impaired client may take no action which would disclose the client's secrets and the San Francisco opinion holding that the attorney in such a situation may take action to protect the client. The State Bar's Estate Planning, Trust, and Probate Section (now the Trusts and Estates Section), in its Guide to the California Rules of Professional Conduct For Estate Planning, Trust and Probate Counsel (1997), advocated adoption of a rule of professional conduct similar to the ABA Model Rule 1.14.

This proposal would remedy the current lack of a provision in California, and would also provide guidelines for attorneys dealing with a mentally impaired client. At the same time, the provision would not allow an attorney to take steps to conserve a client, which steps are authorized by the ABA Model Rules. Thus, the proposed rule preserves to the greatest extent possible California's strict prohibition against taking positions adverse to a client, allowing an attorney only to act to protect the interests of the client, and then only to the most limited extent.

Application:

This bill will enable an attorney to notify the proper individuals or entities of limited facts necessary to protect the attorney's client where the attorney reasonably believes that the client is at risk of substantial physical, financial or other harm due to the client's impairment.

Illustrations:

An attorney represents a client who has no close relatives and has become very attached to the client's caregiver. The attorney believes, based upon conversations with the client, that the client would meet the standard for imposing a conservatorship because the client has exhibited

¹ The following state ethical review committees have proposed adoption of the revised text of MRPC 1.14, with the exceptions noted below: AZ, AR, DE, FL, IL, IN, IA, LA, MD, MI, MN, MT, NJ, NC, OR, PA, SC, SD, VA.

LA: (b), at the end: replaces "guardian ad litem, conservator or guardian" with "fiduciary, including a guardian, curator or tutor, to protect the client's interests."

AR: (b) adds at the end: Extreme caution must be exercised by a lawyer before nominating the lawyer, a member or employee of the lawyer's firm, or a relative within the third degree or relationship to serve as guardian ad litem, conservator or guardian.

symptoms such as extreme short-term memory loss and confused thinking. The attorney has learned from the client that the client wrote a check to the caregiver for \$10,000 for a Christmas gift and intends to transfer her checking account into a joint tenancy account with the caregiver. The attorney knows, solely from prior conversations with the client, that the caregiver has a gambling problem and is concerned that the proposed transfer of assets will harm the client and lead to her losing substantial funds. The client has not authorized the attorney to tell anyone about this. If this legislation were in place, the attorney could notify either a family member or an entity, such as APS, to investigate the actions of the caregiver prior to the client's losing substantial funds to the caregiver.

Documentation:

The author is unaware of any documentary evidence of the problem, beyond ongoing discussions among estate planning and elder law attorneys. There is a substantial accumulation of anecdotal evidence contributed by members of the Section's Executive committee relating examples of clients who have been victims of neglect or abuse and whose attorneys, aware of such neglect or abuse, have not been authorized to seek assistance for their clients.

History:

Although there have been several attempts to make changes consistent with the present proposal at the level of the State Bar's former Conference of Delegates in the past few years, no similar proposal of legislation has been made, although the rationale behind this language, that there are certain public interests that must prevail over attorney-client privilege in certain circumstances, supported the recent passage of AB 1101, which amended Business and Professions Code Section 6068(e) to allow disclosure of attorney-client privileged information in strictly limited criminal law contexts.

Pending Litigation:

None known.

Likely Support/Opposition:

The Trusts and Estates Section will support this legislation. Similar proposals have been discussed by the Conference of Delegates of the State Bar in prior years, but none has been adopted. Those persons supportive of AB 1101 are more likely to be supportive of this (AB 1101 was sponsored by Assembly member Steinberg) and those groups that opposed AB 1101 are likely to be against this proposal as well. This proposal would be supported by ABA members as it brings California law in line with ABA rules. Groups concerned with elder abuse are likely to be supporters of this proposal, which was enthusiastically endorsed in concept by the October 2003 Financial Elder Abuse Seminar organized by the San Francisco Consortium for Elder Abuse Prevention.

Fiscal Impact:

No anticipated fiscal impact.

Germaneness:

This proposed legislation regulates the conduct of attorneys, particularly those attorneys practicing in the trusts and estates section and is thus uniquely within the scope of the section's interests and knowledge.

Proposed Legislation:

SECTION 1. Section 6068.5 is added to the Business and Professions Code, to read:

6068.5. Notwithstanding subdivision (e) of Section 6068:

(a) If a client's capacity to make adequately considered decisions in connection with a representation is significantly impaired, the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) If the attorney reasonably believes that the client has significantly impaired capacity and as a result thereof 1) is at risk of substantial physical, financial, or other harm unless action is taken, and 2) cannot adequately act in the client's own interest, the attorney may, but is not required to, notify those individuals or entities that have the ability to take action to protect the client.

(c) If an attorney takes action pursuant to paragraph (b), above, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) Nothing in this section permits an attorney to file, or represent a person filing, a conservatorship petition or similar action concerning the attorney's client, where the attorney would not otherwise be permitted to do so, nor to take a position adverse to the client beyond the notification permitted in paragraph (b), above.

(e) "Significantly impaired capacity" as used in this section shall mean that the client suffers from an impairment that would be sufficient to support a determination of incapacity under Probate Code Sections 81 I(a) and (b).

(f) An attorney shall not be held liable for taking or forbearing to take the action authorized by this section.



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MEMORADUM

DATE: November 22, 2004
TO: Saul Bercovitch, Office of Governmental Affairs
FROM: Randall Difuntorum, Office of Professional Competence
SUBJECT: COPRAC Comment on 2005 Legislative Proposal T&E 2005-02

=====

BACKGROUND

On behalf of the Committee on Professional Responsibility and Conduct ("COPRAC"), I am submitting this memorandum in response to your September 16, 2004 e-mail message requesting comment on proposals for legislation to be introduced in 2005. COPRAC has reviewed the proposals and offers this comment on Trust and Estates Section Proposal No. 2005-02 [re Confidentiality Exception: Mentally Impaired Clients] ("T&E 2005-02").

COPRAC first considered T&E 2005-02 at its October 7, 2004 meeting. At that meeting a subcommittee was assigned to prepare a recommendation for consideration by the full committee. At its meeting on November 19, 2004, the full committee considered and adopted the subcommittee's recommendation for comment. The committee's comment is set forth below.

COPRAC'S COMMENT

The Trust & Estates Section's proposed legislation concerns issues arising in an attorney's representation of an impaired client and would establish a new exception to the statutory duty of confidentiality in California. COPRAC supports study of the issues the proposal raises, and commends the Trust & Estates Section's attention to this issue, because COPRAC is aware of the difficult client protection issues confronting lawyers who represent impaired clients. However, COPRAC opposes the section's proposed legislation as drafted at this time, because the matter requires further study and that study presently is within the scope of the State Bar's Commission for the Revision of the Rules of Professional Conduct ("Commission").

COPRAC's opposition to the proposed legislation is based upon both procedural and substantive concerns. Procedurally, the Subcommittee believes that the desired change in the law is a matter that falls within the charge given to the Commission. That charge requires the Commission to consider the ABA Model Rules of Professional Conduct, including ABA Model Rule 1.14 ("Client with Diminished Capacity"). COPRAC is informed that the Trust & Estates Section Executive Committee has submitted comprehensive materials to the Commission along with a statement that it "strongly supports in principle the adoption in California of new [ABA Model] Rule 1.14." The Commission will consider the issue in accordance with its mandate from the Board of Governors.

Substantively, COPRAC has policy and technical concerns about the legislative proposal. Some trust and estates practitioners have indicated that the proposed legislation is not universally endorsed by lawyers practicing in that field. Some practitioners have expressed a preference for the status quo rather than the proposed legislation because there are existing steps that can be taken to protect impaired clients and out of concerns that the proposal would weaken the attorney-client trust relationship. As a result, COPRAC perceives the need for further study by the Commission with input from all affected by the proposal. In addition, COPRAC observes that the proposal is under-inclusive in that it would apply only to "elder" clients. And the proposal fails to address the problem of lawyers who are complicit with family members or other malicious actors seeking to exploit an impaired client.

In terms of technical concerns, COPRAC is not convinced that all aspects of the proposed reform would be accomplished by amending the statutory duty of confidentiality. Changes to the Rules of Professional Conduct (perhaps by analogy to Rule 3-100) may be necessary in addition to or in lieu of the present proposal for statutory change. The complex interplay of the Rules of Professional Conduct, which are adopted by the Supreme Court, and legislative provisions which govern attorneys must be considered carefully before changes are made. Here again, this is another reason that the ongoing process of the Commission should be allowed to play out concerning this proposal rather than rushing toward a Legislative change.

COPRAC is, as always, available to the Board and its Commission to assist in the study of impaired client representation issues and would be happy to consult with the Trust & Estates Section as well upon request.

Questions about this comment may be directed to me at (415) 538-2161.