

## RESOLUTION 4-11-2002

### DIGEST

#### Rules of Professional Conduct: Representation of Clients with Diminished Capacity

Adds Rules of Professional Conduct Rule 3-800 to allow an attorney representing a client with diminished capacity to take reasonable action to protect the client, including revealing confidential information.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### Reasons:

This resolution adds Rules of Professional Conduct Rule 3-800 to allow an attorney representing a client with diminished capacity to take reasonable action to protect the client, including revealing confidential information. This resolution should be disapproved because, although it addresses a significant problem, it seeks to make a change to the Rules of Professional Conduct that would contradict statutory law.

Business and Professions Code section 6068 requires an attorney to preserve a client's confidential information and secrets without exception. This resolution proposes a change to Rules of Professional conduct that would permit an attorney to disclose a client's confidential information under certain circumstances. Because rules cannot supercede statutes, this resolution should be disapproved.

The problem addressed by this resolution is, however, important. The current Rules of Professional Conduct track the confidentiality provisions of the statutes. As the proponent points out, these provisions may result in a situation where an attorney has a client who is suffering from diminished capacity but the attorney is constrained from taking steps to protect that client from himself. For instance, an attorney might learn from the client's words and actions that the client is suffering from severe memory impairment and is being taken advantage of by a third party. Under current law, because the attorney's action would be based on confidential information, the attorney can take no action without breaching at least one of the duties of loyalty and confidentiality. Under these circumstances, current law has the effect of preventing adequate representation.

### SECTION/COMMITTEE REPORT

THE STATE BAR OF CALIFORNIA (Professional Competence Unit)

Recommendation: NO POSITION

#### Reasons:

The State Bar agrees with the proponent's concerns for providing guidance to lawyers representing clients with diminished capacity. Currently, the task of developing a possible new Rule of Professional

Conduct is pending with the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. Accordingly, the State Bar takes no position on resolution 04\_11\_2002.

The Rules Revision Commission is charged with conducting a cover-to-cover review of the entirety of the California rules and proposing comprehensive amendments for Board consideration. In particular, the Rules Revision Commission's charter includes the task of evaluating the proposed amendments to the American Bar Association ("ABA") Model Rules of Professional Conduct developed by the ABA Ethics 2000 Commission, including the proposal on ABA Model Rule 1.14.

Consistent with this charge and in response to the Rule Revision Commission's January 2002 solicitation for member and public input, the Executive Committee of the Trusts and Estates Section of the State Bar has already commended to the Rules Revision Commission the consideration of ABA Model Rule 1.14 (Client with Diminished Capacity). In its April 5, 2002 memorandum to the Rules Revision Commission, the Executive Committee states that it "strongly supports in principle the adoption in California of new [ABA Model] Rule 1.14."

The sponsor's desired initiative is in process with the appropriate State Bar entity and it is anticipated that the State Bar will endeavor to provide the best possible guidance to lawyers on this important client protection issue. A State Bar position endorsing the proponent's version of Model Rule 1.14 is premature at this time.

## TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends the State Bar add Rule 3-800 to Rules of Professional Conduct of the State Bar of California to read as follows:

- 1     Rule 3-800
- 2             (a) When a client's capacity to make adequately considered decisions in connection
- 3     with a representation is diminished, whether because of minority, mental impairment or for some
- 4     other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer
- 5     relationship with the client.
- 6             (b) When the lawyer reasonably believes that the client has diminished capacity, is at
- 7     risk of substantial physical, financial, or other harm unless action is taken and cannot
- 8     adequately act in the client's own interest, the lawyer may take reasonably necessary protective
- 9     action, including consulting with individuals or entities that have the ability to take action to
- 10    protect the client and, in appropriate cases, seeking the appointment of a conservator.
- 11            (c) When taking protective action pursuant to paragraph 2. above, the lawyer is
- 12    impliedly authorized to reveal information about the client, but only to the extent reasonably
- 13    necessary to protect the client's interests.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

## STATEMENT OF REASONS

Existing Law: California is one of the few states that have not addressed the issue of representing clients with diminished capacity.

This Resolution: Addresses the issue of representing a client with diminished capacity and addresses the issue of what the attorney may do when that client is at risk.

The Problem: As demographics change in California more attorneys are faced with the dilemma of representing a client with diminished capacity. The fastest growing segment of our society is the age group 85 years and above. Clients may be new clients to the attorney or long term clients who develop cognitive problems. The client may be at severe risks, and presently the lawyer may not ethically make a report to Adult Protective Services or seek other means to protect the client. There are many seniors who are alone and do not have others who can protect them. The above language tracks the language recommended by the American Bar Association's E2K Commission, Report and Recommendations on Amendments to the ABA Model Rules of Professional Conduct as Model Rule 1.14, and will be debated this year. California is now in the minority of states that do not allow some kind of protective actions to be taken for clients. It is time of California to engage in this debate and give guidance to its attorneys when representing clients with diminished capacity.

## IMPACT STATEMENT

This proposed resolution will not affect any other regulation or law.

AUTHOR AND/OR PERMANENT CONTACT: Donna R. Bashaw, Esq., 23601 Moulton Parkway, Suite 220, Laguna Hills, California 92653. (949) 454-2205. dbeldrlaw@aol.com.

RESPONSIBLE FLOOR DELEGATE: Donna R. Bashaw

## COUNTERARGUMENT

### BEVERLY HILLS BAR ASSOCIATION

The proposed addition of Rule 3-800 to the California Rules of Professional Conduct should be opposed. It is based on the false premise that a "normal" relationship might be maintained with a client who is not able or no longer able to maintain normal relationships. For the client with severe impairment, the attorney has a specific function: to provide the best legal services he or she can which includes holding inviolate the confidences of that client. This proposed rule carves out an exception to

the attorney's duty to maintain confidences without providing any guidance for such an exception. The author's assumption that an attorney may not ethically make a report that would lead to protection of the seriously impaired client is unpersuasive as such a report or other action to protect the client from harm may be taken without necessarily revealing confidences of the client.