RE: Rule 1.14
2/26&2/27/10 Commission Meeting
Open Session Agenda Item III.B

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, February 10, 2010 3:17 PM
To: McCurdy, Lauren
Cc: kevin_e_mohr@csi.com
Subject: Re: Rule 1.14 materials

Hey Lauren:

On Rule 1.14, Linda said she was fine w/ going with everything I sent out on Sunday and with which I copied you. The time stamp on 2/7/09 for that e-mail is 11:23 a.m. and the documents were:

1. Dashboard, Draft 3 (2/7/10).

2. Introduction, Draft 6 (2/7/10), redline, compared to the public comment version [Draft 5 (9/3/09)],

3. Rule Comparison Chart, Draft 4 (2/7/10). Changes are highlighted in yellow.

4. Comment Comparison Chart, Draft 4 (2/7/10). Changes are highlighted in yellow.

5. Rule - ALT1 - Draft 13 (2/6/10), redline, compared to Draft 12 (1/11/10), the draft considered at the 1/22-23/10 meeting. This version-ALT1 assumes that a legislative exception to 6068(e) is required for a lawyer to proceed under paragraph (b).

6. Rule - ALT2 - Draft 13 (2/6/10), redline, compared to Draft 12 (1/11/10), the draft considered at the 1/22-23/10 meeting. This version-ALT2 does not require a legislative exception to 6068(e) is required for a lawyer to proceed under paragraph (b), but instead relies on the court's inherent power to regulate the legal profession.

7. Rule - ALT2 - Draft 13 (2/6/10), redline, compared to ALT1, showing the difference in the two approaches. I didn't think any further changes to the Comment were necessary.

8. Public Comment Chart, Draft 3 (2/6/10)LF-KEM.

Just go with what I prepared and don't include any of Linda's stuff. She gave us the OK to do that.

Please let me know if you need a copy of that e-mail w/ attachments and I'll send it on to you.
Thanks,

Kevin

McCurdy, Lauren wrote:
Kevin,

Question re the materials for this item . . . I see Linda submitted a single revised clean draft where she incorporated both an ALT 1 & ALT 2 (her draft 12). Should I remove the two separate versions you submitted earlier (your annotated draft 13s)? Or should I leave them in as well.

Thanks.

Lauren

From: Foy, Linda [mailto:Linda.Foy@jud.ca.gov]
Sent: Wednesday, February 10, 2010 8:23 AM
To: Kevin Mohr; kevin_e_mohr@csi.com; Ellen Peck; JoElla Julien (E-mail); McCurdy, Lauren
Subject: FW: Rule 1.14 materials

Kevin, Lauren:

Attached are (1) revised Rule 1.14 and (2) revised Public Comment Chart, incorporating votes and suggestions from the January meeting. Unfortunately, I had not opened Kevin's 2/7 email at the time I prepared these revisions and will not have time to review until the end of the day tomorrow (Thursday). However, I am fine going with Kevin's work product in its entirety—the revised versions of rule, comment chart, dashboard, introduction—, particularly it appears that because in preparing these attachments, I had problems with formatting and highlighting conventions. I did not revise the dashboard and introduction, pending final Commission consensus on the rule and comment.
Kevin, thank you for your heroic efforts.

Linda

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"*Serving the courts for the benefit of all Californians*"

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

(**Draft #13, 2/6/10**)

Summary: This proposed new rule addresses the special circumstances applicable when a lawyer represents a client who has diminished capacity. It includes a permissive exception to the duty of confidentiality allowing 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 __8___
Opposed Rule as Recommended for Adoption __2___
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

~~September 2009~~February 2010
(Draft rule ~~to be considered for~~ 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 13 (2/6/10).

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~~ 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~~ 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~~ Rule improperly treats disclosure of confidential information as a first resort rather than a last resort for protecting a client; (4) the ~~rule~~ 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~~ 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. ~~The minority also expresses concerns that the use of the phrase "confidential information relating to the representation" in paragraph (c) is problematic because it is the confidence and secrets of a client that are protected by Business and Professions Code section 6068(e), not just confidential information relating to the representation.~~ [**KEM Note**: *The following sentence should be deleted if the Commission proceeds with ALT2*] Finally, the minority opposes statutory changes to Business and Professions Code section 6068(e) as that action might invite abrogation of the duty of confidentiality.

ABA Model Rule Rule 1.14 Client with Diminished Capacity	Commission's Proposed Rule* 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.~~ (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 (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 is the subject of a

* Proposed Rule 1.14, Draft 13 (2/6/10). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.14 Client with Diminished Capacity	Commission's Proposed Rule* 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, (ii) the client is at risk of substantial physical, financial or other harm unless action is taken, and (iii) 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.	conservatorship or protective proceedings under those statutes). 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. 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 Rule 1.14 Client with Diminished Capacity	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity	Explanation of Changes to the ABA Model Rule
	VERSION ALT1	VERSION ALT1
(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.~~ When taking protective action pursuant to paragraph (b), the lawyer is ~~impliedly~~ authorized under ~~Rule 1.6~~Business and Professions Code section 6068(~~a~~e) 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 Business and Professions Code section 6068(e), rather than Rule 1.6, because section 6068(e) is the source of the lawyer's obligation to protect client confidential information under California law. ~~The word "confidential" has been added to modify "information relating to the representation" to conform the phrase to that used in section 6068(e)(2), and the entire phrase placed in brackets pending the Commission's completion of Rule 1.6.~~ Further, because unlike Model Rule 1.6 there is no concept of "implied authority" in section 6068(e), the word "impliedly" has been deleted. The Commission believes an amendment of section 6068(e) is required to provide the authorization contemplated under this Rule. The remainder of paragraph (c) tracks the language of ~~the Model Rule~~Bus. & Prof. Code § 6068(e) and current Cal. Rule 3-100~~, except to clarify that whether disclosure is "reasonably necessary to protect the client's interest" is determined with reference to "the information known to the lawyer at the time of the disclosure."~~.

ABA Model Rule Rule 1.14 Client with Diminished Capacity	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity	Explanation of Changes to the ABA Model Rule
	VERSION ALT2 (c) ~~Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.~~ Notwithstanding Business and Professions Code section 6068(e), ~~When~~ 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 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.	VERSION ALT2 Paragraph (c) refers to information protected under Business and Professions Code section 6068(e), rather than Rule 1.6, because section 6068(e) is the source of the lawyer's obligation to protect client confidential information under California law. This Rule provides an express exception to section 6068(e) in accordance withf the California Supreme Court's inherent authority to regulate the legal profession. See, e.g., Husted v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 329, 336-337; In re Attorney Discipline System (1998) 19 Cal.4th 582, 967 P.2d 49, 79 Cal.Rptr.2d 836. ~~The word "confidential" has been added to modify "information relating to the representation" to conform the phrase to that used in section 6068(e)(2), and the entire phrase placed in brackets pending the Commission's completion of Rule 1.6.~~ Further, because unlike Model Rule 1.6 there is no concept of "implied authority" in section 6068(e), the word "impliedly" has been deleted. ~~The Commission believes an amendment of section 6068(e) is required to provide the authorization contemplated under this Rule.~~ The remainder of paragraph (c) tracks the language of ~~the Model Rule~~Bus. & Prof. Code § 6068(e) and current Cal. Rule 3-100~~, except to clarify that whether disclosure is "reasonably necessary to protect the client's interest" is determined with reference to "the information known to the lawyer at the time of the disclosure."~~.

ABA Model Rule Rule 1.14 Client with Diminished Capacity Comment	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity 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 to clients with disabilities that will permit them to enjoy	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. 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. The term "lawyer-client" has been substituted for "client-lawyer" throughout the Rule to conform to California rule style.

* Proposed Rule 1.14, Draft 13 (2/6/10).

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	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 guidance to a lawyer who seeks to take protective action	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 Rule 1.14 Client with Diminished Capacity Comment	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity Comments	Explanation of Changes to the ABA Model Rule
	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.	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: (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	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.

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	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.	
[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	[~~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	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.

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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.	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.	
[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].
Taking Protective Action [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	~~**Taking Protective Action**~~ [~~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	Comment [6] is based on the latter half of Model Rule 1.14, Cmt. [5], which addresses section (b) of the Rule. 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.

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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.	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, 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.	
[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. See Explanation of Changes for Comment [3] concerning the deletion of the first sentence of MR 1.14, cmt. [6].

ABA Model Rule Rule 1.14 Client with Diminished Capacity Comment	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity Comments	Explanation of Changes to the ABA Model Rule
	[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 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.	~~[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 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	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. 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 conservator where such conduct is not otherwise permitted by Rule 1.7, or to take any action adverse to the client.

ABA Model Rule Rule 1.14 Client with Diminished Capacity Comment	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity Comments	Explanation of Changes to the ABA Model Rule
	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.	
Disclosure of the Client's Condition [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 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.	~~**Disclosure of the Client's Condition**~~ ~~[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 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.~~	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).
	[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	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

ABA Model Rule Rule 1.14 Client with Diminished Capacity Comment	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity Comments	Explanation of Changes to the ABA Model Rule
	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.	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, and 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).
Emergency Legal Assistance [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.	~~**Emergency Legal Assistance**~~ ~~[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 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 Rule 1.14 Client with Diminished Capacity Comment	Commission's Proposed Rule* Rule 1.14 Client with Diminished Capacity Comments	Explanation of Changes to the ABA Model Rule
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 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.~~	
[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

(Commission's Proposed Rule – **ALT 1** – Draft 13 (2/6/10) – COMPARED TO Draft 12 (01/11/10)
February 26-27, 2010 Meeting; Agenda Item III.B.

(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 ~~client-lawyer~~ 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) ~~Confidential information relating to the representation of a client with diminished capacity is protected by Business and Professions Code section 6068(e).~~ [1]When taking protective action pursuant to paragraph (b), the lawyer is authorized under Business and Professions Code section 6068(e) to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is[2] 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~~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~~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

[1] **RRC Action**: At the 1/22-23/10 meeting, the RRC voted 5-3-3 to delete the first sentence of paragraph (c). See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 2A.

[2] **RRC Action**: Further revision of paragraph (c) was deemed approved to reflect the deletion of the first sentence (addition of "Business and Professions Code") and to conform the language to that found in B&P § 6068(e)(2) and rule 3-100(B) ("**the lawyer** reasonably **believes disclosure is**"). See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 7A.

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 ~~an attorney~~ a lawyer provided in this ~~rule~~Rule, ~~attorneys~~lawyers ~~are~~ may be[3] required to make reasonable accommodations to clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the ~~attorney~~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~~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.~~ [4]In appropriate circumstances, ~~the~~ lawyers ~~may~~ are encouraged to seek guidance[5] from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation.

[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

[3] **RRC Action**: At the 1/22-23/10 meeting, substitution of "may be" for "are" was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 6.b.

[4] **RRC Action**: At the 1/22-23/10 meeting, the RRC voted 8-0-3 to delete the third sentence of Comment [3] in response to a comment received from LACBA that the sentence conflicted with the standards set for in the Probate Code. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 8A. That sentence had provided:

> 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.

[5] **RRC Action**: At the 1/22-23/10 meeting, substitution of "lawyers are encouraged to seek guidance" for "a lawyer may seek guidance". See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 12.a.

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 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, 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 minimizing intrusion into the client's decisionmaking 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[6] where the lawyer would not otherwise be permitted to do so

[6] **RRC Action**: Substitution of "person" for "party" was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 9.

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) 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 § 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.

[10] ~~Taking action~~ A lawyer is permitted to act under paragraph (b) ~~is permitted,~~ but ~~not~~ is never required to do so,[7] and a lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

[7] **RRC Action**: At the 1/22-23/10 meeting, revision of the first clause of Comment [10] was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 9.b. The clause had provided:

"Taking action under paragraph (b) is permitted, but not required, . . ."

Rule 1.14 Client with Diminished Capacity

(Commission's Proposed Rule – **ALT 2** – Draft 13 (2/6/10) – COMPARED TO Draft 12 (01/11/10)
February 26-27, 2010 Meeting; Agenda Item III.B.

(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 ~~client-lawyer~~ 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) ~~Confidential information relating to the representation of a client with diminished capacity is protected by Business and Professions Code section 6068(e).~~ [1]Notwithstanding Business and Professions Code section 6068(e), ~~When~~ when taking protective action pursuant to paragraph (b), the lawyer is authorized ~~under section 6068(e)~~ to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is[2] 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~~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-~~

[1] **RRC Action**: At the 1/22-23/10 meeting, the RRC voted 5-3-3 to delete the first sentence of paragraph (c). See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 2A.

[2] **RRC Action**: Further revision of paragraph (c) was deemed approved to reflect the deletion of the first sentence and the fact that the RRC rejected proposed Rule 1.6, which had provided an exception to confidentiality in accordance with this Rule (addition of the opening clause, "Nothwithstanding Business and Professions Code section 6068(e)") and to conform the language to that found in B&P § 6068(e)(2) and rule 3-100(B) ("**the lawyer** reasonably **believes disclosure is**"). See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 7A.

~~lawyer~~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 an attorney provided in this rule, attorneys ~~are~~ may be[3] required to make reasonable accommodations to clients 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).

[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~~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.~~ [4]In appropriate circumstances, ~~the~~ lawyers ~~may~~ are encouraged to seek guidance[5] from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation.

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[3] **RRC Action**: At the 1/22-23/10 meeting, substitution of "may be" for "are" was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 6.b.

[4] **RRC Action**: At the 1/22-23/10 meeting, the RRC voted 8-0-3 to delete the third sentence of Comment [3] in response to a comment received from LACBA that the sentence conflicted with the standards set for in the Probate Code. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 8A. That sentence had provided:

> 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.

[5] **RRC Action**: At the 1/22-23/10 meeting, substitution of "lawyers are encouraged to seek guidance" for "a lawyer may seek guidance". See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 12.a.

[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 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, 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 minimizing intrusion into the client's decisionmaking 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[6] 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) 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 § 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.

[10] ~~Taking action~~ A lawyer is permitted to act under paragraph (b) ~~is permitted,~~ but ~~not~~ is never required to do so,[7] and a lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

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[6] **RRC Action**: Substitution of "person" for "party" was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 9.

[7] **RRC Action**: At the 1/22-23/10 meeting, revision of the first clause of Comment [10] was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.H., at ¶. 9.b. The clause had provided:

> "Taking action under paragraph (b) is permitted, but not required, . . ."