**Rule 1.14 Client with Diminished Capacity.**
**[Sorted by Commenter]**

**Comments rec. as of 5/25/10**

***TOTAL = 5*** **Agree = 4**
**Disagree = 1**
**Modify = __**
**NI = __**

| No. | Commentator | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 1 | Scott Ross | 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. |
| 2 | Sondra J. Allphin | 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. |
| 4 | San Diego County Bar Association Legal Ethics Committee | A | Yes | | We approve the new rule in its entirety. | No response necessary. |
| 5 | Lisa Maccarley | 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.<br><br>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 |

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

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

**Comments rec. as of 5/25/10**

***TOTAL =*** **_5_** **Agree = _4_**
**Disagree = _1_**
**Modify = __**
**NI = __**

| No. | Commentator | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | | terms of paragraph (b), in part, because the rights of such persons are protected under specifically applicable statutory schemes, |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

# Rule 1.14 – Public Comment – File List


| | |
|---|---|
| X-2010-400 Scott Ross [1.14] | 1 |
| X-2010-401 Sondra J. Allphin [1.14] | 2 |
| X-2010-421f COPRAC [1.14] | 3 |
| X-2010-422 Lisa MacCarley [1.14] | 4 |
| X-2010-425-23w SDCBA [1.14] | 5 |

# 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** partner at Beck, Ross, Bismonte & Finley

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Scott Ross

*** City** San Jose

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** 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
## 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** Trusts & Estates Attorney

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Sondra J. Allphin

*** City** San Jose

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** sallphin@tcklawfirm.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.**

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**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

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,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

## Hollins, Audrey

**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.

SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of California Bar Associations District Nine Representative**
James W. Talley

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:

| RULE | TITLE |
|---|---|
| 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 |
| Rule 1.14 | Client with Diminished Capacity |
| 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 |



1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| 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 /RL

Patrick L. Hosey, President
San Diego County Bar Association

# SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of Delegates of California Bar Associations District Nine Representative**
James W. Talley

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

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 [ X ]** 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 [ X ]** 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 [ X ]** 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 [ X ]** 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 separarely 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 considier 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):**

**[ X ] 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.

# Proposed Rule 1.14 [n/a]
# "Client with Diminished Capacity"

(**Draft #14, 2/27/10**)

**Summary:** This proposed new rule addresses the special circumstances applicable when a lawyer represents a client who has diminished capacity. It permits, but does not require, a lawyer to notify an individual or organization that has the ability to take action to protect a client who is at risk of undue influence or other harm. The rule excludes representation of minors, clients in criminal matter, and persons who are the subject of conservatorship proceedings.

## Comparison with ABA Counterpart

| Rule | Comment |
|---|---|
| ☐ ABA Model Rule substantially adopted | ☐ ABA Model Rule substantially adopted |
| ☐ ABA Model Rule substantially rejected | ☐ ABA Model Rule substantially rejected |
| ☑ Some material additions to ABA Model Rule | ☑ Some material additions to ABA Model Rule |
| ☑ Some material deletions from ABA Model Rule | ☑ Some material deletions from ABA Model Rule |
| ☐ No ABA Model Rule counterpart | ☐ No ABA Model Rule counterpart |
| | |

## Primary Factors Considered

☑ Existing California Law

| | |
|---|---|
| Rule | RPC 3-100 |
| Statute | Bus. & Prof. Code §6068(e); Family Code §3150; Welfare & Institutions Code §§300, 602, 675 et seq., §§5000-5579; and Probate Code, Division 4, Parts 1-8, §§1400-3803; Civil Code § 51 (Unruh Act). |
| Case law | |

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __5___
Opposed Rule as Recommended for Adoption __3___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

## Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No
(See the introduction in the Model Rule comparison chart.)

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

Representatives of the State Bar's Trusts & Estates Section Executive Committee have appeared at Commission meetings to discuss this rule and provided valuable assistance to the Commission.

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

See the Introduction to the Model Rule comparison chart.

☐ Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule Proposed Rule 1.14* Client With Diminished Capacity

February 2010
(Draft rule following consideration of public comment.)

*INTRODUCTION:*

Proposed Rule 1.14 generally tracks the language of Model Rule 1.14 with six principal differences: the Rule (1) carves out an exception for minors, defendants in criminal matters and persons who are the subject of guardianship or conservatorship proceedings because the rights of such individuals are separately regulated by California statutes; (2) establishes a stricter standard for when a lawyer can reveal confidential information to protect the client's interests, i.e., "significantly diminished capacity"; (3) provides more detailed guidance regarding what constitutes "significantly diminished capacity"; (4) provides that acting pursuant to paragraph (b) of the proposed Rule to reveal confidential client information in the client's interests is a last resort, and enumerates factors the lawyer should consider before taking such action; (5) emphasizes that the nature and extent of any disclosure pursuant to paragraph (b) is strictly circumscribed; and (6) clarifies that taking action pursuant to paragraph (b) is permissive, not mandatory, and that a lawyer is not subject to discipline for failing to take such action.

Minority. A minority of the Commission believes that the policy of abrogating confidentiality reflected in Model Rule 1.14 is the wrong policy for California because it impairs the trust relationship between clients and lawyers. In particular, the Commission's nonlawyer, public member asserts that the proposed rule wrongly assumes that all lawyers possess the expertise of a psychiatric professional necessary to make a threshold determination that a client's mental capacity is "significantly diminished." Absent this expertise, it is

* Proposed Rule 1.14, Draft 14 (2/27/10).

*INTRODUCTION (Continued):*

argued that even well-intentioned lawyers will inevitably breach confidentiality to "protect the client" but that the actual result will be serious adverse consequences for the client. The proposed Rule is also opposed based on the following: (1) paragraph (b) does not impose a primary requirement that a lawyer act in a client's best interest; (2) the Rule excludes representations of a minor, a client in a criminal matter, or a conservatee and this has an unintended effect of chilling the consideration of protective action by the lawyers for those clients; (3) the Rule improperly treats disclosure of confidential information as a first resort rather than a last resort for protecting a client; (4) the Rule does not require a lawyer to ask for a client's permission before contacting a third party; and (5) the comments to the Rule fail to warn lawyers that the loss of trust and candor in the client-lawyer relationship, following a disclosure of confidential information, may be so severe that it warrants mandatory withdrawal from the client's representation

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| (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. | (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-client relationship with the client. | Paragraph (a) tracks the language of Model Rule 1.14, except that the reference in section (a) to diminished capacity due to "minority" has been deleted because under California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes. See, e.g., Family Code §3150, Welfare and Institutions Code §§300, 602, 675 et seq. See also Explanation of Changes for paragraph (b) and Comment [9]. The term "client-lawyer" has been changed to "lawyer-client" to conform with California Rule style. |
| (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. | ~~(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.~~<br>(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<br><br>(i) that the client has significantly diminished | Paragraph (b). The prefatory language in paragraph (b), which permits a lawyer to take limited protective action on behalf of a client with significantly diminished capacity, excludes from its scope lawyers representing (1) minors, (2) criminal defendants and (3) persons who are the subject of conservatorship proceedings because under California law, The rights of such persons are regulated under other statutory schemes. (Family Code sec. 3150 and Welfare and Institutions Code §§300, 602, 675 et seq. in the case of minors; Penal Code section 1368 et seq. in the case of criminal defendants with diminished capacity, and the Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, §§5000-5579, or Probate Code, Division 4, Parts 1-8,§§1400-3803 in the case of persons who are under conservatorship or who are the subject of a |

* Proposed Rule 1.14, Draft 14 (2/27/10). Redline/strikeout showing changes to the ABA Model Rule

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| | 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,<br><br>(ii) the client is at risk of substantial physical, financial or other harm unless action is taken, and<br><br>(iii) the client cannot adequately act in his or her own interest,<br><br>the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client. | conservatorship or protective proceedings under those statutes).<br><br>Subparagraphs (b)(ii) and (iii) track the language of Model Rule 1.14(b) but break out the two criteria into separate subparagraphs for ease of reference. In addition, subparagraph (b)(i) provides a clearer standard by requiring that the client have "significantly diminished capacity," rather than the Model Rule's reference to the loose concept of "diminished capacity." Subparagraph (b)(i) also focuses the inquiry on whether the impairment specifically affects the client's ability to make decisions in connection with the representation in order to increase client protection in the context of the lawyer-client relationship.<br><br>Finally, the last, unnumbered subparagraph of paragraph (b) limits permissible action by the lawyer to notification of a person or organization that can take action to protect the client. The Commission voted to omit Model Rule 1.14's reference to permitting the lawyer to seek appointment of a guardian *ad litem*, conservator or guardian because a lawyer who took such action would be engaging in conduct adverse to the client and that typically would require the lawyer to withdraw from the representation. Instead, the lawyer can address the problem by notifying an individual or organization with the ability to take action to protect the client, as provided in the proposed Rule. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests. | (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 ~~Rule 1.6(a)~~to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's ~~interests~~interest, given the information known to the lawyer at the time of the disclosure. | Paragraph (c) refers to information protected under both Business and Professions Code section 6068(e) and Rule 1.6, because both address the lawyer's obligation to protect client confidential information under California law.<br><br>Similar to the Model Rule approach, a lawyer is permitted to reveal information under the concept of "implied authorization." However, unlike the Model Rule approach, which implements "implied authorization" as a part of the confidentiality rule, Rule 1.6, the Commission is recommending that the concept of "implied authorization" only be recognized in this Rule. The Commission's more limited approach reflects California's strong policy in favor of protecting the client's confidential information. The Commission has determined that neither an "implied authorization" rubric nor a specific express exception to confidentiality in either Rule 1.6 or Business and Professions Code section 6068(e) is necessary to effectuate the purposes of proposed Rule 1.14. Analytically, the Commission does not regard the permissive disclosure of information pursuant to Rule 1.14 as an exception to the duty of confidentiality. Under the concept of "implied authorization," a lawyer's disclosure under Rule 1.14 to protect a client with diminished capacity is an act of loyalty and advocacy intended to further the client's interests. Ordinarily, a lawyer seeks the client's informed consent to disclose information in furtherance of the client's representation but when a client has a diminished capacity, obtaining the client's informed consent may not be possible. The |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| | | Commission's proposed Rule 1.14 recognizes that fact and reflects a policy determination that "implied authorization" is a rule of necessity that is consistent with loyalty and advocacy rather than a breach of the duty of confidentiality. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| [1] The normal client-lawyer 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 is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. | [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 ~~client-~~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 ~~is a minor or~~ suffers from ~~a~~ diminished mental capacity, however, maintaining the ordinary ~~client-~~lawyer-client relationship may not be possible in all respects. In particular, a ~~severely incapacitated person~~client with significantly diminished capacity may ~~have no power~~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, ~~children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that~~ some persons of advanced age ~~can be quite~~are capable of handling routine financial matters ~~while needing~~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 | Comment [1] is based on Model Rule 1.14, cmt. [1], but (1) adds an introductory sentence to identify the purposes of the rule and (2) omits the reference to minors, representation of whom is addressed in the Family Code and the Welfare and Institutions Code. *See* Explanation Of Changes to paragraph (a) and the prefatory language of paragraph (b), above. The Commission has also substituted the standard it recommends in the Rule itself, "significantly diminished capacity," for the Model Rule phrase, "severely incapacitated person," which neither appears in the black letter of Model Rule 1.14 nor is defined. The remaining changes are stylistic.<br><br>The last sentence was added in response to public comment. The Commission agreed that it was appropriate to remind lawyers of their obligations under the Unruh Act in this Rule.<br><br>The term "lawyer-client" has been substituted for "client-lawyer" throughout the Rule to conform to California rule style. |

* Proposed Rule 1.14, Draft 14 (2/27/10). Redline/strikeout showing changes to the ABA Model Rule

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| | 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 a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. | [2] The fact that a client suffers ~~a disability~~from diminished capacity does not ~~diminish~~affect the lawyer's obligation to treat the client with attention and respect. Even if the ~~person~~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. | Comment [2] uses the term "diminished capacity" rather than the Model Rule's term "disability" for consistency of reference with the title of the Rule. The remainder of the Comment tracks Model Rule 1.14, cmt. [2], except that a sentence has been added to clarify that the lawyer may need to adapt the method of communication to the client's capacity 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 | Except for its last sentence, which is based on the last sentence of Model Rule 1.14, cmt. [6], Comment [3] has no Model Rule counterpart. It has been added to provide much-needed clarity to the significantly diminished capacity standard set forth in section (b)(1). It accomplishes this by reference to standards articulated in the Probate Code and by enumerating some of the factors to be considered and steps that may be taken in determining whether the client meets the significantly diminished capacity standard. The last clause of the Comment cautions that the lawyer must take care at all times to maintain lawyer-client confidentiality. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| | 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. | Following public comment, the Commission determined that including the first sentence of Model Rule 1.14, cmt. [6], would be misleading and potentially confusing. Because the first two factors are covered by the Probate Code and the second two factors are inconsistent with the Probate Code, inclusion of the ABA language could create ambiguity as to the appropriate standard to apply and allow a lawyer to base a decision on the ABA factors, which are arguably too broad and too easily met, thus leading to disclosures in cases where it might be inappropriate to breach confidentiality. |
| | [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:<br><br>(1) the amount of time that the lawyer has to make a decision about disclosure;<br><br>(2) whether the disclosure is likely to lead to | Comment [4] has been added to emphasize that the lawyer's disclosure to a third party of a client's perceived significant diminished capacity should be a last resort, by identifying the steps to be taken and the factors to be considered before making such disclosure. The Comment is an attempt to balance the lawyer's obligation to protect the client's interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| | proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;<br><br>(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;<br><br>(4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and<br><br>(5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.<br><br>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. | |

| **ABA Model Rule**<br>**Rule 1.14 Client with Diminished Capacity Comment** | **Commission's Proposed Rule***<br>**Rule 1.14 Client with Diminished Capacity Comments** | **Explanation of Changes to the ABA Model Rule** |
|---|---|---|
| [3] 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 does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf. | [~~3~~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 ~~does~~will not affect the applicability of the ~~attorney~~lawyer-client ~~evidentiary~~ privilege. ~~Nevertheless~~See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except ~~for protective action~~as authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf. | Comment [5] is based on Model Rule 1.14, Cmt. [3], but has been modified to add a reference to California Evidence Code 952, which governs in these situations. |
| [4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d). | ~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~ | Model Rule 1.14, Cmt. [4], has been deleted. As noted above, (see Explanation of Changes for paragraphs (a) and (b)), the rights of minors and conservatees are addressed in California statutes. See also Proposed Comment [9]. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| **Taking Protective Action**<br><br>[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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 intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections. | ~~**Taking Protective Action**~~<br><br>[~~5~~6] ~~If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph~~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 decisionmaking 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 ~~intruding~~minimizing intrusion into the client's decisionmaking autonomy ~~to the least extent feasible~~, maximizing client capacities and respecting the client's family and social connections. | Comment [6] is based on the latter half of Model Rule 1.14, Cmt. [5], which addresses section (b) of the Rule.<br><br>The first part of the Model Rule comment merely repeats the language of the black letter rule as the predicate for the substantive comment and has been eliminated as surplusage. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| [6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. | ~~[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.~~ | The last sentence from MR 1.14, cmt. [6], as revised, has been inserted in Comment [3], above.<br><br>See Explanation of Changes for Comment [3] concerning the deletion of the first sentence of MR 1.14, cmt. [6]. |
| | [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. | Comment [7] has no Model Rule counterpart. It sets forth the rationale for paragraph (b) and also clarifies that a lawyer who makes a permitted disclosure pursuant to paragraph (b) is not subject to discipline. |
| [7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with | ~~[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with~~ | Model Rule 1.14, Cmt. [7], has been deleted. As noted above, (see Explanation of Changes for paragraph (b)), the proposed Rule does not permit the lawyer to take steps to have a guardian, guardian *ad litem* or conservator to be appointed for the client.<br><br>Instead, the Commission has proposed substituting Comment [8], which clarifies that that this Rule does not permit a lawyer to file for appointment of a guardian or |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client. | ~~diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.~~ [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. | conservator where such conduct is not otherwise permitted by Rule 1.7, or to take any action adverse to the client. |
| **Disclosure of the Client's Condition**<br><br>[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to | ~~**Disclosure of the Client's Condition**~~<br><br>~~[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to~~ | Model Rule 1.14, cmt. [8], has been deleted. As noted above, (see Explanation of Changes for paragraph (c)), there is no counterpart in Business & Professions Code § 6068(e) to Model Rule 1.6's concept of "implied authorization," so this Comment does not clarify the strictly limited disclosure permitted under paragraph (b). |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. | ~~the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.~~ | |
| | [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 § 3150, Welfare and Institutions Code §§300, 602, 675 et seq.; Penal Code section 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. | Comment [9], which has no counterpart in the Model Rule, explains that certain categories of person have been excluded from the rule because the rights of such persons are addressed in specific California statutes. See also Explanation of Changes for paragraphs (b) and (c). |
| | [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. | Comment [10] has no counterpart in Model Rule 1.14. It clarifies that the course of conduct described in paragraph (b) is not mandatory and that a lawyer is not subject to discipline for violation of the rule for failing to take action under paragraph (b). |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| **Emergency Legal Assistance**<br><br>[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client. | ~~**Emergency Legal Assistance**~~<br><br>~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~ | The Commission recommends deleting Comments [9] and [10], both of which are addressed to providing emergency legal assistance to a non-client. Comments that are concerned with a lawyer's interactions with non-clients have no place in a Rule that has been carefully crafted to balance the lawyer's obligation to protect a ***client's*** interest in circumstances when the client appears to have impaired ability to cooperate, with the need to maintain lawyer-client confidentiality and the risk that disclosure to a third party will interfere with the lawyer-client relationship. |

| ABA Model Rule<br>Rule 1.14 Client with Diminished Capacity<br>Comment | Commission's Proposed Rule*<br>Rule 1.14 Client with Diminished Capacity<br>Comments | Explanation of Changes to the ABA Model Rule |
|---|---|---|
| [10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken. | ~~[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.~~ | |

# Rule 1.14 Client with Diminished Capacity

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

(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 ~~lawyer~~ 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) ~~Confidential information~~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 ~~section 6068(e)~~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 ~~client~~ 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 ~~client~~ 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 ~~client~~ 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 ~~determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate his or her reasons for a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In~~ appropriate circumstances, ~~the lawyer may~~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 ~~should~~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 ~~decisionmaking~~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 ~~decisionmaking~~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 ~~party~~person where the lawyer would not otherwise be permitted to do so under Rule 1.7~~ [3-310]~~.

[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 ~~who is~~ 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] ~~Taking action~~A lawyer is permitted to act under paragraph (b) ~~is permitted,~~ but ~~not~~is never required~~, and a~~ to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

# 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.

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

***TOTAL = 70*** **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 1 | Allphin, Sondra J. | A | N | | If this rule is passed it will help to protect those people in California who are substantially mentally impaired from serious financial harm. | No response necessary. |
| 2 | Anderson, Jack | A | N | | Please adopt proposed rule 1.14, so that we can do our job of protecting our elder clients' interests more effectively and more completely. | No response necessary. |
| 3 | Anderson, Michelle E. | A | N | | No comment. | No response necessary. |
| 4 | Angevine, Elizabeth Anne Miller | A | N | | This change is needed for California attorneys. | No response necessary. |
| 5 | Arrieta, Cristian R. | A | N | | The rules of professional conduct should enable us to come to our clients' aid in their time of need, not hamper us from so doing. | No response necessary. |
| 6 | Bond, Stephen A. | A | N | | No comment. | No response necessary. |
| 7 | Boyd, James G. | A | N | | This modification is sorely needed and is consistent with California's Rules of Professional Conduct moving toward consistency with the ABA Model Rules.<br>Rule 1.14(b) could be improved by either modification or clarification to indicate that "an individual or organization that has the ability to | No response necessary.<br>The Commission did not make the suggested change. The Commission concluded that the suggested limitation would unduly restrict the |

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

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | take action to protect the client" is either a governmental entity (i.e. Adult Protective Services, Public Guardian, or Public Conservator), or a Professional Fiduciary or Trust Company with whom the reporting attorney has no prior or concurrent attorney-client relationship. Otherwise, there would be a high likelihood of actual conflicts or potential conflicts of interest for which no waiver would be available. | protective purpose of the Rule. For example, it would prevent the lawyer from communicating with a family member even in the critical situations that are within the narrow scope of the Rule. |
| 8 | Carney, Janis A. | A | N | | This is an extremely important rule change for those who practice elder law. We must have this rule change. | No response necessary. |
| 9 | Caspersen, R. Frederick | A | N | | I support this new rule whole-heartedly. | No response necessary. |
| 10 | Chavers, Herbert Lee | A | N | | This proposed rule would allow me to act on behalf of my client when my client may not be able to fully appreciate or even resist such actions. | No response necessary. |
| 11 | Clarke, Jr., J. Frederick | A | N | | In my opinion, the proposed Rule strikes the appropriate, nuanced balance between the attorney's traditional professional duty of protecting client confidences and the attorney's duty as a moral being under circumstances where the client has diminished capacity to help protect the client him or herself. | No response necessary. |

| Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter] | | | | | | TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0 |
|---|---|---|---|---|---|---|
| **No.** | **Commenter** | **Position[1]** | **Comment on Behalf of Group?** | **Rule Paragraph** | **Comment** | **RRC Response** |
| 12 | Conley, Shelly | D | N | | In updating rules of court and business and professions codes, it is only worthwhile if the attorneys are held to abide by the rules. | |
| 13 | COPRAC | A | Y | | COPRAC supports the proposed rule.<br>But, COPRAC is concerned that the rule does not go far enough in real world terms to effectively permit lawyers to address the needs of clients with diminished capacity. COPRAC believes that seeking the appointment of a guardian ad litem may be appropriate in certain circumstances to protect clients with diminished capacity.<br><br>COPRAC also recommends that Comments [9] and [10] from the ABA Model Rule be retained, in order to allow a lawyer to take limited action in extreme, emergency situations. | No response necessary.<br>The Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by filing a guardianship or conservatorship petition or other action adverse to his/her client.<br><br>The Commission did not make the suggested change. Permitting an attorney to provide "emergency legal assistance" in the absence of an attorney-client relationship goes significantly beyond the scope of the black letter rule. Because proposed Rule 1.14 is being introduced into the California rules for the first time, the Commission supports a more narrowly circumscribed range of permissible conduct under the Rule. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 14 | Courts, Kathleen | A | N | | The minority's objections suggest that a lawyer will rush in to protect a client even when the situation does not warrant it. Not so: this rule carefully instructs us to consider the client's interests as primary. Comment [3] refers us to PC 811, whose requirements for determining capacity are relatively specific and strict. | No response necessary. |
| 15 | Craven, Thomas A. | A | N | | The rule appears to be well-considered in balancing the principle of total confidentiality and the occasional need to strongly advise a client to do what counsel believes is critical in protecting the client's best interests, where there appears to be no defensible objection to the suggestion and no reasonable options. | No response necessary. |
| 16 | Daniels, Edward | A | N | | I strongly support adoption of the proposed rule. | No response necessary. |
| 17 | Davis, Shirleymae | A | N | | I strongly support this rule. | No response necessary. |
| 18 | Day, Richard V. | A | N | | I believe this Proposed Rule is extremely important because of the increasing age of our client population and the increasing numbers of them that suffer from some form of diminished capacity. | No response necessary. |
| 19 | Disability Rights California | D | Y | | We believe that the proposed California Rule is too vague and too broad and would allow attorneys to inappropriately compromise | Proposed paragraph 1.14(b) permits action only when the lawyer reasonably believes that the client has "significantly diminished capacity" etc. The |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | clients' personal autonomy and confidentiality in situations in which this is not warranted.<br><br>A more targeted rule could assist attorneys in navigating the difficult ethical issues raised by situations in which they question their clients' capacity while at the same time preventing unnecessary disclosure of confidential client information. | Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by filing a guardianship or conservatorship petition or other action adverse to his/her client. |
| | | | | | We believe that a rule pertaining to the representation of clients with diminished capacity *should* clarify the circumstances wherein an attorney may assist in the appointment of a guardian *ad litem*. For attorneys who represent seniors and individuals with disabilities in litigation, the ability to seek appointment of a guardian *ad litem* can be an essential tool in advancing those clients' rights if used appropriately. | The Commission did not make the requested change. As stated in paragraph (a) of the proposed Rule, a lawyer is to maintain a normal lawyer-client relationship to the extent possible. When this occurs, a lawyer may follow a client's direction to assist in the appointment of a guardian *ad litem*. If it is not possible to maintain a normal lawyer-client relationship, the Rule is clear that the lawyer may not take this or any other step that makes the lawyer the adversary of the client. |
| | | | | | In Comment [8], we would recommend that the reference to guardianships be deleted, since this applies only to minors and could lead to confusion with the availability of guardians *ad litem*. As discussed above, the use of guardians *ad litem* may, under appropriate circumstances, be an appropriate measure so long as it is not opposed by the client and allows the attorney to more effectively carry out the express wishes of the client. | The Commission did not make the suggested change. As noted above, the Commission determined that filing a guardianship petition without the consent of the client should not be an option available to a lawyer under this Rule. |

| Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter] | | | | | | TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0 |
|---|---|---|---|---|---|---|
| **No.** | **Commenter** | **Position[1]** | **Comment on Behalf of Group?** | **Rule Paragraph** | **Comment** | **RRC Response** |
| | | | | | To the extent the Proposed Rule is adopted in some form, we strongly support Comment [10] and believe the rule should include this provision, not just the Comment. | The Commission did not make the suggested change. Placing Comment [10] in the Rule would not change its impact. |
| 20 | Erenea, Doreen | A | N | | No comment. | No response necessary. |
| 21 | Fishbach, Kenneth | A | N | | This rule is long overdue to allow attorneys to protect their elderly and other diminished capacity clients. | No response necessary. |
| 22 | Foster, John C. | A | N | | Agrees that the current rule needs to be modified to allow attorneys to protect their client and make the necessary judgment based upon the attorney's experience. | No response necessary. |
| 23 | Gambatese, Roger | A | N | | I strongly support any proposal that moves closer to ABA Model Rule 1.14. | No response necessary. |
| 24 | Goldsmith, Dara | A | N | | This is a good rule to enable attorneys to take action to protect clients. I believe it is important for the attorney to protect the client from loss or harm. | No response necessary. |
| 25 | Grier, John | A | N | | No comment. | No response necessary. |
| 26 | Hikoyeda, Allan T. | A | N | | The proposed rule will allow attorneys greater flexibility to serve and protect the client who may be susceptible to undue influence, fraud, or other physical, mental or emotional abuse. | No response necessary. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 27 | Hinshaw, Caroline K. | A | N | | Agree with proposed rule 1.14. | No response necessary. |
| 28 | Hoehler, William J. | A | N | | California needs this. It is years overdue. It is the balance we need to protect a client and preserve confidentiality. | No response necessary. |
| 29 | Hoey, Beverly M. | A | N | | I am very glad the proposed changes are here and I enthusiastically endorse them. | No response necessary. |
| 30 | Hoffman, Paul Gordon | A | N | | I strongly agree that a lawyer dealing with a client with diminished capacity should have the right to alert some third party or parties (such as Adult Protective Services) of the fact that the client is suffering from diminished capacity so that an appropriate investigation may be commenced by those parties. | No response necessary. |
| 31 | Hunt, Lori A. | A | N | | No comment. | No response necessary. |
| 32 | Jackson-Sapirstein, Rebekah | A | N | | No comment. | No response necessary. |
| 33 | Janer, Gary | D | N | | This rule puts the attorney into the position of determining a client's capacity. Even though it is permissive, the rule would ultimately be used to create a duty by providing that a reasonably trained attorney should be able to determine the capacity and thus had the power to prevent the undue influence or financial loss. I also adopt the minority's reasoning as sound and as such this rule should be rejected. | As noted in proposed Comment [10], action pursuant to paragraph 1.14(b) is permitted, but not required. The Commission does not see how this permissive standard could be read as creating a duty, and it believes it is important to state in the Rule the extent to which a lawyer may act without being subject to professional discipline. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 34 | Kramer, Linda C. | A | N | | This proposed rule would be a useful tool for an attorney who believes her client is incompetent and thus unable to take steps to defend his/her interests and consequently is unable to take action to protect him/herself. | No response necessary. |
| 35 | LeBlanc, John A. | A | N | | I completely support this change. | No response necessary. |
| 36 | Lejnieks, John H. | A | N | | This is a well thought-out and crafted rule that is long overdue. | No response necessary. |
| 37 | Lindsley, Philip P. | M | N | | I question the inclusion of "relating to the representation" as too limiting and confusing in translation to the real world; i.e. when does the scope of representation end? | The Commission has removed the phrase criticized by the commenter. |
| | | | | Comment [4] | Comment [4] should include language that "the enumeration of these factors in balancing the decision to disclose should not be construed to prohibit disclosure if any, or all, of these factors are present." | Proposed Comment [4] makes clear that the decision requires that the lawyer may not proceed under paragraph 1.14(b) unless "(i) no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces" <u>and</u> that the lawyer take into account "such factors as" the ones enumerated. It is clear that none of the individual factors enumerated is either required for action under paragraph 1.14(b) or that its absence would preclude action under paragraph 1.14(b). |
| | | | | Comment [6] | Not sure what is meant by utilizing "voluntary surrogate decision making tools such as durable POAs . . ." One would assume from the context, you are speaking of existing | Proposed Comment [6] provides several illustrations of such tools, including not only durable powers of attorney and consultations with other agencies or individuals that have the ability |

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | POAs. Does this suggest that it would be appropriate to assist in finding your client incapacitated and bring to life a springing power? Comment should omit this reference or further clarify. | to assist or protect the client. |
| | | | | Comment [8] | I believe Comment [8] is disingenuous. This rule allows the waiver of confidentiality and the prohibition against taking actions potentially (legally) adverse to our clients to prevent, in our judgment, a greater and more adverse harm to our clients. | Confidentiality and loyalty are treated distinctly in the proposed Rule. It narrowly permits a lawyer to disclose information, but it does not permit a lawyer in any circumstances to act as a client's adversary. The Commission does not believe that any change in Comment [8] is warranted. |
| 38 | Los Angeles County Bar Association, Professional Responsibility and Ethics Committee | M | Y | 1.14(a) | In 1.14(a), we suggest that a Comment be added to include a specific reference to the obligation of the attorney to comply with the reasonable accommodations provisions of the Americans with Disabilities Act and of the Unruh Civil Rights Act. Both of these Acts require a lawyer dealing with a client with a disability not just treat them the same as other clients, but to make reasonable accommodations to ensure that they are able to fully obtain the services of the lawyer. Pointing lawyers to this obligation in the Rule would help to increase lawyers' awareness and compliance with the additional obligations. | The Commission agrees that a reference to lawyers' Unruh Act obligations would provide useful guidance and has modified the Comment accordingly.<br>"In addition to the obligations of an attorney provided in this rule, attorneys may be required to make reasonable accommodations to persons with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the attorney. See California Civil Code section 51 (Unruh Civil Rights Act)." |
| | | | | 1.14(c) | We suggest strengthening the language of 1.14(c) to make clearer that the information disclosed must be no greater than the | The Commission agrees and has revised paragraph (c) to state: |

| Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter] | | | | | | TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0 |
|---|---|---|---|---|---|---|
| **No.** | **Commenter** | **Position[1]** | **Comment on Behalf of Group?** | **Rule Paragraph** | **Comment** | **RRC Response** |
| | | | | | minimum amount necessary to alert the 3rd party of the problem. A Comment on this point might also be helpful. | ". . . 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 [3] | In proposed Comment [3], we are concerned about the listed criteria for disclosing information. After referring to Probate Code sections 811 and 812, which provide very specific criteria for determining whether a person has diminished capacity, the Comment then incorporates the criteria listed in the ABA Comment. As drafted, we believe the rule could undercut the references to the Probate Code and allow a lawyer to base a decision on the ABA factors, which are too broad and too easily met, thus leading to disclosures in cases where it might be inappropriate to breach confidentiality. | The Commission agrees and has deleted the third sentence of Comment [3], which contains the broader ABA factors, to avoid ambiguity as to the appropriate standard. |
| 39 | Lumsdaine, Joseph A. | A | N | | This proposed rule rectifies in large part a recurring problem I, and many I meet in probate court, have struggled with for years. Adopt it. It's about time! | No response necessary. |
| 40 | McEvoy, Jean C. | A | N | | This is a rule that has been needed for a long time. I absolutely agree with this proposed Rule. | No response necessary. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 41 | McGowan, Maureen C. | A | N | | No comment. | No response necessary. |
| 42 | Morris, Melissa<br>Law Foundation of Silicon Valley | D | Y | | We feel that protecting the rights of clients to keep their communications with their attorneys confidential is extremely important, especially for people with disabilities. The promise of confidentiality is essential to the trust they establish with their attorney.<br>Clients have the right to make their own bad decisions. It is not the role of the attorney to report in situations where the attorney feels the client is the victim of abuse. | The Commission agrees that the protection of client confidentiality is critical to the lawyer-client relationship. However, following extensive input from stakeholders, the Commission has decided to include in the Rules of Professional Conduct for the first time a rule along the lines of ABA Model Rule 1.14 in order to provide to the attorney whose client has significantly diminished capacity guidance that will enable the attorney to protect the interests of his/her client without improperly abrogating client confidentiality. The balance struck is a narrow permission to disclose the existence of the problem so that another person can act to protect the client while the lawyer is prohibited from taking any action that might be adverse to the directions or interests of the client. |
| 43 | Mullin, Ronald | A | N | | This Rule change is needed. | No response necessary. |
| 44 | Office of the Chief Trial Counsel ("OCTC"), State Bar of California | M | | 1.14(b) | 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 other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified | 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 pursuant to it. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | assessment to permit the attorney to reveal a client's confidences. Further, it appears to be broadening what B&P Code section 6068(e) allows. | |
| | | | | Cmt. [1] | Comment [1] is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions – and how and to whom does the attorney reveal this. 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. Thus, the Comment creates its own exception to confidentially not specifically in the Rule. OCTC believes this is not appropriate for a Comment. | 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. As to the confidentiality concerns OCTC expresses, paragraph (c) expressly provides that a lawyer may reveal information about 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. |
| | | | | | It should either be stated specifically in the Rule, or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the Rule and more specific. | 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. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | Cmt. [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 more difficult. | 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]. |
| | | | | Cmts. [5], [6] | 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 interests foremost. Again, the question is to what extent is this consistent with B&P Code section 6068(e) and this Comment may make enforcement of the confidentially rules much more difficult. | See response concerning Comment [1], above. |
| | | | | Cmt. [7] | Comment [7], which is different than Model Rule Comment [7], explains that section (b) is a balancing between the interest of preserving | 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. |

| Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter] | | | | | | TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0 |
|---|---|---|---|---|---|---|
| **No.** | **Commenter** | **Position[1]** | **Comment on Behalf of Group?** | **Rule Paragraph** | **Comment** | **RRC Response** |
| | | | | | 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 that it was appropriate under this rule. Thus, what safeguards exist for the client? | |
| | | | | Cmt. [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). Thus, 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 is intended to narrow 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. |
| 45 | Orange County Bar Association | A | Y | | The OCBA endorses the adoption of proposed Rule 1.14 and its commentary. Although the OCBA suggests that proposed Comment [3] be modified as follows, its endorsement is not contingent upon adoption of the proposed change. | No response necessary. |

| Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter] | | | | | | TOTAL = 70 Agree = 60 Disagree = 6 Modify = 4 NI = 0 |
|---|---|---|---|---|---|---|
| **No.** | **Commenter** | **Position[1]** | **Comment on Behalf of Group?** | **Rule Paragraph** | **Comment** | **RRC Response** |
| | | | | | "Significantly diminished capacity" is not defined in the proposed Rule or commentary. Instead, the Rule describes several factors for the lawyer to "consider and balance" in making that assessment. Proposed Comment [3] currently states that ". . . the lawyer ***may seek*** guidance from an appropriate diagnostician. . . ." The OCBA proposes modifying that portion of the Comment to state that ". . . lawyers *are* ***encouraged to seek*** guidance from an appropriate diagnostician. . . ." | The Commission agrees and has changed the last sentence of Comment [3] to state: In appropriate circumstances, lawyers are encouraged to seek guidance …" |
| 46 | Penrose, Steven | A | N | | No comment. | No response necessary. |
| 47 | Pershing, Richard W.S. | A | N | | I support the proposed Rule although I remain concerned about an attorney's ability to determine when to avail themselves of the rule on behalf of the client. | No response necessary. |
| 48 | Pham, Diem Thinh | A | N | | I support proposed rule 1.14 because the rule permits the attorney to take preventive measure in protecting the client and the risk for abuse is minimized and adequately safeguarded by the limitations imposed on the attorney as discussed in the rule's comments. | No response necessary. |
| 49 | Prior, Robert D. | A | N | | No comment. | No response necessary. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| 50 | Rigg, Laurie C. | A | N | | This rule fills an urgent need for us estate planning attorneys to use our discretion to protect our clients from harm and still be able to preserve their confidences as much as possible. Please pass it as written with NO modifications. | No response necessary. |
| 51 | Robbeloth, Ann Marshall | A | N | | I support Proposed Rule 1.14. | No response necessary. |
| 52 | Rogers, John T. | A | N | | Agree with this proposed rule. | No response necessary. |
| 53 | Roodhouse, Linda C. | A | N | | I fully support Proposed Rule 1.14. I encourage the adoption of this proposed rule as soon as possible. | No response necessary. |
| 54 | Ross, Scott | A | N | | I'm strongly in favor of this rule. The goal of protecting the client trumps the attorney/client confidentiality concern, and the protections on confidentiality are reasonable. | No response necessary. |
| 55 | Sammis, Ian M. | A | N | | This rule is needed and seems adequate to protect the client and the attorney. | No response necessary. |
| 56 | San Diego County Bar Association Legal Ethics Committee | A | Y | | We approve the new rule in its entirety. | No response necessary. |
| 57 | Santa Clara County Bar Association | A | Y | | Support the adoption of the rule with one recommendation: Add the following to Comment [10]:<br>"The implementation of this rule is not | The Commission did not make the requested addition. The language of proposed Comment [10] has been revised to make clear that taking action under paragraph [b] is permissive. As revised |

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | intended to establish an affirmative duty of conduct that would create a new standard of care for attorneys." | Comment [10] states:<br>"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."<br>It is unnecessary to add that the rule does not establish an affirmative duty of conduct or a new standard of care. |
| 58 | Schur, Dara<br>Disability Rights California | D | Y | | We oppose the rule and support the minority position.<br>We are concerned the proposed rule will infringe on the autonomy of people with disabilities, create barriers in attorney-client trust relationships, and will unnecessarily in many cases result in the breach of client confidences and the destruction of trust in the lawyers who are supposed to speak for the people with disabilities.<br>We believe that lawyers ought to be bound by the expressed interest of the client, even if the client is dealing with a disability, rather than a best interest standard.<br><br>We have a concern about the phrase in 1.14(a) that lawyers who represent clients with diminished capacity should aspire to maintain a normal client-lawyer relationship, "as far as | The Commission agrees that the protection of client confidentiality is critical to the lawyer-client relationship. However, following extensive input from stakeholders, the Commission has decided to include in the Rules of Professional Conduct for the first time a rule along the lines of ABA Model Rule 1.14 in order to provide to the attorney whose client has significantly diminished capacity guidance that will enable the attorney to protect the interests of his/her client without improperly abrogating client confidentiality. The balance struck is a narrow permission to disclose the existence of the problem so that another person can act to protect the client while the lawyer is prohibited from taking any action that might be adverse to the directions or interests of the client.<br><br>In a normal client-lawyer relationship, the lawyer reasonably believes that written and oral communications regarding client options, consequences, advised courses of action are |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | reasonably possible." We believe this quoted phrase is unclear as we carry out a normal client-lawyer relationship with all of our clients. | understood by the client and that the client has the ability to make decisions and communicate those decisions to the lawyer. These assumptions may be faulty when the client suffers from diminished capacity, and in such a case the lawyer may be required to take extra measures to ensure that the means of communication used are adequate to the client's needs (e.g., relying more on in-person meetings or oral communications, involving family members where authorized and appropriate, etc.). |
| 59 | Smedley, David G. | A | N | | I am in favor of the proposed rule. | No response necessary. |
| 60 | Sood, Victoria Tran | A | N | | I support the proposed rule 1.14 because I believe that it is vital that attorneys have this tool to protect people with diminished capacity. I urge you to make this tool available to attorneys. | No response necessary. |
| 61 | Stern, Peter S. | A | N | | I strongly encourage the adoption of Rule 1.14. | No response necessary. |
| 62 | Swanson, Linda Alden | A | N | | I would like to see the rule, or the comments, include some discussion of the client's subjectivity to undue influence. Some individuals are more easily influenced than others. | No response necessary. |
| 63 | Temmerman Jr., Robert | A | N | | I am very much in favor of the proposed rule and consider it to be an insightful, well drafted, and refreshing approach to protecting our elderly clients when they perhaps most need protection. | No response necessary. |

| Rule 1.14 Client with Diminished Capacity. [Sorted by Commenter] | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | ***TOTAL = 70*** **Agree = 60** **Disagree = 6** **Modify = 4** **NI = 0** |
| **No.** | **Commenter** | **Position[1]** | **Comment on Behalf of Group?** | **Rule Paragraph** | **Comment** | **RRC Response** |
| 64 | Thompson, Kent C. | D | N | | If counsel believes that there is diminished capacity and there is a need for disclosure, utilize either a temporary Conservatorship or have a GAL appointed for the client. A Conservator or GAL can be authorized to undertake the action of the practitioner. Better means, other than the proposed Rule, are available to the practitioner. | The Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by initiating conservatorship proceeding. |
| 65 | Thompson, Scott A. | A | N | | No comment. | No response necessary. |
| 66 | Uro-May, Patricia | A | N | | This is a much needed change. I have often had to wrestle with the dilemma regarding confidentiality that this proposed change addresses. Thank you to whoever put this forward. | No response necessary. |
| 67 | Watson, Edward J. | M | N | | I believe Comment [7] should not be deleted, especially when considering the situation where the client has already indicated a desire to have the attorney act on client's behalf, in the event of diminished capacity. I believe that conservatorship proceedings, which include the appointment of an attorney to represent the proposed conservatee, protect the interest of the client sufficiently.<br><br>Some protection and procedure to move more swiftly than the current system is needed. And, I don't feel that the revisions to Rule 1.14 are addressing the real need. It seems that these | The Commission considered the range of options that should be available to an attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by filing a guardianship or conservatorship petition or other action adverse to his/her client. |

## Rule 1.14 Client with Diminished Capacity.
## [Sorted by Commenter]

*TOTAL = 70* **Agree = 60**
**Disagree = 6**
**Modify = 4**
**NI = 0**

| No. | Commenter | Position[1] | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|---|---|---|---|---|---|---|
| | | | | | revisions are addressing solely the needs of attorneys for specific guidance and protection from subsequent claims, without dealing with the real world problems and protection of clients. | |
| 68 | Webber, Stephen E. | A | N | | The proposed rule's shortcoming is that it does not go far enough, being limited only to those with diminished capacity, primarily the elderly, instead of including all mentally impaired individuals. | No response necessary. |
| 69 | Wilcox, Gregory | A | N | | Time is overdue for a rule that allows an attorney to protect his or her own client when it is obvious that the client's abilities are compromised and that outside help is needed. | No response necessary. |
| 70 | Yi, Connie | A | N | | I strongly agree with the proposed rule, it would be consistent with the fiduciary duty we owe to the client. | No response necessary. |

## Rule 1.14: Client with Diminished Capacity

# STATE VARIATIONS

**(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)**

**California** has no rule comparable to ABA Model Rule 1.14.

**Indiana** adds Rule 1.14(d), which states: "This Rule is not violated if the lawyer acts in good faith to comply with the Rule."

**Massachusetts:** Rule 1.14(b) permits a lawyer who reasonably believes that a client lacks capacity as described in Rule 1.14(a) to consult "family members, adult protective agencies, or other individuals or entities that have authority to protect the client, and, if it reasonably appears necessary, the lawyer may seek the appointment of a guardian ad litem, conservator, or guardian, as the case may be. The lawyer "may not consult any individual or entity that the lawyer believes, after reasonable inquiry, will act in a fashion adverse to the interests of the client. In taking any of these actions the lawyer may disclose confidential information of the client only to the extent necessary to protect the client's interests." Massachusetts has no counterpart to ABA Model Rule 1.14(c).

**New York** has no counterpart to ABA Model Rule 1.14 in its Disciplinary Rules, but ECs 7-11 and 7-12 provide as follows:

> EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.
>
> EC 7-12 Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with

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> care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

**Texas:** Rule 1.02(g) provides: "A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

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