THE CALIFORNIA LAWYER'S GREY FOG OF UNCERTAINTY: ASSESSING A CLIENT'S DIMINISHED MENTAL CAPACITY

Marshall S. Zolla

As our population ages[1]/[2], an increasingly frequent decision is faced by California attorneys: What ethical rules govern a California attorney's assessment of a client's suspected diminished mental capacity? This determination becomes crucial in family law matters where sensitive issues involving finances, real estate, children, grandchildren, beneficiary designations, estate planning and retirement benefits, all require the informed consent of a competent client. A California attorney cannot currently seek outside expert advice to assess a client's suspected diminished capacity without the client's consent. Doing so violates the strict duty of confidentiality owed to the client. There is a current evolving shift away from this restrictive policy, but it has not yet been officially adopted by the Legislature, the State Bar or the Supreme Court. Counsel must therefore proceed with caution, bearing in mind the guidelines set forth in the Due Process in Competence Determinations Act [*Probate Code* §§ 810-813]. If a client lacks capacity, counsel should consider withdrawing from the representation. If counsel believes the client has sufficient capacity, but thinks there might be a challenge to the client's capacity later on, counsel should document in detail the client's indicia of capacity with meticulous notes.

The American Bar Association (ABA) Model Rules of Professional Conduct, Rule 1.14, permit counsel to consult with third parties to determine client capacity. California law is more stringent. Under the California view, the duty of client confidentiality is paramount and prevents counsel from consulting third parties and divulging client confidences to determine client capacity. There thus exists a conflict between the ABA Model Rules of Professional Conduct, Rule 1.14, and California law as set forth in *Business and Professions Code* Section 6068(e).

---

[1] California is projected to be one of the fastest growing States in the nation in total population. In 1990, California comprised 12 percent of the nation's population and is expected to have 14 percent of the nation's population by 2020. In California, the elderly population is expected to grow more than twice as fast as the total population and this growth will vary by region. The elderly age group will have an overall increase of 112 percent during the period from 1990 to 2020. More than half the counties will have over a 100 percent increase in this age group. The influence of the 60 and over age group on California is expected to emerge most strongly between 2000 to 2020. Journal of the Center for Families, Children and the Courts [6 J. Center for Families, Child. & Cts. 73 (2005)]; www.aging.ca.gov

[2] An estimated 5.2 million Americans age 65 and older (approximately one in eight) currently have Alzheimer's disease, and the number is projected to reach 7.7 million by 2030. Alzheimer's Association, 2011 Alzheimer's Disease Facts and Figures, Alzheimer's & Dementia, Volume 7, Issue 2, p. 17.

ABA Model Rule 1.14

(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[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 like consulting with third parties to assess the clients, 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 the issue 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

[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)."

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.*)

A proposed new rule is in the process of being finalized by the State Bar. This proposal would mirror ABA Model Rule 1.14, with the exception that counsel could not file or represent a person filing a conservatorship proceeding. At its meetings on July 24, 2010 and September 22, 2010, the State Bar Board of Governors received final recommendations from the State Bar's Rules Revision Commission, assigned with the task of studying the rules and recommending comprehensive amendments. The State Bar is currently preparing a comprehensive petition containing the 67 proposed new rules to submit to the Supreme Court for approval. The Court could ask the Commission to reconsider the rule. The ultimate timing of the new rule is uncertain.

In addition to the push for a new Rule of Professional Conduct, there is impetus for adding a legislative exception to *Business and Professions Code* Section 6068(e), Section 6068.5 (proposed), which would permit counsel to make limited disclosures about a client to one who has the ability to take action to protect the client. "This would allow disclosure only if the client's decision-making capacity is sufficiently impaired to support an incapacity determination under [*Probate* Code § 811] and the client is at risk of substantial physical, financial, or other harm." (*California Conservatorship Practice, supra*, §1.6, p. 7-8.)

For now, Ethics Opinion 1989-112 remains valid. California attorneys cannot divulge client confidences to obtain assistance in the determination of 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 suffered a stroke in May 2003. Following his stroke, he executed four amendments to the family trust that he established with his wife who had passed away. In each of those amendments, he changed the trust to leave 60% of the assets to his long time partner and caretaker, Pauline Hunt. The remaining 40% was left and to split equally among his two children (whom he did not get along with) and his grandson, except the last amendment deleted reference to the grandson.

The trial court made the following three rulings:

1. That Wayne did not have the requisite contractual capacity to execute the four 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.

2. That the joint tenancy bank accounts were void because Wayne lacked financial capacity to understand the significance or consequences of placing personal assets in joint tenancy accounts with Pauline. In so holding, the trial court found that Pauline had a fiduciary duty not to seek personal financial advantage over his assets.

3. That the life insurance change in beneficiary was void because Wayne lacked capacity when he executed the change of beneficiary form in October 2003 naming Pauline Hunt as the beneficiary. As a result, his two children as the prior beneficiaries should have been paid and Pauline should hold the policy proceeds in a constructive trust for their benefit.

The Court of Appeal reversed in part and affirmed in part, as follows:

1. The Court of Appeal reversed the trial court's decision that the trust amendments were not enforceable. The Court determined that it was error to apply 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 based its reasoning on the fact 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.'" "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. No witness testified and no medical records reflected that at any time prior to his second stroke in 2006, Wayne did not recall what assets he owned, who his children and grandson were, who Pauline was, or what it meant to provide for his children and Pauline in his trust. His children conceded Wayne's capacity and his doctor testified that before 2005 no medical evidence existed suggesting that he did not know who his family was or what property he owned. Finally, the lawyer who drafted his trust amendments testified that at no time in 2003 or 2004 did Wayne indicate that he did not know what assets were in the trust or who his family was or what he was signing. In her judgment, she testified there was no occasion when she believed Wayne lacked testamentary capacity.

2. The Court of Appeal affirmed the trial court's decision regarding the joint tenancy accounts on the ground that following his 2003 stroke, Wayne lacked the capacity to understand the legal effect of placing his assets into joint tenancy accounts with Pauline. The Court of Appeal explained that "[w]hile Wayne undoubtedly wanted Hunt to have signature authority on the joint accounts, there was no credible evidence that he intended to give Hunt 50% ownership or gift the accounts to Hunt on death. Given his condition after the 2003 stroke, Wayne could not have understood that he need not make Hunt an undivided 50% joint tenant owner of the funds in order to make the funds accessible to her."

3. The Court of Appeal affirmed the trial court's decision regarding the life insurance change in beneficiary based on Wayne's 2003 stroke and that he lacked capacity to change the beneficiary.

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. 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 by documenting 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. (*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.

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 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 the *Probate Code* and *Civil Code* pursuant to the Due Process in Competence Determinations Act (*Probate Code* §§ 810-813, 1801, 1881, 3201, 3204). (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 the California statute (*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.) According to the Tanibata article, "the new rule, and proposed legislation if enacted, will relieve 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, pending proposed changes by the State Bar and proposed new legislation:

> Until--or whether--these proposed changes in the law become official, practitioners 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. [Citing, *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, (2003) 109 Cal. App. 4th 1287, 1306.]
>
> It is important to note that even though the probable issuance of a new ethics rule and the possibility of upcoming statutory enactments seemingly offer guidance to attorneys in their future dealings with a client whose capacity is questionable, attorneys must always proceed with caution in taking action or violating a confidence to protect a client.(*Id.* at 31.)

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.