

Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter]						
						TOTAL = <u>7</u> Agree = <u>5</u> Disagree = <u>2</u> Modify = <u> </u> NI = <u> </u>
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Allphin, Sondra J.	A	No		I strongly support this proposed rule because I believe it will make it easier for attorneys to protect their clients who have developed diminished capacity.	No response necessary.
3	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.14 and the Comments to the Rule.	No response necessary.
5	MacCarley, Lisa	D	No		The rule is wrong and should not be adopted, or better yet, should not be applicable to court appointed counsel as such counsel must have a separate role and must not become a tool to promote the agendas of those who are committing fraud.	The reasons stated for the commenter's opposition suggests a misunderstanding of the proposed rule. Under paragraph (b), the proposed rule would establish a new permissive standard allowing a lawyer to take action to prevent wrongful conduct, such as fraud, that threatens the interests of a client with diminished capacity. Also, while the rule does not exempt all appointed counsel, a lawyer who represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding is exempted under the terms of paragraph (b), in part, because the rights of such persons are protected under specifically applicable statutory schemes,
7	Office of Chief Trial Counsel ("OCTC")	D	Yes		OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the confidentiality rules.	The Commission received a substantial amount of input from many stakeholders who confront the problems this Rule is intended to address. The Rule is substantially narrower than Model Rule 1.14 in the discretion permitted a lawyer who takes action

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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				1.14(b)	<p>Subparagraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified assessment to permit the attorney to reveal a client's confidences.</p> <p>Further, this rule appears to be broadening the exceptions to confidentiality beyond what is permitted by Business & Professions Code section 6068(e).</p> <p>The Comments are more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>pursuant to it.</p> <p>See previous response of the Commission.</p> <p>The Rule expressly limits the actions a lawyer might take to what a lawyer is impliedly permitted to do under current law to advance the interests of the client.</p> <p>As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.</p>
				Comment [1]	<p>Comment [1] is problematic as to when and how to utilize the rule. When and who decides a client is not capable of making decisions - - and how and to whom does the attorney reveal this? If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client's behalf as to the matter? Comment [3] attempts to address this, but in such broad terms that it is vague and leaves too much</p>	<p>The Commission has revised Comment [3] to remove the third sentence, which raised concerns with several commenters about the conflicting standards a lawyer might employ in determining whether a client suffers from significantly diminished capacity. That should assuage the concerns of the commenter concerning when and how to utilize the Rule. As to the confidentiality concerns the commenter expresses, paragraph (c) expressly provides that a lawyer may reveal information about</p>

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				Comment [4]	<p>discretion to the attorney. It also states that the attorney may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule or section 6068(e).</p> <p>Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counselor, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.</p> <p>Comment [4] lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.</p>	<p>the client to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interests, which is the purpose of consulting with a diagnostician.</p> <p>As noted above, paragraph (c) expressly permits reasonably necessary disclosures. The comment does not attempt to define the term "diagnostician" because the lawyer must act reasonably in making a determination in the specific factual circumstances of a particular representation.</p> <p>The Comment is meant to provide guidance on how to proceed under the black letter of the Rule. This is true in current rule 3-100, which concerns the disclosure of confidential information to prevent a crime likely to result in death or substantial bodily harm. The Discussion to that rule lists factors that a lawyer should consider in deciding how to proceed under the rule. See, e.g., Cal. Rule 3-100, Discussion ¶¶. [6], [9].</p>
				Comments [5] & [6]	<p>Comments [5] and [6] state the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interest foremost. Again, the question is to what extent is this consistent with Business & Professions Code section</p>	<p>See response concerning Comment [1], above.</p>

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				Comment [7]	6068(e)? This Comment may make enforcement of the confidentiality rules much more difficult. Comment [7], which is different than the Model Rules Comment [7], explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline of almost any attorney who claims that he or she revealed the confidences because of a belief it was appropriate under this rule. Thus, what safeguards exist for the client?	As provided in the Rule, the lawyer must not only "believe," but must "reasonably believe." If the lawyer's belief is shown not to have been reasonable, the lawyer would be subject to discipline.
				Comment [8]	Comment [8] states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (Current Rule 3-310.) According to this Comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?	This Rule narrows the options a lawyer may take unilaterally. As noted in Comments [1] and [2], a lawyer must treat the client with respect and to the extent possible, maintain a normal lawyer-client relationship. Filing a petition for a conservatorship or guardianship is a radical departure from that relationship. Permitting disclosure to "an individual or organization that has the ability to take action to protect the client" helps assure that the client comes within the protection of an individual or organization that more likely than not is better situated to explore non-legal options on the client's behalf.

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1	Ross, Scott	A	No		This rule, and the clarifications added by the comments, is an important step forward in protecting elders against financial and physical abuse. I strongly urge that this rule be adopted.	No response necessary.
4	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response necessary.
6	Trusts & Estates Section, State Bar, Executive Committee [Peter Stern] (Public Hearing)	A	Yes		We have been very pleased to see the way Rule 1.14 and now Rule 1.6, which intermeshes with it, have been developed by the RRC, and we strongly encourage their endorsement by the State Bar Board of Governors and by the Supreme Court.	No response necessary.

Rule 1.14 Client with Diminished Capacity

(Commission's Proposed Rule – Clean Version)

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- (b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes
- (1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,
 - (2) the client is at risk of substantial physical, financial or other harm unless action is taken, and
 - (3) the client cannot adequately act in his or her own interest,
- the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Business and Professions Code section 6068(e). When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's

interest, given the information known to the lawyer at the time of the disclosure.

Comment

- [1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary lawyer-client relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons of advanced age are capable of handling routine financial matters but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).
- [2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far

as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the

lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;
- (3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;
- (4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client's

interests foremost and, except as authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

- [6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision making autonomy, maximizing client capacities and respecting the client's family and social connections.
- [7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.
- [8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.
- [9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor,

(2) involved in a criminal matter or (3) who is under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

- [10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.