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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[3]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal the information about the client, but only to the extent necessary to protect the client's interests. (Emphasis added.)

ABA Rule 1.14(b) suggests that it would be ethical for counsel to take reasonably necessary protective action, such as consulting with third parties to assess a client, where counsel believes capacity is an issue.

## California Business and Professions Code Section 6068(e)

*Business and Professions Code* Section 6068(e) embraces a broad duty of confidentiality which prohibits disclosure by counsel of any client information learned in the course of the attorney-client relationship. The statutory exception is where the attorney believes disclosure is necessary to prevent a criminal act reasonably believed likely to result in an individual's death or substantial bodily harm.

In 1989, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California issued Ethics Opinion No. 1989-112, addressing whether counsel may institute conservatorship proceedings for a client without the client's consent, where counsel concludes the client is incompetent to act in his/her best interest. That opinion concluded that it is unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes, as doing so requires the attorney to divulge client secrets and represent either conflicting or adverse interests. Under the California view, instituting such a proceeding for a client without capacity violates California Rules of Professional Responsibility, Rule 3-310, in which counsel cannot represent conflicting interests, absent the informed written consent of all parties concerned.

Ethics Opinion 1989-112 is still viewed as a valid ethical guideline. A current practice guide warns counsel not to institute proceedings for appointment of a conservator even where an attorney recognizes his/her client may need one:

> [Ethics Opinion 1989-112] ruled that an attorney who petitions for a conservatorship for his or her client without the client's consent violates the attorney's duties to protect client secrets and to avoid conflicts of interest. . . . The exceptional situation would occur if the client consented to the attorneys' petition while the client still had capacity. Very few attorneys seek such consent from their clients and thus, as a general rule, attorneys may not petition to have a conservator appointed for a client.

[*California Conservatorship Practice* (CEB June 2011) § 1.6, p. 9-10].

*California Conservatorship Practice* also acknowledges the existence of objections to Ethics Opinion 1989-112 and a growing trend to change direction on this issue to side with ABA Model Rule 1.14(b). For example, the Estate Planning, Trust and Probate Law Section of the State Bar was troubled by the subject Ethics Opinion, and urged that California adopt a Rule of Professional Conduct similar to ABA Model Rule 1.14. The Legal Ethics Committee of the Bar Association of San Francisco also disagreed with the ethics opinion and concluded that "counsel who reasonably believes that a client is substantially unable to manage his or her own financial resources or to resist fraud or undue influence may, but need not, take protective action with respect to the client's person or property." (*Id.*)

In 2010 the State Bar Board of Governors considered a new proposed rule which largely mirrored ABA Model Rule 1.14, except that it specified that counsel could not file or represent a person filing a conservatorship proceeding. Earlier, in 2005, the Executive Committee of the Trusts and Estates Section of the State Bar of California proposed adding *Business and Professions Code* Section

[3] ABA Model Rule 1.6(a) provides that "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)."

6068.5, to allow an attorney to make limited disclosures about a client to one who has the ability to take action to protect the client. That proposed statute would have created an exception to *Business and Professions Code* Section 6068(e), which imposes the attorney-client duty of loyalty and confidentiality, and would have allowed disclosure only if the client's decision-making capacity was sufficiently impaired to support an incapacity determination under *Probate Code* Section 811 and the client was at risk of substantial physical, financial, or other harm. Like the proposed rule, the proposed statute virtually mirrored ABA Model Rule 1.14, but prohibited counsel from filing a petition for conservatorship for the impaired client. As of this date, the proposed rule has not been adopted, nor has specific legislation been introduced to address or resolve this issue.

For now, Ethics Opinion 1989-112 remains valid. California attorneys cannot divulge client confidences for the purpose of obtaining assistance in determining client capacity.

## California Case Law

*Andersen v. Hunt* (2011) 196 Cal.App.4th 722 is instructive in determining the different legal standards that apply when deciding whether or not a person has the mental capacity to execute a will or a trust. **The Court of Appeal held where a person simply amends a trust, that person's capacity should be determined by the lower standard of executing a will, which is set forth in *Probate Code* Section 6100.5.**

In that case, Wayne Andersen and his wife established a family trust in 1992, which left all of their assets to their two children. In 2003, ten years after his wife died, Wayne suffered a stroke, following which he amended the trust to leave 60% of the assets to his long-time partner and caretaker, Pauline Hunt. The remaining 40% was split equally among his two children and his grandson. The trial court ruled that Wayne did not have the requisite contractual capacity to execute the trust amendments. In doing so, the trial court held Wayne to the higher standard of contractual capacity set forth in *Probate Code* Section 811 and 812, rather than the lower standard of testamentary capacity set forth in *Probate Code* Section 6100.5.

The Court of Appeal held that the trial court erred when it evaluated Wayne's capacity to execute the trust amendments by applying the higher standard of mental capacity set forth in *Probate Code* Sections 810-812 ("contractual capacity") rather than the lower standard applicable to "testamentary capacity" codified in *Probate Code* Section 6100.5. The court stated that "[w]hen determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person's mental deficits are sufficient to allow a court to conclude that the person lacks the ability 'to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.' (§ 811, subd. (b).) In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils." As a result, the Court of Appeal found that when Wayne's capacity was evaluated under the correct lower standard, there was no substantial evidence that Wayne lacked capacity to execute the 2003 and 2004 trust amendments.

The Court of Appeal based its holding on well-established law in California that a testator is presumed competent and the burden rests on the person challenging competency to overcome the presumption. A person lacks capacity to make a will if, at the time of the making of the will, he or she cannot understand the nature of the testamentary act, recall the nature of his or her assets, or recall his or her relations to living descendants and those whose interests are affected by the will. In the unpublished portion of the opinion, the Court of Appeal concluded that there was no substantial evidence that Wayne lacked testamentary capacity to execute the trust amendments.

*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.* (2003) 109 Cal.App.4th 1287 also provides insight into the issue of counsel's obligation to determine a client's testamentary capacity in the course of representation. In that case, the testator's children filed a legal malpractice lawsuit against the attorney who prepared the testator's will, alleging that the attorney should have recognized that the

client did not have testamentary capacity to change his estate planning documents. The trial court sustained the attorneys' demurrer without leave to amend and the children appealed. The Court of Appeal affirmed, holding that an attorney preparing a will for a client does not owe a duty to non-client beneficiaries to ascertain and document the client's testamentary capacity. To hold otherwise could compromise the attorney's duty of loyalty to the client and also, perhaps, put the attorney in the position of potentially conflicting duties to different beneficiaries [*Id.*].

Although *Moore* addressed the capacity issue in the context of non-client beneficiaries, in dicta, the Court of Appeal acknowledged California's heightened policy regarding the duty of loyalty to a client. The Court of Appeal advised that prudent counsel should be familiar with the test for capacity set forth in *Probate Code* Section 811 *et seq.*; however, "in accordance with case law, . . . because the attorney owes his or her undivided loyalty to the interests of the client, the attorney's only duty of care is to intended beneficiaries of a testator client whose testamentary rights are impaired by negligent drafting. (Citation omitted.) So paramount is the duty of loyalty, that in this state, the attorney may not institute conservatorship proceedings on a client's behalf without consent, even when the attorney concludes the client is incompetent, because of the prohibition against disclosure of client confidences" [*Id.* at 1306 – 1307 (emphasis added)].

In *Moore*, the children-appellants argued on appeal that competent counsel has a duty to his/her testator client to ascertain the client's competence before drafting a will and to document that exploration. The Court of Appeal disagreed, acknowledging the pitfalls inherent in requiring counsel to determine testator capacity:

> It may be that prudent counsel should refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity or should take steps to preserve evidence regarding the client's capacity in a borderline case. However, that is a far cry from imposing malpractice liability to nonclient potential beneficiaries for the attorney's alleged inadequate investigation or evaluation of capacity or the failure to sufficiently document that investigation. None of the cited secondary sources appear to even suggest imposition on the attorney of such a duty to nonclient. We conclude that the policy considerations present in these circumstances and discussed above strongly militate against imposition on the testator's lawyer of a duty to nonclient beneficiaries to investigate, evaluate and ascertain the testator's capacity or to document the same.
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> [*Id.* at 1305 – 1307].

*Moore* is instructive because it provides guidance in dealing with clients who may lack legal capacity. The *Moore* court suggests that prudent counsel should refrain from engaging in work for a client where counsel reasonably believes the client lacks capacity. In a borderline case, counsel should preserve evidence regarding the client's capacity. This approach is also suggested in the article mentioned below.

In *In re Marriage of Greenway (2013) 217 Cal. App. 4th* 628, the 76-year-old husband, Lyle, sought to end his marriage to Joanne, his wife of 48 years. The trial court rejected Joanne's argument that Lyle was mentally incompetent and incapable of making a reasoned decision regarding his marital status, and granted his request for a status-only dissolution. In affirming, the Court of Appeal determined that the mental capacity required to end one's marriage is similar to the mental capacity required to enter into the marriage, i.e., the baseline presumption of mental capacity is based upon the criteria set forth in *Probate Code* section 811 (part of the Due Process in Competence Determinations Act). As framed by the appellate opinion, notwithstanding the fact that the testifying experts agreed that Lyle had dementia, the question was whether his impairment was such that he no longer had the capacity of making a reasoned decision to end his marriage. In analyzing conflicting arguments, the Court of Appeal determined that a person's mental capacity is fact specific, and the level of required mental capacity changes depending on the issue at hand. The *Greenway* court concluded that mental capacity can be measured on a sliding scale, with marital capacity requiring the least amount of capacity, followed up the scale by testamentary capacity, and, on the high end of the scale, the mental capacity required to enter into contracts.

Likewise, according to the *Greenway* court, the burden of proof with respect to mental capacity

changes depending on the issue presented. There exists a presumption in favor of a person seeking to marry or make a will, but not a person executing a contract. In its summary of overlapping statutes with varying semantics relating to mental capacity, the court held that the required level of understanding rests entirely on the complexity of the decision being made; case authority evidences an extremely low level of mental capacity needed before the decision to marry or to execute a will. Similarly, the standard for testamentary capacity is also relatively low. However, the capacity to contract, which includes the capacity to convey, create a trust, make gifts and to grant powers of attorney, requires the baseline criteria contained in *Probate Code* sections 811 and 812, as well as the specific guidelines for determining the capacity to contract embraced in *Civil Code* section 39(b).

Finally, in *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, the court set aside a transmutation of separate property to community property, as well as provisions for a spouse under a living trust. The court held that *Family Code* Section 721 imposes a fiduciary duty between spouses, and the probate Court should have applied a presumption of undue influence. The court also held that the Probate Court should have applied a "sliding scale" standard of contractual capacity (based on the complexity of the documents) under *Probate Code* Sections 810 to 812, rather than the testamentary capacity standard of *Probate Code* Section 6100.5.

## Mind Over Matters: The Question of an Elder's Legal Capacity Nearly Always Involves Issues of Fraud and Undue Influence

In October 2007, Los Angeles Lawyer published an article, *Mind Over Matters: The Question of an Elder's Legal Capacity Nearly Always Involves Issues of Fraud and Undue Influence*, by Sherrill Y. Tanibata. The article addresses counsel's determination of client capacity and balancing the duties of loyalty and confidentiality. Tanibata contends that counsel is required, both practically and ethically, to resolve critical questions of client capacity (e.g., does the client have capacity, if not, how much is diminished, etc.). Basic guidelines and definitions for capacity are set forth in both the *Civil Code* and the *Probate Code* [*Probate Code* §§ 810-813, 1801, 1881, 3201, 3204], pursuant to the Due Process in Competence Determinations Act [Tanibata, *Mind Over Matters: The Question of an Elder's Legal Capacity Nearly Always Involves Issues of Fraud and Undue Influence* (Oct. 2007) 30 L.A. Law. 28].

The article cites the current conflict set forth above between California *Business and Professions Code* Section 6068(e) and the American Bar Association, Model Rules of Professional Conduct, Model Rule 1.14. California strictly construes counsel's duty of loyalty and confidentiality to a client, without making any special provision for one with diminished capacity, versus the flexible standard afforded by the ABA. California's "duty of loyalty strictly prohibits an attorney from initiation of conservatorship proceedings regarding a client with diminished capacity without the client's consent. The duty of confidentiality constrains an attorney from disclosing confidential information to individuals, institutions, agencies, and even family members who might help a client with diminished capacity." (*Id.* at 30.) The ABA model rule was adopted by a majority of states, but not California; in fact, the ABA model rule was expressly rejected by the State Bar of California's Formal Ethics Opinion No. 89-112.

Beginning in 2004, the State Bar proposed adopting a rule similar to the ABA Model Rule, which effort was coupled with a proposal for a new *Business and Professions Code* Section 6068.5 "that would not only codify the new rule but also thereby create exceptions to *Business and Professions Code* Section 6068(e)'s duty for attorneys to 'maintain inviolate the confidence and preserve the secrets of [the] client' " [*Id.* at 31]. Ultimately, neither of these efforts was successful. According to Tanibata, "the new rule, and proposed legislation if enacted, [would have relieved] the attorney to some extent from the conflict that naturally arises from the duties of loyalty and confidentiality to the client and the duty to question and assess the capacity of the client."

Tanibata offers the following advice to counsel in how to govern their relationship with clients suffering from suspected diminished capacity:

> [P]ractitioners confronted with a client whose capacity is questionable or whose capacity could be subject to question in the future must assume that they will be held to the strictest

> duty to represent the client's interest even when that interest diverges from what practitioners believe to be the client's best interest. Thus, if an attorney makes an initial determination that the client lacks capacity to engage in the transaction for which the client consulted with the attorney, then the attorney must decline to act and permit the client to seek other representation. The attorney may make a recommendation to the client for a conservatorship, always subject to the caveat that an attorney may not initiate conservatorship proceedings without the client's consent (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, (2003) 109 Cal. App. 4th 1287, 1306.). . . .
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> In the course of representation, counsel should reasonably assess a client's capacity using common sense and the guidelines set forth in the Due Process in Competence Determinations Act (*Probate Code* §§ 810-813, 1801, 1881, 3201, 3204). *Probate Code* Section 811 sets forth criteria in determining an "unsound mind;" *Probate Code* Section 812 sets forth criteria in determining "capacity to make a decision;" and *Probate Code* Section 6100.5 sets forth the criteria to determine "testamentary capacity." As noted above in *Andersen*, the standards are not the same. If counsel believes a client suffers from diminished capacity, counsel cannot at this time initiate a conservatorship proceeding for the client without the client's consent. Nor can counsel divulge client confidences to third persons.

If counsel believes the client lacks capacity, it would be prudent to document the client's capacity in the course of the client's representation. As suggested by *Moore*, counsel might document a client's present mental and physical state and keep detailed notes of the client's communications, disposition, and behavior in the client intake interview and during the course of representation. Perhaps a memorandum to the file would assist in establishing client capacity if subsequent litigation ensues on that issue. If counsel suspects that other parties might attack the validity of an instrument or legal document, counsel might consider retaining an expert psychiatric consultant to affirm the client's capacity; or the client can be videotaped when signing a document in which the client states she/he fully understands the nature of the legal agreement or instrument upon executing it. Counsel should be careful, though, because retaining a consultant can backfire with a potentially discoverable report that the client does in fact lack capacity.

Counsel must proceed with caution in handling the issue of suspected diminished capacity, adhering to the client's best interest, which may not be consistent with what counsel personally believes is the client's best interest under the current state of California law and the existing Rules of Professional Conduct.