

# Ethical Considerations in California Medical-Legal Partnerships

October 2014

by Eliza Schafler

Equal Justice Works Fellow sponsored by Greenberg Traurig, LLP

© Mental Health Advocacy Services, Inc.

## INTRODUCTION

Unmet legal needs – from poor housing conditions to employment barriers to inadequate access to education, and more – can seriously affect the health of low-income individuals and communities. The medical-legal partnership (MLP) model addresses this problem by integrating non-profit attorneys into health care settings. By providing free legal assistance within a health care institution and allowing attorneys to collaborate with the clinical team, MLPs can prevent poor health outcomes and promote wellness.<sup>1</sup>

Because MLPs require attorneys and health care providers to collaborate despite their distinct professional obligations, legal practice in an MLP raises a unique set of ethical issues. The purpose of this handout is to discuss those ethical issues, in order to inform and improve the work of pro bono attorneys in California MLPs. This handout will address four ethical issues relevant to MLPs: 1) Confidentiality; 2) Conflicts of Interest; 3) Representing Clients with Diminished Capacity; and 4) Partnership with a Non-Legal Entity.<sup>2</sup> Each section will include a list of suggested best practices.

## CONFIDENTIALITY

The MLP model raises important questions about confidentiality. Health care providers, who are often accustomed to sharing patient information, may expect to attend attorney-client meetings. Attorneys, eager to promote a cooperative MLP culture, may want to share client information or case updates with the health care team. Careful planning and coordination between the legal and health care providers can help attorneys comply with their ethical obligations while maintaining a collaborative and efficient MLP.

1. MLP attorneys are generally prohibited from sharing confidential client information with the health care team without informed consent.

MLP attorneys must follow the same ethical rules that apply to California attorneys generally: they cannot reveal confidential client information without informed client

---

<sup>1</sup> See generally, National Center for Medical-Legal Partnerships, “The Need,” available at <http://medical-legalpartnership.org/need/> (last visited Sept. 4, 2014).

<sup>2</sup> This handout does not discuss the Health Insurance Portability and Accountability Act (HIPAA) because attorneys are generally not “covered entities” under HIPAA. 45 C.F.R. § 164.502(a); 45 C.F.R. § 160.102.

consent.<sup>3</sup> CAL. RULES OF PROF'L CONDUCT R. 3.100(A)(2013) [hereinafter CRPC]; CAL. BUS. & PROFS CODE § 6068(e)(1) [hereinafter CBPC]. Confidential information is defined in the CRPC as information "relating to the representation," regardless of the actual source. CRPC R. 3.100(b); CRPC R. 3.100, Discussion [2]. Thus, the duty of confidentiality is very broad, extending even beyond the attorney-client relationship.

There is one narrow exception: California attorneys may, but are not required to, disclose confidential information when it would "prevent reasonably certain death or substantial bodily harm," and attempts to persuade the client have failed. CRPC R. 3.100(B).

2. In certain circumstances, MLP attorneys may permit third parties to attend attorney-client meetings and still preserve the attorney-client privilege.

MLP attorneys often have vulnerable clients who wish to have a third party in the room, such as a clinician or family member. Yet the MLP attorney should attempt to preserve the attorney-client privilege, which could protect the client if she is forced to testify later.

Information is only protected by the attorney-client privilege if it was transmitted "in confidence." Wigmore, Evidence § 2292 (1961). The California Evidence Code states that information is "in confidence" if it was "transmitted by a means which, so far as the client is aware, discloses the information to no third persons." CAL. EVIDENCE CODE § 952. However, the CEC lists some exceptions to this rule. The attorney-client privilege is preserved *even if a third party is present* if the third party: 1) is "present to further the interest of the client in the consultation"; 2) is a person "to whom disclosure is reasonably necessary for the transmission of the information"; or 3) must receive the information "for the accomplishment of the purpose for which the lawyer is consulted." CEC § 952.

Many third parties present at MLP attorney-client meeting are there in the interest of the client, to assist in transmitting information (such as interpreters), or to help fulfill the purpose of the representation. Their presence does not destroy attorney-client privilege.

3. California ethical rules on confidentiality may change to permit disclosure of confidential information in order to protect clients with diminished capacity.

The California State Bar has submitted California Proposed Rules for Professional Conduct (CPRPC). If these proposed rules are adopted by the Board of Governors, they will broaden the circumstances in which confidential information can be shared without consent. One proposed rule would enable an attorney to reveal confidential information to the extent she reasonably believes necessary to protect a client with significantly diminished capacity. CAL. PROPOSED RULES FOR PROF'L CONDUCT 1.6(b)(5), 1.14(b) [hereinafter CPRPC]. This rule could change legal practice in MLPs, which often serve clients with diminished capacity in health care settings.

---

<sup>3</sup> Since the CRPC does not define informed consent, it is helpful to look to the MRPC for guidance. The MRPC defines informed consent as the client's agreement to the sharing of information after his attorney has explained the risk of sharing the information and alternatives to the release of information. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) [hereinafter MRPC].

4. MLP attorneys, unlike most health care professionals, are not mandated reporters.

Most California health care professionals, child care professionals, and social workers are mandated reporters; they must report suspected child abuse or neglect to the Department of Child and Family Services (DCFS). However, California attorneys have no such duty. On the contrary, they must protect confidential client information rather than disclose it, even if it suggests abuse or neglect. Attorneys may, but are not required to, disclose confidential information only on the rare occasions when doing so would “prevent reasonably certain death or substantial bodily harm.” CRPC R. 3.100(B).

Many health care professionals incorrectly assume that MLP attorneys are mandated reporters. In addition, clients in MLP settings may be confused about whom to trust with confidential information. MLP attorneys should work to minimize confusion about mandated reporting and assure clients that their information will be protected.

**BEST PRACTICES**

Below are suggestions for best practices to address confidentiality issues in an MLP:

- While developing the MLP, create referral forms and retainer agreements that include an informed consent section. This section should cover information on the MLP model and identify the individuals participating in the MLP with whom confidential information can be shared. Marcia M. Boumil, Debbie F. Freitas & Cristina F. Freitas, *Multidisciplinary Representation of Patients: The Potential for Ethical Issues and Professional duty Conflicts in the Medical-Legal Partnership Model*, 13 J. HEALTH CARE L. & POL’Y 107, 136 (2010); Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 841.
- While developing the MLP, discuss confidentiality and professional reporting obligations with the health care partner and identify mandated and non-mandated reporters in the MLP. Brustin, *supra*, at 839; Boumil, *supra*, at 128. It is important to ensure that the health care provider understands that the potential conflict between confidentiality and reporting obligations will limit the attorney’s ability to share information in some cases. Campbell, *supra*, at 855.
- Conduct regular trainings with health care provider partners and their representatives on confidentiality and mandated reporting obligations.
- At the outset of representation, review the informed consent section of the referral form and retainer agreement with the client. Ensure that the client understands the professional obligations of each member of the MLP team. Boumil, *supra*, at 128.

- During the course of representation, carefully assess the individuals present at attorney-client meetings. Boumil, *supra*, at 137. Ensure that representatives of the health care partner do not participate in meetings unless the client has provided informed consent or their presence is necessary to the legal representation. *Id.*
- Even when the client has provided informed consent, attorneys should carefully limit mandated reporters' exposure to confidential information that would trigger reporting duties. Boumil, *supra*, at 127; Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 713 (2007).

## CONFLICTS OF INTEREST

Conflicts of interests between clients are likely to arise in the MLP context. For instance, it is common for patients, particularly when they are minors, to bring family members with conflicting interests to meetings with the MLP attorney. Sometimes, multiple clients with diverging interests will request to be represented together.

In addition, MLP attorneys may be forced to navigate conflicts of interest between clients and the health care partner. For example, health care professionals may request what they believe is in a patient's "best interest," while the patient seeks a different outcome. Clients may also ask MLP attorneys to sue the health care provider.

By anticipating when conflicts may arise and developing strategies for preventing them, MLP attorneys can ensure that their clients receive competent, loyal representation.

1. MLP attorneys must obtain written, informed consent prior to representing a client if they are representing an interest adverse to the client's in another matter.

The CRPC<sup>4</sup> provides that an attorney must obtain written, informed consent before agreeing to represent a client in a matter if the attorney has *interests adverse to that client in another matter*. CRPC R. 3.310(C)(3). For example, if a health care consumer approaches an MLP attorney for help with a traffic ticket, but the MLP attorney is already representing the consumer's wife in their custody battle, the attorney must obtain consent from both parties before agreeing to advise the consumer.

Moreover, even with informed consent, an attorney is still obligated by the CRPC to provide competent representation. CRPC R. 3.110(A). The CRPC defines competency as applying diligence, learning and skill, as well as mental, emotional, and physical ability, to legal representation. CRPC R. 3.110(B). An MLP attorney may not represent multiple clients if he lacks the emotional ability to balance their conflicting interests.

---

<sup>4</sup> There has been a proposal to amend CRPC rules regarding conflict of interest so that they conform with the Model Rules of Professional Conduct. MRPC R. 1.7; PCRPC R. 1.7. In practice, however, an attorney's obligations to avoid conflicts of interest are very similar under the MRPC and CRPC. Therefore, the proposed rules are likely designed to standardize U.S. attorneys' professional obligations nationwide, rather than to change California attorneys' obligations.

2. MLP attorneys must obtain written, informed consent before representing multiple clients whose interests potentially or actually conflict.

Under the CRPC, an attorney must obtain written, informed consent from each client prior representing of multiple clients in a matter in which their interests potentially or actually conflict. CRPC R. 3.310 (C)(1)-(2). The attorney must also notify them of the reasonably foreseeable adverse consequences of representing them. *Id.* at R. 3.310(A)(1).

For example, if an MLP attorney is asked to represent a married couple in a housing matter, but the spouses have indicated they are likely to disagree on the desired outcome, the attorney must obtain informed consent from both before agreeing to represent them. In practice, if the interests of family members are likely to conflict, the attorney should consider limiting representation to only one family member or declining representation.

3. MLP attorneys cannot represent clients in cases against the health care partner.

California attorneys are obligated to advocate diligently and competently for the interests of their clients. CRPC R. 3-310(A); *see also*, MPRC R. 1.2(a). In addition, where an attorney has a professional, financial, or business relationship with a third party that is involved in the same matter, they must provide written disclosure<sup>5</sup> of the conflict to the client before accepting or continuing representation. CRPC R. 3-310(B)(1).

In the MLP context, the MLP attorney has a professional and business (and sometimes financial) relationship with the health care partner. Thus, if an MLP attorney were to represent a consumer of the health care partner in a suit or complaint against the health care partner, a conflict of interest would exist.

Furthermore, even if the MLP attorney were to provide written disclosure of the conflict to the client, she would likely violate her duties to provide competent, diligent advocacy, given her interest in the livelihood of the MLP relationship. Thus, an MLP attorney cannot provide representation to a client in cases against the health care partner.

4. MLP attorneys must advocate for the client's stated interest, not the client's "best interests" as identified by the health care team.

Often, a health care team will request legal intervention in order to achieve what they believe is in a patient's or family's "best interest." However, it is implied throughout the CRPC that the *client's own* desired outcome, and not that of the health care partner, is paramount. CRPC R. 3.310(C) (conflicts of interest); CBPC § 6068(e)(1) (confidentiality); CRPC R. 3.110(A) (competent representation); *see also*, MRPC R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation."); MRPC Preamble (As advocate, a lawyer zealously asserts the client's position."). In an MLP, even when the client's stated interests do not align with his "best

---

<sup>5</sup> The CRPC defines "disclosure" as informing the client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to him or her. CPRC R. 3.310(A)(1).

interests,” the attorney is still obligated to represent the client’s stated interests. (One major exception is that attorneys for children in dependency court must determine and advocate for the child’s “best interests.” CAL. FAMILY CODE § 3151(a).)

However, there is no ethical rule that prohibits the provision of candid advice. On the contrary, the California State Bar has submitted a Proposed Rule that would create an explicit ethical duty to provide candid advice.<sup>6</sup> CPRPC R. 2.1; *see also*, MRPC R. 2.1. Thus, if an attorney is concerned that the client’s desired outcome would cause him negative health outcomes or other harm, the attorney can discuss this issue with the client without violating the duty to provide diligent representation. *See* Anderson, *supra*, at 690.

## BEST PRACTICES

Below are suggestions for best practices to address conflicts of interest in an MLP:

- While developing the MLP, create protocols for identifying and responding to conflicts of interest among family members. Brustin, *supra*, at 859. For instance, restrict initial representation of multiple family members to the matter for which they were referred. Prior to offering legal services for additional matters, talk with the family to determine if their interests actually or potentially conflict. *Id.* at 787.
- Design specific protocols for situations in which the health care consumer is a minor child and the parents are the clients. For instance, develop a special retainer agreement for special education cases.
- While developing an MLP, establish a written policy against representing clients in cases against the health care partner.
- Prior to providing legal services to clients, particularly multiple family members, explain the MLP protocols on conflicts of interest. Anderson, *supra*, at 684.
- While developing the MLP, inform the health care partner at the outset and during subsequent trainings that the MLP attorney is forbidden from acting in a client’s “best interest” against the client’s wishes.
- Create referral forms and retainer agreements that explain the MLP relationship to the health care partner and prospective clients. This can include information regarding the attorney’s obligations to avoid conflicts of interest.

---

<sup>6</sup> Although the MRPC and PCRPC are not binding, they are helpful, persuasive guidance in the absence of explicit CRPC rules.

## REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

As mentioned above, attorneys are obligated to represent the interests of their clients. Complying with this obligation may be difficult, however, when a client with diminished capacity has difficulty expressing his interests or desires an outcome that could cause him harm. For instance, an elderly client with dementia may resist leaving a hoarding situation despite the hazards, or a client with an intellectual disability may have trouble articulating how she wants her disability benefits to be managed. A child may be too young to understand the most appropriate special education placement for him.

The CRPC does not directly address representation of clients with diminished capacity. However, California law does offer some guidance in certain situations.

1. “Procedural” decisions, which are potentially more challenging for clients with diminished capacity, must be made by the MLP attorney rather than the client.

As discussed above, California attorneys have a general, implicit duty to remain loyal to, and represent the interests of, clients. CRPC R. 3.310(C); CBPC § 6068(e)(1); CRPC R. 3.110(A); *see also*, PCRPC R. 1.2(a). Yet some decisions in a legal case must be made by the attorney without input from the client. The proper identity of the decision-maker turns on whether the decision is “substantive” or “procedural.”

During the course of representation, the *attorney* must make decisions pertaining to “procedural” aspects of the representation, such as trial strategy. *Blanton v. Womancare*, 38 Cal. 3d 396, 410 (1985); CAL. PRAC. GUIDE TO PROF’L RESPONSIBILITY Ch. 3-D §2(a) [hereinafter CPGPR]; CAL. CIV. PROC. CODE §283(1). Meanwhile, the *client* makes decisions regarding the “substantial rights” of the case or “the cause of action itself.” *People v. Wilkinson*, 185 Cal. App. 4<sup>th</sup> 543, 551 (5<sup>th</sup> Dist. 2010). “Substantive” decisions include essential matters such as whether or not to settle the case, waive a jury trial, or have the case dismissed with prejudice. CPGPR Ch. 3-D §1.

Procedural decisions, which are often technical, could present particular challenges for clients with diminished capacity. The fact that the MLP attorney must make those decisions may help a client with diminished capacity focus on substantive issues.

2. MLP attorneys are prohibited from seeking a guardian or conservator for a client against the client’s wishes, but they can request a guardian ad litem.

The State Bar of California Standing Committee on Professional Responsibility and Conduct has held that it is unethical for an attorney to petition the court to have a conservator or guardian appointed for a gravely disabled client against the client’s wishes. State Bar of Cal. Standing Comm. on Prof’l Resp. & Conduct, Formal Op. No. 112 (1989); *see also* Los Angeles County Bar Ass’n Formal Op. No. 450 (1988); San Diego County Bar Ass’n Formal Op. 1978-1. The Committee reasoned that instituting the conservatorship or guardianship would require the attorney to share information regarding the client’s observed behavior that is protected under CBPC § 6068(e) and

CRPC R. 3.100. Moreover, the Committee stated that, if an attorney initiates the proceedings at the request of a third party, he will likely violate his obligation under CRPC R. 3-310 to avoid representing adverse interests without his client's consent. *Id.* In effect, instituting a guardianship or conservatorship may remove a client's decision-making ability, and it should be approached with caution.

However, California attorneys have authority under the California Code of Civil Procedure (CCCP) to request that a court appoint a guardian ad litem for a client who is legally "incompetent." CAL. CIV. PROC. CODE § 372(a). California Appellate Courts have defined incompetence as being unable to "understand the nature of the proceeding" or "meaningfully participate" in the representation. *In Re Christina B.*, 19 Cal.App.4<sup>th</sup> 1441, 1450-51(1993); *In re Lisa M.*, 177 Cal.App.3d 915, 919 (1986); *In re R.S.*, 167 Cal.App.3d 946, 979 (1985).

3. Limited California law supports a "best interests" approach for attorneys representing children in dependency court and attorneys representing clients who are permanently unconscious.

Attorneys for children in dependency court are, under California law, "charged with the representation of the child's best interests" (though they must also, at the child's request, "present the child's wishes to the court"). CAL. FAMILY CODE § 3151(a). This is a general departure from the California ethical rules on conflicts of interest described previously. However, this statute does not apply to attorneys for children in other contexts, such as special education, school discipline, and public benefits.

In addition, the California Court of Appeals, Sixth District has held that a lawyer must make decisions based on her own judgment when the client is permanently unconscious. *See Conservatorship of Drabic*, 200 Cal.App.3d 190, 212 (6<sup>th</sup> Dist. 1988).

4. MLP attorneys may choose to withdraw from representation of clients with diminished capacity in limited circumstances and as a last resort.

California attorneys may withdraw from representation if a client "insists upon presenting a claim or defense that...cannot be supported by good faith argument" or "renders it unreasonably difficult" to represent him or her. CRPC R. 3.700(C)(1)(a), (d).

However, the State Bar of California Standing Committee on Professional Responsibility and Conduct has cautioned that, in cases of diminished capacity, withdrawal should only be sought if absolutely necessary due to the risk of prejudice. Formal Op. 112. Thus, the CRPC requires that a withdrawing attorney take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client [and] allowing time for employment of other counsel." CRPC R. 3.700(A)(2). If considering withdrawal, MLP attorneys should be mindful of the MLP mission to serve the most vulnerable clients in order to promote health and wellness.



5. California ethical rules on confidentiality may change to permit disclosure of confidential information in order to protect clients with diminished capacity.

As discussed previously, the California State Bar has submitted a proposed rule that would enable an attorney to reveal confidential information to the extent she reasonably believes necessary to protect a client with significantly diminished capacity. CPRPC 1.6(b)(5), 1.14(b). This rule could potentially alter current MLP practice.

## BEST PRACTICES

Below are suggestions for best practices when serving clients with diminished capacity:

- While developing the MLP, inform the health care partner of an attorney's ethical obligations to represent the interests of the client, regardless of mental disability, as well as the prohibition against initiating conservatorship or guardianship proceedings.
- When a client with diminished capacity requests a legal outcome that would likely cause him harm, attempt to persuade the client otherwise. CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, DETERMINING CAPACITY AND REPRESENTING CLIENTS WITH DIMINISHED CAPACITY: AN ADVOCATE'S GUIDE 7 (2013). Help the client to understand how his stated interests could adversely affect his wellbeing. If possible, contact attorneys in the mental health and disability rights communities to discuss appropriate tone for such conversations.
- If it becomes evident that the client cannot understand the nature of the pending proceedings or participate in the representation, obtain a guardian ad litem.
- Before representing children, consult with community practitioners in the relevant practice area on best practices for determining the client's interests. Practitioners may have different approaches depending on the age and capacity of the child. In addition, consider representation of parents/guardians as education rights holders or representatives of their children.

### **PARTNERSHIP WITH A NON-LEGAL ENTITY**

Under the CRPC, California attorneys are prohibited from "form[ing] a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law." CRPC R. 1.310; *see also*, MRPC R. 5.4(b), PCRPC R. 5.4(b). Given that collaborations between health-care and legal services providers are widely referred to as "medical-legal partnerships" (MLPs), this ethical rule seems to forbid their existence.

MLPs, however, do not violate the CRPC, because they are not partnerships with non-legal entities *in the practice of law*. The Discussion following Rule 1.310 clarifies that

the rule “is not intended to govern members’ activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer.”

MLP attorneys do not partner with health care providers in the provision of actual legal representation. Instead, the health care partner refers clients to MLP attorneys and concurrently ensures that the client receives medical care to complement the legal services the attorney provides. The health care provider does not assist the attorney in the practice of law in any capacity. Accordingly, the CPRC does not bar MLPs.

## BEST PRACTICES

Below are suggestions for best practices to avoid confusion on the legal ethics of forming a partnership with a non-legal entity:

- While developing the MLP, inform concerned stakeholders that the MLP model does not conflict with ethical rules on partnerships.
- If the health care partner or another stakeholder is concerned that the MLP will be seen as an unethical partnership, choose a name for the MLP that does not include the term “partnership,” such as “Medical-Legal Advocacy Project.”

## CONCLUSION

Medical legal partnerships between legal services providers and health care providers are working to improve health and wellness for low-income patients, families, and communities. By better understanding the ethical issues that arise in the MLP context, instituting protocols that anticipate ethical challenges, and having honest conversations with health care partners and clients, MLP attorneys and pro bono volunteers can help California MLPs provide quality legal service to clients.

---

This memorandum was completed with research support from Leah Glowacki, law student, University of Texas at Austin School of Law.