

**Rule 1.14 Client with Diminished Capacity  
(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)**

- (a) Duties Owed Client with Diminished Capacity. 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 lawyer-client relationship with the client.
- (b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.
- (1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes that:
- (i) there is a significant risk that the client will suffer substantial physical, psychological, or financial harm unless protective action is taken,
  - (ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and
  - (iii) the client cannot adequately act in the client's own interest.
- (2) Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. In taking protective action as authorized by this paragraph, the lawyer must:
- (i) act in the client's best interest, and
  - (ii) disclose no more information than is reasonably necessary to protect the client from substantial physical, psychological, or financial harm, given the information known to the lawyer at the time of disclosure.
- (c) Obtaining Consent To Take Protective Action.
- (1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably necessary to preserve client confidentiality and decision-making authority, which includes:
- (i) explaining to the client the need to take protective action, and

- (ii) obtaining the client's consent to take the protective action.
- (2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:
  - (i) act in the client's best interest;
  - (ii) disclose no more information than is reasonably necessary to protect the client from substantial physical, psychological, or financial harm, given the information known to the lawyer at the time of disclosure; and
  - (iii) take all reasonable steps to ensure that the information disclosed remains confidential.
- (d) Obtaining Advance Informed Written Consent to Take Protective Action. A lawyer may obtain a client's advance informed written consent to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must include the following written disclosures:
  - (1) the authorization to take protective action is valid only when the lawyer reasonably believes that the circumstances set forth in (b)(1)(i) – (iii) are present; and
  - (2) the client retains the right to revoke or modify the advance consent at any time.
- (e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:
  - (1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;
  - (2) any action on behalf of a person other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or
  - (3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.
- (f) Definitions. For purposes of this Rule:
  - (1) "Protective action" means to take action to protect the client's interests by:

- (i) notifying an individual or organization that has the ability to take action to protect the client, or
  - (ii) seeking to have a guardian ad litem appointed.
- (g) Discipline. Neither a lawyer who takes protective action as authorized by this Rule, nor a lawyer who chooses not to take such action, is subject to discipline.

### **Comments**

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, often has the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Probate Code §§ 810 – 813.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer may seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Rule 1.6(b) and Business and Professions Code § 6068(e)(2).

[4] Where it is reasonably foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent. See Rule 1.4.

[5] In obtaining the assistance another person such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person, for authorization to take protective measures on the client's behalf. See Evidence Code §952. The lawyer must advise the person who assists the lawyer that the person is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) to any third person.

[6] This Rule does not apply in the case of a client who is (1) a minor, (2) involved in a criminal matter, (3) is the subject of a conservatorship; or (4) has a guardian or other person legally entitled to act for the client. The rights of such persons are regulated under other statutory schemes. See Family Code §3150; Welfare and Institutions Code

*Draft rules adopted by the commission are subject to change prior to being submitted to the board of trustees for public comment authorization.*

§1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, §5000-5579; Probate Code, Division 4, Parts 1-8, §1400-3803; [Code Civ. Pro. §§ 372-376].