

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

Professional Affiliation <input type="text"/>	partner at Beck, Ross, Bismonte & Finley	Commenting on behalf of an organization <input type="text"/>	<input type="radio"/> Yes
			<input checked="" type="radio"/> No
* Name	<input type="text" value="Scott Ross"/>		
* City	<input type="text" value="San Jose"/>		
* State	California	<input type="text"/>	
* Email address <small>(You will receive a copy of your comment submission.)</small>	<input type="text" value="sross@beckross.com"/>		

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

\* Select the Proposed Rule that you would like to comment on from the drop down list.

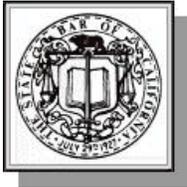
Rule 1.14 Client with Diminished Capacity

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule  
 DISAGREE with this proposed Rule  
 AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

This rule, and the clarifications added by the comments, are an important step forward in protecting elders against financial and physical abuse. I strongly urge that this rule be adopted.



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

**\* Select the Proposed Rule that you would like to comment on from the drop down list.**

Rule 1.14 Client with Diminished Capacity

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

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.



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 2010

Harry B. Sondheim, Chair  
Commission for the Revision of the  
Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Rule 1.14

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.14 - Client with Diminished Capacity. COPRAC supports the adoption of proposed Rule 1.14 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC

## Hollins, Audrey

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**From:** Lisa Maccarley [lisamaccarley@earthlink.net]  
**Sent:** Saturday, May 08, 2010 3:04 PM  
**To:** Hollins, Audrey  
**Subject:** Comment on Probate California Rule No. 1.14 - Client with Diminished Capacity

As a conservator ship and elder law attorney for 17 years, and someone who has literally sat on all sides of disputes regarding conservatorships and persons with diminished capacity, I believe that this rule is WRONG OR, better yet, should NOT be applied to court appointed counsel. - Court appointed counsel should not become a tool to promote the agendas of those who are committing fraud and exercising undue influence, and also should not be advocates for the patently inappropriate wishes of clients with diminished capacity.

Sacramento County's rule No. 15.103 is RIGHT on the money. Court appointed counsel MUST have a separate role, and should not be bound to zealously advocate the "wishes" of clients.

Examples of advocacy gone wrong:

In Re: The Conservatorship of Susan Ward

Ms. Ward is a 60 year old woman who was never married. She never held a job, never wrote a check, never paid a bill, and was taken care of by her father her entire life. Mr. Ward, now in his 80's, is suffering from congestive heart failure. When Mr. Ward experienced a heart attack, a local hospital called a Private Professional Fiduciary ("PPF") and asked him to intervene on behalf of father and his clearly take action to protect Susan. Susan's estate is quite modest - and she is ineligible for social security since she has, literally, never worked a day in her life.

The PPF applied to be Ms. Ward's conservator. She objected. The court-appointed attorney came to court - without Susan - and told the Judge. Susan had a plan: Susan's boyfriend, and a friend of his, were living rent free in the attic, and they were going to take care of Susan when her father died. Sounds like a plan, right? Well, there was no attic and no boyfriend. The court-appointed attorney was well aware of this, but in the course of "advocating" for Susan, he tallied up \$20,000 in legal fees. Susan didn't know that her little estate was going to take such a massive hit. Oh, and by the way, a conservator WAS appointed for Susan.

May 6, 2010

Ms. Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

**Re:**

<b>RULE</b>	<b>TITLE</b>
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
<b>Rule 1.14</b>	<b>Client with Diminished Capacity</b>
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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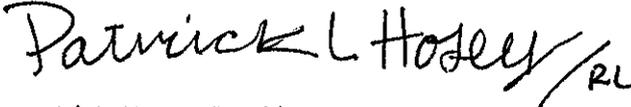
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President  
San Diego County Bar Association



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

November 11, 2009

Audrey Hollins  
Office of Professional Competence,  
Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of  
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 5 of the Proposed Amendments to the Rules of  
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics  
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

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District Nine Representative**  
James W. Talley

SDCBA Legal Ethics Committee  
Subcommittee for Responses to Requests for Public Comment  
Coversheet to Recommendations on State Bar of California Rules Revision Commission  
Batch 5

- Rule 1.2      Scope of Representation [N/A]  
APPROVE
- Rule 1.6      Confidentiality of Information [3-100, B&P 6068(e)]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.8.2    Use of Confidential Information [3-100, 3-310]  
APPROVE
- Rule 1.8.13   Imputation of Personal Conflicts [N/A]  
APPROVE
- Rule 1.9      Duties to Former Clients [3-310]  
APPROVE
- Rule 1.10     Imputation of Conflicts: General Rule [N/A]  
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12     Former Judge, Arbitrator, Mediator [N/A]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14     Client with Diminished Capacity [N/A]  
APPROVE**
- Rule 2.1      Advisor [N/A]  
APPROVE
- Rule 3.8      Responsibilities of a Prosecutor [5-110]  
NO POSITION TAKEN – see comments
- Rule 8.5      Choice of Law [1-100(D)] SIMMONS  
APPROVE

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5**  
**SDCBA Legal Ethics Committee Deadline October 8, 2009**  
**Subcommittee Deadline October 26, 2009**  
**State Bar Comment Deadline November 13, 2009**

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: California has no comparable rule

Proposed New Rule No./ Title: Rule 1.14 Client with Diminished Capacity

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [  ] No [  ]

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [  ] No [  ]

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [  ] No [  ]

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [  ] No [  ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

This moderately controversial Rule 1.14 generally tracks the language of Model Rule 1.14 with six principal differences: 1) it makes an exception for minors, criminal defendants, and persons subject guardianship or conservatorship proceeding which are separately regulated by California statutes; 2) establishes a stricter standard for when a lawyer may reveal confidential information to protect the client’s interests, namely, “significantly diminished capacity”; 3) provides more detailed guidance regarding what constitutes “significantly diminished capacity”; 4) provides that this is a last resort, and enumerates factors the lawyer should consider before taking such action; 5) emphasized the nature and extent of any disclosure is strictly circumscribed, and 6) clarifies that taking action is permissive, not mandatory, and a lawyer is not subject to discipline for failing to take such action.

Some people, such as a minority of the Commission (and I suspect at least a minority of our Legal Ethics Committee), might reasonably believe the policy of abrogating confidentiality here is wrong because it impairs the trust relationship between clients and lawyers. I, however,

agree with the underlying policy of Rule 1.14 of allowing the lawyer to act competently on behalf of the client with significantly diminished capacity, to further the client's goals in the representation and to protect the client's interests, and believe the Rule is drafted well enough to greatly minimize the occurrence of such impairment of trust, and, that on balance it actually serves to protect the client's interests.

This is one rule I recommend all subcommittee members review because it brings into play significant values that I know many have strong views on.

The Commission's nonlawyer public member asserts the proposed rule wrongly assumes all lawyers possess the psychiatric professional expertise needed to determine whether a client's mental capacity is "significantly diminished" and therefore even well-intentioned lawyers will inevitably breach confidentiality to "protect the client" resulting in serious adverse consequences for the client. While this may possibly occur on occasion, I think the Rule and comments thereto provide reasonable guidance to assist the lawyer in acting when necessary as a last resort and protect the lawyer from discipline whether she or he takes action or not.

**CONCLUSIONS (pick one):**

**We approve the new rule in its entirety.**

We approve the new rule with modifications.\*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.\*

We abstain from voting on the new rule but submit comments for your consideration.\*

\* If you select one of the \* options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



**THE STATE BAR OF  
CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT  
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director  
Office of Professional Competence, Planning &  
Development  
State Bar of California  
180 Howard Street  
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed  
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,<sup>1</sup> we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.<sup>2</sup> We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

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<sup>1</sup> OCTC refers the Commission to its previous comments and recommendations.

<sup>2</sup> We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).<sup>3</sup>

## GENERAL COMMENTS

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.<sup>4</sup>

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.<sup>5</sup> The 1974 rules were 13 pages; contained 25 rules; and 6 comments.<sup>6</sup> The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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<sup>3</sup> Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

<sup>4</sup> See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

<sup>5</sup> The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

<sup>6</sup> The 1974 rules had 6 footnotes (\*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.<sup>7</sup>

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<sup>7</sup> There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.14. Client with Diminished Capacity.**

1. 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. 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. Further, this rule appears to be broadening the exceptions to confidentiality beyond what is permitted by Business & Professions Code section 6068(e).
2. The Comments are more appropriate for treatises, law review articles, and ethics opinions.
3. 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 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). 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.
4. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence 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, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then 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.
5. 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 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 they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
6. 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?