

## **RESOLUTION 10-03-04**

### **DIGEST**

#### Attorney: Revelation of Confidential Information to Protect Client

Amends Business and Professions Code section 6068 to permit an attorney to reveal confidential client information to protect an aged client with diminished mental capacity.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

#### **DISAPPROVE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Business and Professions Code section 6068 to permit an attorney to reveal confidential client information to protect an aged client with diminished mental capacity. This resolution should be disapproved because it is underinclusive and vague.

California maintains an exceptionally strict duty of attorney-client confidentiality. Only in very limited circumstances-when an attorney believes disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm-may an attorney reveal confidential client information. (Bus. & Prof. Code, § 6068(e).)

This resolution is underinclusive because it is restricted to clients over the age of 65. In contrast, ABA Model Rule of Professional Conduct 1.14-adopted by thirty-three states-permits an attorney to reveal confidential information related to the representation of a client with diminished capacity, when necessary to protect such client's welfare, irrespective of such client's age. This resolution, though in principle fundamentally sound, is too narrowly drawn.

This resolution is also too vague as drafted. The resolution states that an attorney may, under certain circumstances, act to protect his or her client from "substantial physical harm," yet it does not define "substantial physical harm."

### **SECTION/COMMITTEE REPORTS**

#### **OFFICE OF PROFESSIONAL COMPETENCE RECOMMENDATION**

#### **DISAPPROVE**

This position is solely that of the State Bar's Office of Professional Competence and has not been adopted or endorsed by the State Bar's Board of Governors. The State Bar Office of Professional Competence opposes resolution 10-03-2004. This position should not be construed as an opinion on the merits of the sponsor's proposal. Rather, this opposition is based on the current study being conducted by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. 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 ABA Model Rules of Professional Conduct developed by the ABA Ethics 2000 Commission, including ABA Model Rule 1.14. ABA Model Rule 1.14 provides:

“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.

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 commended to the Rules Revision Commission the consideration of the ABA Model Rule 1.14. In its April 5, 2002 memorandum to the Commission, the Executive Committee states that it “strongly supports in principle the adoption in California of new [ABA Model] Rule 1.14.”

Accordingly, the sponsor's desired initiative is in process appropriately with the State Bar through its Rules Revision Commission as that group will consider whether to recommend adoption of a California counterpart to ABA Model Rule 1.14. Conference action, if any, at this time, would be referred by the State Bar to the Rules Revision Commission.

**TRUSTS AND ESTATES SECTION RECOMMENDATION  
APPROVE AS AMENDED**

The Trusts and Estates Section executive committee of the State Bar takes the position that it will approve the resolution if amended to conform to the language being proposed by the trusts and estates section to add Business and Professions Code §6068.5 to read as follows:

6068.5.

Notwithstanding Section 6068, above,

(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 811(a) and (b).

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

**This position is only that of the of the Executive Committee of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.**

#### **TEXT OF RESOLUTION**

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Business and Professions Code section 6068 as follows:

1     § 6068

2             It is the duty of an attorney to do all of the following:

3             (a) To support the Constitution and laws of the United States and of this state.

4             (b) To maintain the respect due to the courts of justice and judicial officers.

- 5 (c) To counsel or maintain those actions, proceedings, or defenses only as appear to  
6 him or her legal or just, except the defense of a person charged with a public offense.
- 7 (d) To employ, for the purpose of maintaining the causes confided to him or her  
8 those means only as are consistent with truth, and never to seek to mislead the judge or any  
9 judicial officer by an artifice or false statement of fact or law.
- 10 (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself  
11 to preserve the secrets, of his or her client.
- 12 (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal  
13 confidential information relating to the representation of a client to the extent that the  
14 attorney reasonably believes the disclosure is necessary to prevent a criminal act that the  
15 attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an  
16 individual.
- 17 (3) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal  
18 confidential information relating to the representation of a client over the age of 65 that the  
19 attorney reasonably believes has diminished mental capacity and who is at risk of  
20 substantial physical harm unless action is taken. The attorney may take reasonably  
21 necessary protective action including consulting with individuals or entities that have the  
22 ability to take action to protect the client. When taking protective action pursuant to this  
23 subparagraph, the attorney is authorized to reveal information about the client, but only to  
24 the extent reasonably necessary to protect the client's interests.
- 25 (f) To advance no fact prejudicial to the honor or reputation of a party or witness,  
26 unless required by the justice of the cause with which he or she is charged.
- 27 (g) Not to encourage either the commencement or the continuance of an action or  
28 proceeding from any corrupt motive of passion or interest.
- 29 (h) Never to reject, for any consideration personal to himself or herself, the cause  
30 of the defenseless or the oppressed.
- 31 (i) To cooperate and participate in any disciplinary investigation or other regulatory  
32 or disciplinary proceeding pending against himself or herself. However, this subdivision  
33 shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth  
34 Amendment to the Constitution of the United States, or any other constitutional or  
35 statutory privileges. This subdivision shall not be construed to require an attorney to  
36 cooperate with a request that requires him or her to waive any constitutional or statutory  
37 privilege or to comply with a request for information or other matters within an  
38 unreasonable period of time in light of the time constraints of the attorney's practice. Any  
39 exercise by an attorney of any constitutional or statutory privilege shall not be used against  
40 the attorney in a regulatory or disciplinary proceeding against him or her.
- 41 (j) To comply with the requirements of Section 6002.1.
- 42 (k) To comply with all conditions attached to any disciplinary probation, including  
43 a probation imposed with the concurrence of the attorney.
- 44 (l) To keep all agreements made in lieu of disciplinary prosecution with the agency  
45 charged with attorney discipline.
- 46 (m) To respond promptly to reasonable status inquiries of clients and to keep  
47 clients reasonably informed of significant developments in matters with regard to which  
48 the attorney has agreed to provide legal services.

- 49 (n) To provide copies to the client of certain documents under time limits and as  
50 prescribed in a rule of professional conduct which the board shall adopt.
- 51 (o) To report to the agency charged with attorney discipline, in writing, within 30  
52 days of the time the attorney has knowledge of any of the following:
- 53 (1) The filing of three or more lawsuits in a 12-month period against the attorney  
54 for malpractice or other wrongful conduct committed in a professional capacity.
- 55 (2) The entry of judgment against the attorney in a civil action for fraud,  
56 misrepresentation, breach of fiduciary duty, or gross negligence committed in a  
57 professional capacity.
- 58 (3) The imposition of judicial sanctions against the attorney, except for sanctions  
59 for failure to make discovery or monetary sanctions of less than one thousand  
60 dollars(\$1,000).
- 61 (4) The bringing of an indictment or information charging a felony against the  
62 attorney.
- 63 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty  
64 or no contest, of a felony, or a misdemeanor committed in the course of the practice of  
65 law, or in a manner in which a client of the attorney was the victim, or a necessary element  
66 of which, as determined by the statutory or common law definition of the misdemeanor,  
67 involves improper conduct of an attorney, including dishonesty or other moral turpitude, or  
68 an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor  
69 of that type.
- 70 (6) The imposition of discipline against the attorney by a professional or  
71 occupational disciplinary agency or licensing board, whether in California or elsewhere.
- 72 (7) Reversal of judgment in a proceeding based in whole or in part upon  
73 misconduct, grossly incompetent representation, or willful misrepresentation by an  
74 attorney.
- 75 (8) As used in this subdivision, “against the attorney” includes claims and  
76 proceedings against any firm of attorneys for the practice of law in which the attorney was  
77 a partner at the time of the conduct complained of and any law corporation in which the  
78 attorney was a shareholder at the time of the conduct complained of unless the matter has  
79 to the attorney’s knowledge already been reported by the law firm or corporation.
- 80 (9) The State Bar may develop a prescribed form for the making of reports required  
81 by this section, usage of which it may require by rule or regulation.
- 82 (10) This subdivision is only intended to provide that the failure to report as  
83 required herein may serve as a basis of discipline.

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

PROPONENT: Orange County Bar Association

#### STATEMENT OF REASONS

Existing Law: California now allows attorneys to reveal confidential information in representing clients to protect third parties from death or substantial bodily harm. It does not allow the

attorney to reveal confidential information to protect the client himself.

This Resolution: Allows an attorney to take protective action for an elderly client with diminished capacity when the attorney believes such action is necessary to protect the client when the client is at risk.

The Problem: The fastest growing segment of our society is the age group 85 years and above. Representing elderly clients sometimes presents unique challenges for the attorney. Occasionally an attorney becomes aware of an elderly client with diminished capacity who is at a severe risk of harm. Presently a lawyer may not ethically make a report to Adult Protective Services or seek other means to protect the client who is at risk. California is one of a minority of states who prohibit an attorney from protecting the client by seeking help when needed. There are many seniors who are alone and do not have others who can protect them. It presents a terrible conflict between personal ethics and professional ethics to the California attorney who cannot protect her client.

#### IMPACT STATEMENT:

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

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RESPONSIBLE FLOOR DELEGATE: Donna R. Bashaw

#### COUNTERARGUMENTS

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution would further dilute the duty of an attorney to maintain inviolate the confidential information of his or her attorney on the pretext of protecting the client. Moreover, this resolution may fall under the category of action unnecessary, since the revelation exception contained in sub-paragraph (e)(2) of B&P Code Section 6068 includes the necessity to protect an individual which logically includes the attorney's client.

##### **SANTA CLARA COUNTY BAR ASSOCIATION**

This resolution would undermine clients' assurance that information given to their attorneys in confidence will be kept confidential. It would, therefore, make clients less candid with their attorneys, thereby undermining attorneys' effectiveness and the administration of justice. Attorneys are not qualified to determine whether their clients have diminished mental capacity. In most cases, under the existing rules, attorneys can take steps to protect their clients by either seeking the clients' consent to the disclosure of confidential communications or notifying the appropriate authorities of the risk of harm without disclosing confidential information. The change called for by this resolution would make attorneys vulnerable to claims for negligent

failure to protect clients from physical harm even though they may not have intended to assume a duty to do so.