RE: Rule 1.14
1/22&23/10 Commission Meeting
Open Session Agenda Item III.H.

From: Kevin Mohr
To: McCurdy, Lauren; Difuntorum, Randall
Cc: Linda Foy; JoElla L. Julien; Ellen Peck; Harry Sondheim; Lee, Mimi; Kevin Mohr G
Subject: RRC - 1.14 - III.H. - Agenda Materials (1/22-23/10 Meeting)
Date: Tuesday, January 12, 2010 7:43:57 AM
Attachments: RRC - [1-14] - Public Comment Chart - By Commenter - DFT2.2 (01-11-10)LF-KEM.doc
RRC - [1-14] - Rule - DFT12 (01-11-10) - Cf. to 11.2 (09-01-09) - LAND.doc

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Greetings:

I've renamed (to facilitate keeping track of the sundry drafts), made some formatting changes (no substantive changes), and/or added footers to the following attached documents:

1. Public Comment Chart, Draft 2.2 (1/11/10)LF-KEM. I've re-sorted the commenters alphabetically.

2. Rule, Draft 12 (1/11/10), redline, compared to Draft 11.2 (9/1/09), the public comment draft.

I don't think we need to update the other documents (Dash, Intro & Rule & Comment Comparison Chart) until we have a final decision on whether we will make any further changes to the Rule. Thanks to Linda for her fine work in reviewing the voluminous public comment and responding.

Please let me know if you have any questions. Thanks,

Kevin

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

TOTAL =__ **Agree = __ Disagree = __ Modify = __ NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
45	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.
62	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.
13	Anderson, Michelle E.	A	N		No comment.	No response necessary.
28	Angevine, Elizabeth Anne Miller	A	N		This change is needed for California attorneys.	No response necessary.
47	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.
48	Bond, Stephen A.	A	N		No comment.	No response necessary.
26	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. Rule 1.14(b) could be improved by either modification or clarification to indicate that "an	No response necessary.

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

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

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					individual or organization that has the ability to 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.	
50	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.
27	Caspersen, R. Frederick	A	N		I support this new rule whole-heartedly.	No response necessary.
24	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.
63	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.
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65	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.	
14	COPRAC	A	Y		COPRAC supports the proposed rule. 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. 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.
40	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.
44	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	No response necessary.

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					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.	
56	Daniels, Edward	A	N		I strongly support adoption of the proposed rule.	No response necessary.
36	Davis, Shirleymae	A	N		I strongly support this rule.	No response necessary.
52	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.
64	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 clients' personal autonomy and confidentiality in situations in which this is not warranted. 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. 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	Proposed paragraph 1.14(b) permits action only when the lawyer reasonable believes that the client has "significantly diminished capacity" etc. The Commission considered the range of options that should be available to the 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.

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					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. 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. 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.	See response immediately above.
60	Erenea, Doreen	A	N		No comment.	No response necessary.
51	Fishbach, Kenneth	A	N		This rule is long overdue to allow attorneys to protect their elderly and other diminished capacity clients.	No response necessary.
1	Foster, John C.	A	N		Agrees that the current rule needs to be modified to allow attorneys to protect their	No response necessary.

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					client and make the necessary judgment based upon the attorney's experience.	
15	Gambatese, Roger	A	N		I strongly support any proposal that moves closer to ABA Model Rule 1.14.	No response necessary.
35	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.
22	Grier, John	A	N		No comment.	No response necessary.
6	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.
61	Hinshaw, Caroline K.	A	N		Agree with proposed rule 1.14.	No response necessary.
39	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.
34	Hoey, Beverly M.	A	N		I am very glad the proposed changes are here and I enthusiastically endorse them.	No response necessary.
4	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	No response necessary.

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

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					capacity so that an appropriate investigation may be commenced by those parties.	
32	Hunt, Lori A.	A	N		No comment.	No response necessary.
20	Jackson-Sapirstein, Rebekah	A	N		No comment.	No response necessary.
25	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.
57	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.
30	LeBlanc, John A.	A	N		I completely support this change.	No response necessary.
18	Lejnieks, John H.	A	N		This is a well thought-out and crafted rule that is long overdue.	No response necessary.

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3	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 (?).	
				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 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.	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 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	The proposed rule is intended to permit the attorney to act to further the client's goals in the representation and to further the client's interests.

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					potentially (legally) adverse to our clients to prevent, in our judgment, a greater and more adverse harm to our clients.	The Commission believes that the circumstances in which the attorney may act pursuant to paragraph 1.14(b) and the options the attorney may take under those circumstances have been narrowly defined to preclude action that is adverse to the client.
67	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M	Y	1.14(a) 1.14(c) Comment [3]	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. We suggest strengthening the language of 1.14(c) to make clearer that the information disclosed must be no greater than the minimum amount necessary to alert the 3rd party of the problem. A Comment on this point might also be helpful. 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	**DRAFTER'S RECOMMENDATION**: A reference in a Comment to statutory obligations of an attorney whose client may have a covered disability (the concept covered disability is broader than having "significantly diminished capacity") would provide useful guidance. The principal drafter recommends adding to Comment [1] a final sentence along the following lines: "In addition to the obligations of an attorney provided in this rule, attorneys are 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)."

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					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.	
31	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.
17	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.
42	McGowan, Maureen C.	A	N		No comment.	No response necessary.
T	Morris, Melissa 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. 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	With extensive input from stakeholders, the Commission decided for the first time to include in the Rules of Professional Conduct 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. Both the circumstances under which an attorney is

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					the client is the victim of abuse.	permitted to act under the rule and the options he/she may take are narrowly circumscribed by the proposed rule.
19	Mullin, Ronald	A	N		This Rule change is needed.	No response necessary.
8	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. "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. . . ."	No response necessary.
33	Penrose, Steven	A	N		No comment.	No response necessary.
29	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	No response necessary.

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					rule on behalf of the client.	
12	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.
38	Prior, Robert D.	A	N		No comment.	No response necessary.
10	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.
53	Robbeloth, Ann Marshall	A	N		I support Proposed Rule 1.14.	No response necessary.
58	Rogers, John T.	A	N		Agree with this proposed rule.	No response necessary.
21	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.
7	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	No response necessary.

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					confidentiality are reasonable.	
55	Sammis, Ian M.	A	N		This rule is needed and seems adequate to protect the client and the attorney.	No response necessary.
54	San Diego County Bar Association Legal Ethics Committee	A	Y		We approve the new rule in its entirety.	No response necessary.
59	Santa Clara County Bar Association	A	Y		Support the adoption of the rule with one recommendation: Add the following to Comment [10]: "The implementation of this rule is not intended to establish an affirmative duty of conduct that would create a new standard of care for attorneys."	No response necessary.
T	Schur, Dara Disability Rights California	D	Y		We oppose the rule and support the minority position. 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. 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.	With extensive input from stakeholders, the Commission decided for the first time to include in the Rules of Professional Conduct 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. Both the circumstances under which an attorney is permitted to act under the rule and the options he/she may take are narrowly circumscribed by the proposed rule.

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

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					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 reasonably possible." We believe this quoted phrase is unclear as we carry out a normal client-lawyer relationship with all of our clients.	
43	Smedley, David G.	A	N		I am in favor of the proposed rule.	No response necessary.
11	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.
16	Stern, Peter S.	A	N		I strongly encourage the adoption of Rule 1.14.	No response necessary.
46	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.
5	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	No response necessary.

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					need protection.	
9	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 the attorney and concluded that the attorney should not be permitted to take action adverse to his/her client by initiating conservatorship proceeding.
49	Thompson, Scott A.	A	N		No comment.	No response necessary.
2	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.
23	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. Some protection and procedure to move more	The Commission considered the range of options that should be available to the 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.

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					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 revision 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.	
66	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.
41	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.
37	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

(Commission's Proposed Rule (01/11/10)– ~~Clean~~ Redline Version against DFT 11 2)

(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 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). 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 reasonably 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 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 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 required to make reasonable accommodations to clients with disabilities that will permit them to enjoy the provison 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 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 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.

[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 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 under paragraph (b) is permitted, but not required, and a lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

E-2009-292g OCBA [1.14]

E-2009-293f State Bar OCTC [1.14]

E-2009-294 Patricia Uro-May [1.14]

E-2009-295 John Foster [1.14]

E-2009-296 Scott Ross [1.14]

E-2009-297 Allan Hikoyeda [1.14]

E-2009-298 Philip Lindsley [1.14]

E-2009-299 Robert Temmerman Jr. [1.14]

E-2009-300 Paul Hoffman [1.14]

E-2009-302 Kent Thompson [1.14]

E-2009-303 Michelle Anderson [1.14]

E-2009-304 Diem Pham [1.14]

E-2009-305 Victoria Sood [1.14]

E-2009-307 Laurie Rigg [1.14]

E-2009-310b COPRAC [1.14]

E-2009-312 Roger Gambatese [1.14]

E-2009-313 Peter Stern [1.14]

E-2009-314 Jean McEvoy [1.14]

E-2009-315 John Lejnieks [1.14]

E-2009-316 Ronald Mullin [1.14]

E-2009-317 Rebekah Sapirstein [1.14]

E-2009-318 Linda Roodhouse [1.14]

E-2009-319 John Grier [1.14]

E-2009-320 Edward Watson [1.14]

E-2009-321 Herbert Chavers [1.14]

E-2009-322 Gary Janders [1.14]

E-2009-323 James Boyd [1.14]

E-2009-324 R Caspersen [1.14]

E-2009-325 Elizabethanne Angevine [1.14]

E-2009-326 Richard Pershing [1.14]

E-2009-327 Joan LeBlanc [1.14]

E-2009-328 Joseph Lumsdaine [1.14]

E-2009-329 Lori Hunt [1.14]

E-2009-330 Steven Penrose [1.14]

E-2009-331 Beverly Hoey [1.14]

E-2009-332 Dara Goldsmith [1.14]

E-2009-333 Shirleymae Davis [1.14]

E-2009-334 Connie Yi [1.14]

E-2009-335 Robert Prior [1.14]

E-2009-336 William Hoehler [1.14]

E-2009-337 Kathleen Courts [1.14]

E-2009-338 Gregory Wilcox [1.14]

E-2009-339 Maureen McGowan [1.14]

E-2009-340 David Smedley [1.14]

E-2009-341 Thomas Craven [1.14]

E-2009-342 Sondra Allphin [1.14]

E-2009-343 Linda Swanson [1.14]

E-2009-344 Cristian Arrieta [1.14]

E-2009-345 Stephen Bond [1.14]

E-2009-346 Scott Thompson [1.14]

E-2009-347 Janis Carney [1.14]

E-2009-348 Kenneth Fishbach [1.14]

E-2009-349 Richard Day [1.14]

E-2009-351h SDCBA [1.14]

E-2009-352 Ann M Robbeloth [1.14]

E-2009-355 Stephen Webber [1.14]

E-2009-356 Linda Kramer [1.14]

E-2009-357 John Rogers [1.14]

E-2009-358g Santa Clara County Bar [1.14]

E-2009-359 Doreen Erenea [1.14]

E-2009-360 Caroline Hinshaw [1.14]

E-2009-362 Jack Anderson [1.14]

E-2009-363 J. Frederick Clark [1.14]

E-2009-364 Shelly Conley [1.14]

E-2009-365 Dara Schur [1.14]

E-2009-366 Ian Sammis [1.14]

E-2009-367 Edwarrd Daniels [1.14]

E-2009-369 Peter Pettler [1.14]

E-2009-370f LACBA [1.14]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 16, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.14 – Client with Diminished Capacity**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

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 conditioned upon adoption of the proposed change.

"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. Under the proposed Rule, lawyers would have limited guidance and broad discretion to make, on a case-by-case basis, what in some circumstances may amount to a medical diagnosis of their clients. 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 STATE BAR OF CALIFORNIA

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000
TDD: (415) 538-2231
FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

November 4, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

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

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.

2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should 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.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.

4. Comments 5 and 6 states 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 Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?

5. 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?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?

2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

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PROPOSED RULES OF PROFESSIONAL CONDUCT
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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation La Raza Lawyers Association; Senior Adult Legal Assis

Commenting on behalf of an organization
- Yes
- No

*** Name** Patricia Uro-May

*** City** San Jose

*** State** California

*** Email address** (You will receive a copy of your comment submission.) p.uromay@sbcglobal.net

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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 is a much needed change. i often come across seniors who have not only limited capacity but with limited language and education who report outrageous situations in which they are at risk. I have often had to wrestle with the dilemma regarding confidentiality that this proposed change addresses. Thank you to whoever put this forward.

OFFICE USE ONLY.

* Date	Period	File :
11/03/2009	PC	E-2009-294 Patricia Uro-May [1.14].pdf

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11/03/2009	PC	E-2009-295 John Foster [1.14].pdf

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

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

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

Rule 1.14 Client with Diminished Capacity [N/A]

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'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.

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11/06/2009	PC	E-2009-296 Scott Ross [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** Allan T. Hikoyeda

*** City** San Jose

*** State** California

***** Email address (You will receive a copy of your comment submission.) a.hikoyeda@sbcglobal.net

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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.

As a certified specialist in estate planning, probate and trust law, many of my clients exhibit diminished capacity or impaired judgment as time passes. 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.
While I appreciate the comment that attorneys are not necessarily qualified to opine about a client's mental or emotional status, the claimed breach of trust should be viewed from the client's point of view. S/he has retained me to provide the best legal advice I can offer to protect their interests. The present rule prevents me from doing so. Furthermore, insisting that a qualified professional (presumably a psychiatrist or psychologist) be the only decider of impairment burdens the client with costs s/he may be unable to afford.
Allowing the attorney to refer the matter to appropriate agencies will reduce the possibility of litigation among family members.

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11/06/2009	PC	E-2009-297 Allan Hikoyeda [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney, Certified Specialist in Estate Planning, Trust a

Commenting on behalf of an

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

I agree with the purpose of the rule, conforming us, subject to nece3ssary modifications, to ABA MR 1.14. As to the proposed rule itself, I question only the inclusion of "relating to the representation" as too limiting and confusing in translation to the real world. For example, assume 3 years after I have completed an estate plan for a client, I am made aware of my client's substantial diminished capacity and current physical or financial harm. Am I in the scope of my representation?. If this statement is to be left, the comments shold clarify this. With this caveat, I am in support of the proposed rule. HOWEVEWR, some of the comments, in attempting to reconcile ABA 1.14 with B&P 6068(e) only muddy the waters. In particular:

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." Other wise, the existence, for example, of the likelihood of the disclosure resulting in commitment proceedings could be seen as requiring non-disclosure.

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 POAs. Does this suggest that it would be appropriate to assist in finding your client incapacitated and bring to life a springing power? I'm not sure this is what is meant...but I am also not clear as to what IS meant be reference to these tools. Comment should omit this reference or further clarify. I'm aware this is part of the ABA rule Model rule...but I never understood it there either. Since the obvious effort has been made to consider ABA 1.14 in light of 6068(e), that exercise should take place for this reference as well.

Comment [8] prohibits taking action adverse to the client. This is comforting to say for those looking for perfect harmony between 6068(e) and ABA 1.14. However, let's not be disingenuous: the model rule invites action adverse to the client after engaging in the section (b) balancing. How can we say calling Adult Protective Services (after, let's assumne, I've engaged in full analysis as per 1.14) when we know the likelihood that this will result in conservatorship or other procedings limiting my clients control over his affairs, is not "adverse to the client." Clearly it is in any defintion I understand. To clarify, I'm in support of proposed 1.14 (subject to my comments), but let's have the honesty to admit what we are doing, and why: We are allowing 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. To say otherwise really only confuses matters, and obscures the scope of this rule. I would imagine this is an opinion I share with more who oppose this rule that support it. Proponents, however, will not help the matter by sophistry.

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11/07/2009	PC	E-2009-298 Philip Lindsley [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Senior partner of a 10 person Trust and Estates Firm

Commenting on behalf of an organization
- Yes
- No

*** Name** Robert Temmerman Jr.

*** City** San Jose

*** State** California

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

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

Rule 1.14 Client with Diminished Capacity [N/A]

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

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11/07/2009	PC	E-2009-299 Robert Temmerman Jr. [1.14].pdf

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Lawyer in private practice

Commenting on behalf of an organization
- Yes
- No

*** Name** Paul Gordon Hoffman

*** City** Los Angeles

*** State** California

***** Email address (You will receive a copy of your comment submission.) paul@hswlaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.14 Client with Diminished Capacity [N/A]

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- 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 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 or a person named as the client's attorney in fact under a "springing" durable power of attorney or the client's successor Trustee under the client's living trust) of the fact that the client is suffering from diminished capacity so that an appropriate investigation may be commenced by those parties.

In some cases, the client's lawyer may be the only person aware that the client is suffering from diminished capacity, and that the client is taking actions that are significantly adverse to the client. For example, I was once involved in a situation where the client was persuaded to turn over her assets to a "con man", and the "con man" warned the client not to discuss this matter with her children because the children were plotting to put her into a nursing home and take away all of her money. Despite our effort to persuade the client to allow us to alert her children or others to what was happening, the client was so fearful of being placed in a

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

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 or a person named as the client's attorney in fact under a "springing" durable power of attorney or the client's successor Trustee under the client's living trust) of the fact that the client is suffering from diminished capacity so that an appropriate investigation may be commenced by those parties.

In some cases, the client's lawyer may be the only person aware that the client is suffering from diminished capacity, and that the client is taking actions that are significantly adverse to the client. For example, I was once involved in a situation where the client was persuaded to turn over her assets to a "con man", and the "con man" warned the client not to discuss this matter with her children because the children were plotting to put her into a nursing home and take away all of her money. Despite our effort to persuade the client to allow us to alert her children or others to what was happening, the client was so fearful of being placed in a nursing home that she refused to allow us to take actions to protect her, and instead proceeded to turn assets over to the con man. Fortunately, in this case, an alert bank employee intervened when she attempted to withdraw all of her funds from the bank and deliver the funds to the con man, and the bank employee notified adult protective services. However, it was a matter of great frustration to me that I was prohibited from taking an action that was clearly beneficial to the client, and that the client would have authorized if she had not suffered from diminished capacity.

The client's lawyer should have the ability to notify an appropriate party or parties to the client's situation. Generally, a notification that the client is in jeopardy should be all that the lawyer need disclose. A successor Trustee or an attorney-in-fact under a springing durable power of attorney will generally have the ability to require the client to be evaluated to determine whether the client indeed has such diminished capacity that the relevant estate planning documents can become effective (either removing the client as a trustee of his or her living trust, or effectuating the power of attorney.) Adult protective services may institute conservatorship proceedings. In any case, there exist protections should the client feel that he or she is not suffering from a sufficiently diminished mental capability such that no action should be taken.

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* Date	Period	File :
11/08/2009	PC	E-2009-300 Paul Hoffman [1.14].pdf

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation 35-year practitioner in the area of deminished capacity

Commenting on behalf of an organization
- Yes
- No

*** Name** Kent C. Thompson

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) kctlaw@pacbell.net

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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

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Attorneys should not be placed in this position. 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 propsed Rule, are available to the practioner.

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Michelle E. Anderson

*** City** Santa Cruz

*** State** California

*** Email address** (You will receive a copy of your comment submission.) manderson@bossowilliams.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

Rule 1.14 Client with Diminished Capacity [N/A]

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

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11/09/2009	PC	E-2009-303 Michelle Anderson [1.14].pdf

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* Required

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Tran Sood Law Firm

Commenting on behalf of an organization
- Yes
- No

*** Name** Diem Thinh Pham

*** City** 12822 Via Aventura

*** State** California

***** Email address (You will receive a copy of your comment submission.) diemthinh@yahoo.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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Rule 1.14 Client with Diminished Capacity [N/A]

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

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I would support the Proposed California Rules of Professional Conduct, Rule 1.14 for Substantially Impaired Clients because the rule permit 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.

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11/09/2009	PC	E-2009-304 Diem Pham [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Victoria Tran Sood

*** City** Milpitas

*** State** California

***** Email address (You will receive a copy of your comment submission.) vtran@viclaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

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Rule 1.14 Client with Diminished Capacity [N/A]

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

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Attorneys should protect the most vulnerable in society. No one is more vulnerable than those who have diminished capacity and have no one to protect them from being harmed. Attorneys are often the FIRST detectors of harm being done or about to be done to these vulnerable individuals. Attorneys, therefore, should have the necessary tools to initiate a line of defense to protect their clients especially those most vulnerable. The tool the proposed rule 1.14 gives to attorneys is the ability to SEEK help for their clients who have diminished capacity.

Under the current rule, clients with diminished capacity often suffer irreparable harm (house sold, cash looted, deed transferred, etc.) by the time a non-attorney detector (family members, Adult Protect Services, etc.;)finds out and intervenes. At such time the only remedies are to file lawsuits against the perpetrators for damages. Attorney fees and costs will have to be incurred to recover assets, and thus further depleting the estate. Worst of all, most of these perpetrators are judgment proof. The current rule gives the “bad” person a license to do wrong until

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With the proposed rule 1.14, the intervention to prevent or stop the harm is more likely to happen sooner rather than later. As a result, harm and damages to the clients are minimized or prevented. The proposed rule only authorizes attorneys to release the minimal sufficient information in order to SEEK help for their clients who have diminished capacity. The application of the proposed rule is narrow in scope.

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.

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11/09/2009	PC	E-2009-305 Victoria Sood [1.14].pdf

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PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation principal, Law Offices of Laurie C. Rigg

Commenting on behalf of an organization
- Yes
- No

*** Name** Laurie C. Rigg

*** City** Rolling Hills Estates

*** State** California

*** Email address** (You will receive a copy of your comment submission.) laurie@laurierigglawoffices.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

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Rule 1.14 Client with Diminished Capacity [N/A]

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- AGREE with this proposed Rule
- DISAGREE with this proposed Rule

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* Date	Period	File :
11/10/2009	PC	E-2009-307 Laurie Rigg [1.14].pdf

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THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

November 9, 2009

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 6WDQGLQJ &RPPLWWHH RQ 3URIHVVLRQDO 5HVSRQVLEL 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 5HJXODWLRQ $GPLVVLRQV 'LVFLSOLQH 2YHUVLJKW ³5$´ IRU reviewed the provisions of proposed Rule 1.14 and offers the following comments.

&235$&&VXSSRUWV WKH SURSRVHG UXOH :H DUH FRJQL]DQW F

Carole J. Buchner

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Member of the State Bar

Commenting on behalf of an organization
- Yes
- No

*** Name** Roger Gambatese

*** City** Davis

*** State** California

*

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

I strongly support any proposal that moves closer to ABA Model Rule 1.14. I have been a trusts and estates lawyer for many years and have several clients in their 80's and 90's. Many are mentally impaired or becoming impaired. Over the years we have become friends. I know that they have great trust in my judgment to act in their best interests. I have three reasons for supporting the proposal:

1. Friends don't sit idly by and let friends be abused. Just because I am an impaired person's lawyer shouldn't prevent me from acting as a friend.

2. A lawyer's ethical duty of loyalty to the client should be given more weight in these situations. I consider it loyalty to the impaired client to report abuses. I consider it disloyal to sit idly by.

3. In certain circumstances, laws protect Good Samaritans and physicians when taking actions without a person's explicit consent. When an impaired client is being abused, a lawyer should have a similar freedom to act. If this seems a radical idea, consider that the law now imposes on many professionsls a MANDATE to report abuses when they suspect them.

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11/11/2009	PC	E-2009-312 Roger Gambatese [1.14].pdf

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PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Private attorney, former chair State Bar Trusts and Esta

Commenting on behalf of an organization
- Yes
- No

*** Name** Peter S. Stern

*** City** Palo Alto, CA

*** State** California

*** Email address** (You will receive a copy of your comment submission.) pstern1939@aol.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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

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I strongly encourage the adoption of Rule 1.14. As one of the participants of the Trusts and Estates Section's drafting team on our version of this project, I have worked for nearly ten years with TEXCOM and five years as co-liaison to the Rules Revision Commission on seeking this exception to the attorney-client confidentiality provisions of the Rules of Professional Conduct. It is ironic that the source of our Rules, as codified in B&PC 6068(e), the Field Code from New York, is no longer applied in the state of its origin.

California's proposed Rule 1.14 goes far toward protecting the core concept of confidentiality while permitting an attorney to take the minimal step necessary to notify someone or an entity when the attorney's client is substantially impaired, cannot act in his or her own behalf, and is at risk of being harmed physically or financially. The Ethics Guide published by the Section in 1997 and revised in 2008, emphasized the commitment of California's trusts and estates lawyers to balance "the duties of confidentiality and loyalty that are the cornerstones of the California

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The modification of B&PC Sec. 6068(e)(2) to allow notification of confidential information where necessary to prevent a criminal act involving death or substantial bodily, and Rule 3-100, created to implement the new code section, mandate that the notification an attorney can give is no more than is necessary to prevent the criminal act. Proposed Rule 1.14 similarly permits only the minimum disclosure of information necessary to get assistance for the substantially impaired client. The rule is in this regard consistent with the existing COPRAC standard set out in Formal Opinion 1989-112, which does not permit an attorney to initiate conservatorship proceedings over his or her own client.

By permitting any action at all, the proposed rule of course goes beyond the COPRAC standard. In the twenty-five years that I have practiced estate planning and conservatorship law in California, working with impaired clients and their families, I have seen many instances where this proposed rule would have saved clients from personal harm and financial exploitation. In some instances, I saw attorneys act notwithstanding the law and the rules of professional conduct, and on occasion to their detriment, to protect the interests of a client who was at risk. I have heard numerous accounts of dilemmas faced by attorneys whose clients were too demented to realize their situation and thus were unable to understand the risks they were confronting. In response to these calls for change in the rules, I have worked both at my local bar level and with the State Bar to try to bring about change.

Proposed Rule 1.14 is overdue. While much of the opposition to it is based on the reasonable desire to preserve the value of absolute confidentiality, that opposition does not provide any measures that would offer protection to an impaired client who is at risk. I believe the proposed rule comes as close as possible to achieving the balance between confidentiality and protection that should be the law in California.

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11/12/2009	PC	E-2009-313 Peter Stern [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Jean C. McEvoy

*** City** Sacramento

*** State** California

***** Email address (You will receive a copy of your comment submission.) jean.mcevoy@worldnet.att.net

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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 is a rule that has been needed for a long time. I absolutely agree with this proposed Rule.

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11/12/2009	PC	E-2009-314 Jean McEvoy [1.14].pdf

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* Date	Period	File :
11/12/2009	PC	E-2009-315 John Lejnieks [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Ronald Mullin SBN 84231

*** City** Concord

*** State** California

*** Email address** (You will receive a copy of your comment submission.) ronald@mullinlaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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This Rule change is needed. Attorneys who are appointed by the court to represent persons with dementia oft times find themselves in an ethical quandary requiring them to choose between what the client is saying they want and what the attorney knows that they need because the client is significantly impaired and their judgment is abnormal.

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11/12/2009	PC	E-2009-316 Ronald Mullin [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney, member of Trusts and Estates Section

Commenting on behalf of an organization
- Yes
- No

*** Name** Rebekah Jackson Sapirstein

*** City** San Francisco and San Anselmo

*** State** California

***** Email address (You will receive a copy of your comment submission.) rebekah@lawrjs.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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- AGREE ONLY IF MODIFIED

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* Date	Period	File :
11/12/2009	PC	E-2009-317 Rebekah Sapirstein [1.14].pdf

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Your Information

Professional Affiliation Attorney at law; Vice Chair of the Trusts and Estates Se

Commenting on behalf of an organization
- Yes
- No

*** Name** Linda C. Roodhouse

*** City** Oakland

*** State** California

***** Email address
(You will receive a copy of your comment submission.) lcr@llcllp.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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 am certified by the State Bar Board of Legal Specialization as a specialist in estates, trusts and probate law. I have practiced in this area since 1980. I fully support Proposed Rule 1.14.

The proposed change is a welcome acknowledgment of the situation "on the ground" for estates and trusts lawyers. We are from time to time presented with the client who may no longer be able to understand the nature and consequences of a particular transaction, an estate planning wish, or an estate/trust administration fiduciary action, and turning to the named successor fiduciary is necessary to protect the client's assets or to shield the client from potential liability, or both. We see that friends, family members and others insinuate themselves into an unnatural familiarity with a vulnerable client whose need for attention and companionship in later years remains strong and whose ability to discern attempts at undue influence and fraud is severely diminished. We need to be able to contact Adult Protective Services or another interested friend or family member in such a situation.

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

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Often, only the lawyer can see what is happening. Of course, we try to work with the client as much as possible. But when the client's reasoning and judgment are so impaired that the client is at significant personal or financial risk, or both, I would like to have the authority to act on behalf of the client to get appropriate help. Because modern medicine has extended life expectancy to the point that neurological/mental decline appears more frequently, these situations are becoming more and more common, unfortunately.

I encourage the adoption of this proposed rule as soon as possible.

Linda C. Roodhouse

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* Date	Period	File :
11/12/2009	PC	E-2009-318 Linda Roodhouse [1.14].pdf

Commented On:	Specify:	Submitted via:
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* Required

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation State Bar of California

Commenting on behalf of an organization
- Yes
- No

*** Name** John Grier

*** City** El Cajon

*** State** California

*** Email address** (You will receive a copy of your comment submission.) jcg@mbglawoffices.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

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Rule 1.14 Client with Diminished Capacity [N/A]

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

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* Date	Period	File :
11/12/2009	PC	E-2009-319 John Grier [1.14].pdf

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* Required

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Edward J. Watson, Esq.

*** City** San Francisco

*** State** California

*** Email address** (You will receive a copy of your comment submission.) ejwatson@watlanlaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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In general the propopsed rules are good changes, but I am currently involved with a client, who has dimished capacity, although probably not incompetent in the legal sense. Years ago she selected me as her alternate to be successor trustee if her son could not act or failed to act. Her son, who lives on the other side of the country has failed to act on her behalf. She needs a conservator. She has no one to turn to except me and by virtue of these rules, I am powerless to act. My only recourse is to let the situation deteriorate until Adult protective services prods the Public Guardian to act, which will take months. (I have had discussion with the Public Guardian Office).

I believe that the comment 7 should not be deleted, especially in the case where, such as mine, the client has already indicated a desire to have her attorney act on her behalf, in the event of diminished capacity. I believe that the conservatorship proceedings, which include the appointment of an attorney to represent the proposed conservatee, protect interest of the client sufficiently.

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

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In the real world, our inability to act on behalf of clients in this situation are more damaging to the client than the potential harm from theoretical breaches of client confidentiality and the substitution of the client's interest, which admittedly is clouded by age and infirmity, instead of the client's best interests as determined by his or her long time advisor and the court proceedings.

I realize this is a very sentitive area, but some protection and procedure to move more swiftly that 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 revisions are addressing solely the needs of the attorneys for specific guidance and protection from subsequent claims, without dealing with the real world problems and protection of clients.

Thank you for your consideration of my comments.

Sincerely,

Edward J. Watson

Watson & Lanctot, LLP

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11/12/2009	PC	E-2009-320 Edward Watson [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Herbert Lee Chavers

*** City** Riverside

*** State** California

*** Email address** (You will receive a copy of your comment submission.) Herb@Chaverslaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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Rule 1.14 Client with Diminished Capacity [N/A]

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- 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 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. In 20 years of handling conservatorship, probate and estate planning matters, numerous clients have asked if I will be able to help their family members take care of them should they become disabled. This rule would allow me to say yes I will be able to help their family in caring for themselves and I can even help protect themselves from themself.

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11/12/2009	PC	E-2009-321 Herbert Chavers [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
- No

*** Name** Gary Jander

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) gary@briertonandjones.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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This rule put the attorney into the position of determining a client's capacity. Most if not all attorneys have no background or training that would allow them to determine whether the client qualified or not. Even though it is permissive, the rule would ultimately be used to create a duty by providing that a reasonably trained attorney should be be able to determine the capacity and thus had the power to prevent the undue influence or financial loss. I also adopt the minorities reasoning as sound(thus h.t2]JT*[ule would ultimately)be used to create a (uty by pr 28Rc

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11/12/2009	PC	E-2009-322 Gary Janders [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Deputy County Counsel for Public Guardian, San Diego

Commenting on behalf of an organization
- Yes
- No

*** Name** JAMES G. BOYD

*** City** SAN DIEGO

*** State** California

*** Email address** (You will receive a copy of your comment submission.) james.boyd@sdcounty.ca.gov

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a] Rule 1.9 [3-310] Rule 2.1 [n/a]
Rule 1.6 [3

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11/12/2009	PC	E-2009-323 James Boyd [1.14].pdf

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11/12/2009	PC	E-2009-324 R Caspersen [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation bar members since 1986

Commenting on behalf of an organization
- Yes
- No

*** Name** elizabethanne miller angevine

*** City** whittier

*** State** California

*** Email address** (You will receive a copy of your comment submission.) angevine@earthlink.net

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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Rule 1.14 Client with Diminished Capacity [N/A]

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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Those of us who deal with elder law see many vulnerable elders. Sometimes later as their capacity wanes they may reveal that they are being abused financially or physically by people. Under the previous rule without their permission we can do nothing to help avert the continued abuse of our client.

In the past 23 years of practice I have had three cases where I had to wonder about the physical safety of a client through the cast of a non family caregiver. Those clients would not allow me to speak to other family members or anyone else about their condition. In all three cases it became clear that the least the client endured was fraud and possibly theft before their death.

I have seen many more cases with family members who stole from their elders. The elder would in general prefer to be stolen from, then to thought a fool when they have dimished capacity. That fear of the world knowing that they have been taken advantage of by family makes these people an easy victim for the family thief.

CA is the only state that has the elder's attorney protecting a thief who has stolen from an elder if the elder has diminished capacity in their effort to protect the attorney client relationship. The current CA rule destroys the attorneys ability to protect their client.

This change is needed for CA attorneys.

Elizabethanne Miller Angevine

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* Date	Period	File :
11/12/2009	PC	E-2009-325 Elizabethanne Angevine [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney Practicing in Estate Planning

Commenting on behalf of an organization
- Yes
- No

*** Name** Richard W. S. Pershing

*** City** Riverside

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rwp@rjslaw.com

---

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Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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Rule 1.14 Client with Diminished Capacity [N/A]

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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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 a client.

THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Joan A LeBlanc

*** City** Palo Alto

*** State** California

*** Email address** (You will receive a copy of your comment submission.) jleblanc@lakinspears.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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I completely support this change for several reasons. The old rule put my clients at risk. I like the fact that this new rule gives attorneys a choice. We are not required to act but if we act in our clients' best interests, it is more in keeping with our normal role of making judgment calls. That is what we are trained to do. Sure, I like bright lines, but not when someone is at risk. Do we risk our clients' wrath later? Sure, but that is always a risk no matter what you do for a client.

Joan LeBlanc, Lakin Spears 106421

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Past President, Southeast District Bar Association

Commenting on behalf of an organization
- Yes
- No

*** Name** Joseph A. Lumsdaine

*** City** Downey

*** State** California

***** Email address (You will receive a copy of your comment submission.) jlumsdaine@tldlaw.com

---

The following proposed rules can be viewed by clicking on the links below:

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- AGREE with this proposed Rule
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- AGREE ONLY IF MODIFIED

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

As an elder law practitioner and member of the Bar these past 33 years, 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!

THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Lori A. Hunt

*** City** Napa

*** State** California

***** Email address (You will receive a copy of your comment submission.) lorih@gawvanmale.com

---

The following proposed rules can be viewed by clicking on the links below:

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Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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- AGREE ONLY IF MODIFIED

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation attorney; specialist in Est Plng Probate & Trust law

Commenting on behalf of an organization
- Yes
- No

*** Name** Steven Penrose

*** City** Santa Cruz

*** State** California

***** Email address (You will receive a copy of your comment submission.) spenrose@bossowilliams.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Trusts and Estates Section of State Bar

Commenting on behalf of an organization
- Yes
- No

*** Name** Beverly M. Hoey

*** City** Pleasanton

*** State** California

***** Email address (You will receive a copy of your comment submission.) bhoey@trustslaw-ca.com

---

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Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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

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PROPOSED RULES OF PROFESSIONAL CONDUCT
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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** Dara Goldsmith

*** City** Las Vegas

*** State** Nevada

*** Email address** (You will receive a copy of your comment submission.) dgoldsmith@goldguylaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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This is a good rule to enable attorneys to take action to protect clients. having practiced for almost 20 years in teh area of guardianship and conservarttorship, but mostly in Nevada, I beleive it is important for the attorney to protect the client from loss or harm.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation CA attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** Shirleymae Davis

*** City** La Jolla

*** State** California

***** Email address (You will receive a copy of your comment submission.) sdavis@nethere.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.14 Client with Diminished Capacity [N/A]

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- DISAGREE with this proposed Rule
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I strongly support this rule. I have been faced with similar situations all too frequently during my years of practice and have struggled to balance my concern for my client with my responsibility to protect my client's confidentiality. In fact, I have a matter in my office at the present time which presents this very issue.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Trust Attorney

Commenting on behalf of an organization
- (●) Yes
- ( ) No

*** Name** Connie Yi

*** City** Pleasanton

*** State** California

***** Email address (You will receive a copy of your comment submission.) connieyi@attorney-cpa.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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- ( ) DISAGREE with this proposed Rule
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I strongly agree with the proposed rule, it would be consistent with the fiduciary duty we owe to the client.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** Robert D. Prior

*** City** Eureka

*** State** California

***** Email address (You will receive a copy of your comment submission.) rprior@pacbell.net

---

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Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation T&E Practice for 35 + years

Commenting on behalf of an organization
- Yes
- No

*** Name** William J. hoehler

*** City** San Francisco

*** State** California

***** Email address (You will receive a copy of your comment submission.) Whoehler@hansonbridgett.com

---

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California needs this. This is years overdue. It is the balance we need to protect a client and presrve confidentiality.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation I am a long-time estate planning attorney, help my clien

Commenting on behalf of an organization
- Yes
- No

*** Name** Kathleen Courts

*** City** Alameda

*** State** California

***** Email address (You will receive a copy of your comment submission.) kcourts@mitchellcourts.com

---

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This rule addresses a problem that I, as EP counsel, have wrestled with several times. Currently, I may not report a client's diminished capacity to anyone, including APS, without his or her permission unless actual elder abuse has already occurred. That is often akin to closing the barn door after the horse has disappeared.

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. The other objections are specious, in view of attorneys' continuing duties under the Rules of Prof Conduct and B&P 6068, and California's separate statutory requirements for representing minors and conservatees.

Even if Rule 1.14 is adopted, the EP attorney's job will not be easy. As in most of

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Your Information

Professional Affiliation Private elder law attorney, written and spoken on ethics

Commenting on behalf of an organization
- Yes
- No

*** Name** Gregory Wilcox

*** City** Berkeley

*** State** California

*** Email address** (You will receive a copy of your comment submission.) gregwilcox-atty@comcast.net

---

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"The perfect should not be the enemy of the good". It will not be possible to craft a formula of words that is perfect in every case, but that does not mean that we should abandon attempts to adopt a rule that is appropriate in most cases.

As a general matter the law should respond to evolving social conditions. In this context, as medical science has advanced there are ever more people who are living longer but no longer competent to look after their own affairs. As a result, 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.

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Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Maureen C. McGowan

*** City** San Francisco

*** State** California

***** Email address
(You will receive a copy of your comment submission.)
maureen@mcgowan-law.com

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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Your Information

Professional Affiliation Attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** David G. Smedley

*** City** San Diego

*** State** California

***** Email address (You will receive a copy of your comment submission.) dsmedley@sgg-law.com

---

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Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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- AGREE ONLY IF MODIFIED

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I am in favor of the proposed rule. Although the subject is complicated, I trust the Executive Committee of the Trusts and Estates to have done a thorough analysis. I particularly approve of the exceptions they have made to the Model Rule 1.14.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney in trust & estates private practice; state bar sp

Commenting on behalf of an organization
- Yes
- No

*** Name** Thomas A. Craven

*** City** Sacramento

*** State** California

***** Email address (You will receive a copy of your comment submission.) tacraven@sbcglobal.net

---

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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. I believe attorneys who practice in this field are often more committed to doing what is in the client's best interests from a more global perspective, not focused just on the one aspect of the client's situation that motivated the client to seek out counsel in the first place. There are certainly reasons why an attorney, being permitted to act under this rule, would choose not to do so - perhaps, as is sometimes the case, where the client sees the attorney as his or her sole "protector" and confidant - and the jeopardy to the relationship that gives the client access to the attorney is too great. It would be comforting, however, to have the option in a case that involves a likely dire consequence which the client does not grasp. I know of no one more likely to avoid abusing this authority than the attorneys who work in the trust and estates field.

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Your Information

Professional Affiliation

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

---

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Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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This rule is long overdue in California. It is extremely frustrating to see a client's mental capacity decline to the point where the client is unable to understand that he or she is being "taken to the cleaners" by a financial abuser and to be prohibited, as the client's attorney, from taking the actions that would be necessary to protect the client by putting an end to the abuse. If this rule is passed it will help to protect those people in California who are substantially mentally impaired from serious financial harm.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation practicing attorney (sole practitioner)

Commenting on behalf of an organization
- Yes
- No

*** Name** Linda Alden Swanson

*** City** Larkspur

*** State** California

***** Email address (You will receive a copy of your comment submission.) laslaw@pacbell.net

---

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Although I just learned about the proposed rule and have only read through it once, I would like to support it as a great improvement over having no such rule at all. The one thing that jumped out at me was the omission of any reference to the client's possible subjectivity to undue influence. I practice almost entirely in the trusts and estates area, and find that (not surprisingly) undue influence is the greatest threat to a frail elder. As Section members well know, incapacity often diminishes gradually, and the client may have a pretty good understanding of what he or she ought to do (or not do), but not be able to resist an importunate person. "Of course I didn't want to give her the money, but she made me do it." That is an exact quote from a client whose diagnosis from the Memory Clinic was mderate Alzheimer's. Even in earlier stages of dimentia, certain personality types can be more easily influenced than others. Indeed, some people can be influenced even when they have no dimentia at all.

All in all, I would like to see the rule, or the comments at least, include some

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All in all, I would like to see the rule, or the comments at least, include some discussion of subjectivity to undue influence.

I am not concerned about shaking the public's confidence in attorney-client confidentiality. This is not an issue that will have hot-button media attention (in my view), and clients who need an attorney's help pursuant to this rule would generally not be in a frame of mind to understand or care about confidentiality. There could be exceptions, of course, but the balancing is in favor of protecting the client from bad people. A good attorney is going to do it anyway, rule or no rule. As one of my departed breathen said once: "Sometimes you have to rise about ethics and do what's right."

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Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Cristian R. Arrieta

*** City** Camarillo

*** State** California

***** Email address
(You will receive a copy of your comment submission.)
cristian@edsallarrieta.com

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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

Under my reading of the current rule of conduct, I must defer to my client's wishes even if, in my professional opinion, she has diminished capacity and is being subjected to undue influence, duress or financial abuse. However, I believe my carrying out my duties to my client, created when she retained me, I should be empowered to act to prevent such abuses during her significantly diminished incapacity. Essentially 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.

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: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Stephen A. Bond

*** City** San Diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) sbond@lawbls.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

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

Rule 1.14 Client with Diminished Capacity [N/A]

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

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Private Solo Practitioner

Commenting on behalf of an organization
- Yes
- No

*** Name** Scott A. Thompson, Esq.

*** City** Three Rivers

*** State** California

***** Email address (You will receive a copy of your comment submission.) jurist@email.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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Rule 1.14 Client with Diminished Capacity [N/A]

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

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation President of the Silicon Valley Bar Association

Commenting on behalf of an organization
- Yes
- No

*** Name** Janis A. Carney

*** City** Los Gatos

*** State** California

***** Email address (You will receive a copy of your comment submission.) janisc@carneysugai.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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Rule 1.14 Client with Diminished Capacity [N/A]

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

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This is an extremely important rule change for those of us who practice elder law. It has not been right that we have had to sit back and watch our vulnerable clients, who due to mental incapacity are unable to understand some danger they are in, often from scheming "friends" or even "family". We MUST have this rule change!

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Kenneth Fishbach

*** City** San Ramon

*** State** California

*** Email address** (You will receive a copy of your comment submission.) kenfishbach@aol.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.14 Client with Diminished Capacity [N/A]

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

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Long overdue to allow attorneys to protect their elderly and other diminished capacity clients. This is a professional and ethical mandate as well as the right action to take. This has waited far too long, twelve years from the 1997 first proposal to now. Approve this so the frail and diminished client is protected. It does not matter if the rule is perfect: just get it done. Approve something to protect these unprotected people!

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Richard V. Day

*** City** Napa

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rvd@rvdaylaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
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Rule 1.14 Client with Diminished Capacity [N/A]

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- (●) 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 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. Sometimes the person's lawyer is the one who discovers the diminished capacity and allowing the lawyer to act on that information could be crucial to client.

SAN DIEGO COUNTY BAR ASSOCIATION

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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.

1999 South Bascom Avenue
Suite 950
Campbell, CA 95008

LAW OFFICES OF
Ann Marshall Robbeloth

(408) 371-5206
(408) 559-5161 fax
ann@robbelothlaw.com

November 4, 2009

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

RE: Proposed RRC Rule 1.14 for Substantially Impaired Clients

Dear Audrey:

This letter is to show my support of the Proposed RRC Rule 1.14. I work in the fields of estate planning, conservatorship, probate and trust administration. There have been instances in my practice in which it would have been helpful to notify a separate party regarding a client's ability to care for themselves. I appreciate the importance of keeping my client's information confidential; however, keeping them safe is also important.

I work with many clients whose closest relatives are out of the area. When these clients begin to experience dementia, they often have health or safety issues, such as a slip and fall. They are often unable to seek appropriate assistance. Clients have also expressed a desire to protect their children from worry. I am sometimes the first person they notify of a safety issue. Many clients look to me for support, although I am not the appropriate source for that support. It would be very beneficial to ensuring the health and safety of my impaired clients if this rule allows for some openness with client information.

Please contact the office with any questions or concerns.

Sincerely,

Ann Marshall Robbeloth
Attorney at Law

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Mental Health Attorney

Commenting on behalf of an organization
- Yes
- No

*** Name** STEPHEN E. WEBBER

*** City** GLENDALE

*** State** California

*** Email address** (You will receive a copy of your comment submission.) sewebberlaw@gmail.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

---

* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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 have represented persons with diminished capacity, mentally ill offenders and mentally ill conservatee's and their conservators since 1981 when, as a deputy Public Defender I was assigned to the L.A. County mental health courts. By the nature of their disease impaired capacity and mentally ill persons are often incapable of properly processing information. Either they do nothing when action is required, such as stopping the pending loss of property, or they make the wrong decision. This results in the person, for example, giving away property, placing themselves in danger, being bilked out of money and assets,or neglecting necessities. A conscientious attorney cannot be expected to either terminate the relationship or follow a fool-hardy course of action dictated by a impaired client. The attorney must act in the client's best interests regardless of what the client dictates, or fails to dictate. Regardless of the current rule, most contact Adult Protective Services, law enforcement, or other appropriate agencies, anonymously if necessary.
Attorneys that handle dimished capacity and mentally ill individuals consistently

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

I have represented persons with diminished capacity, mentally ill offenders and mentally ill conservatee's and their conservators since 1981 when, as a deputy Public Defender I was assigned to the L.A. County mental health courts. By the nature of their disease impaired capacity and mentally ill persons are often incapable of properly processing information. Either they do nothing when action is required, such as stopping the pending loss of property, or they make the wrong decision. This results in the person, for example, giving away property, placing themselves in danger, being bilked out of money and assets,or neglecting necessities. A conscientious attorney cannot be expected to either terminate the relationship or follow a fool-hardy course of action dictated by a impaired client. The attorney must act in the client's best interests regardless of what the client dictates, or fails to dictate. Regardless of the current rule, most contact Adult Protective Services, law enforcement, or other appropriate agencies, anonymously if necessary.

Attorneys that handle dimished capacity and mentally ill individuals consistently violate the rule of conduct requiring either disassociation from employment or compliance with unreasonable requests. Compassion and the desire that justice be served allows for nothing else. The recommended change takes the rule out of impractical theory and acknowledges the reality of conscientious representation. To do otherwise is the same as leaving a lost child in the wilderness.

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.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation CA State Bar Member

Commenting on behalf of an organization
- Yes
- No

*** Name** Linda C. Kramer

*** City** Los Altos

*** State** California

***** Email address (You will receive a copy of your comment submission.) kramer@kramerradin.com

---

The following proposed rules can be viewed by clicking on the links below:

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Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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

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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 himself/herself. The steps taken by the attorney should be limited to revealing only that confidential information that is reasonably necessary to protect the client's interest.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney - private practice

Commenting on behalf of an organization
- Yes
- No

*** Name** John T. Rogers, Jr.

*** City** Los Angeles

*** State** California

***** Email address (You will receive a copy of your comment submission.) jrogers@luce.com

---

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Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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I practice primarily in the area of trust, estate, and conservatorship law and am a Certified Specialist. I am the current Chair of the Professional Responsibility Committee of the American College of Trust and Estate Counsel (ACTEC), although please note that I am submitting this comment in my individual capacity. I have written and spoken about clients with diminished capacity several times, both in California and elsewhere.

I am strongly in favor of adopting proposed Rule 1.14, subject to some suggested edits of the Rule and one of the proposed Comments as indicated on the pdf file that I have attached. The suggestions are intended to clarify but not change the substance of the proposed Rule and the proposed Comment.

Business and Professions Code Section 6068 should also be amended to enable implementation of paragraph (c) of the proposed Rule.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

***** Email address (You will receive a copy of your comment submission.) chrisb@sccba.com

---

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

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

Support the adoption of the rule with one recommendation: Add the following to Comment [10]: The implementation of this rule is not intended to establish an affirmative duty of conduct that would create a new standard of care for attorneys.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** DOREEN ERENEA

*** City** SAN DIEGO

*** State** California

***** Email address
(You will receive a copy of your comment submission.) doreen.erenea@gmail.com

---

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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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: NOVEMBER 13, 2009

Your Information

Professional Affiliation Member California Bar

Commenting on behalf of an organization
- Yes
- No

*** Name** Caroline K. Hinshaw

*** City** San Francisco

*** State** California

***** Email address (You will receive a copy of your comment submission.) chinshaw@bryanhinshaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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* Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity [N/A]

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 agree with proposed rule 1.14.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Jack Anderson, Esq., APLC - SBN 145308

Commenting on behalf of an organization
- Yes
- No

*** Name** Jack Anderson

*** City** Bodfish

*** State** California

***** Email address (You will receive a copy of your comment submission.) jackaesq@sbcglobal.net

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Those of us who practice with elders currently have our hands tied if and when we perceive evidence of elder abuse. We are put into a horrible catch-22 situation of choosing between lock-step adherence to the rule requiring protection of confidentiality, and the need to protect our clients' real and immediate needs and well-being. The current state of affairs is detrimental to the safety of our elder population because it prevents the elder's attorney--who is often one of the few people who would gain insight into an elder abuse situation-- from getting his or her elder client the help that the elder truly needs. Balancing the interests, the elder's well-being, financial security and safety are more immediately important than the minimal (and theoretical) intrusion into the elder's privacy that disclosure would cause. Protection from elder abuse should trump confidentiality in these situations. Rule 1.14 only allows the minimum disclosure required to protect the elder from abuse. This should be a no-brainer. PLEASE adopt proposed Rule 1.14, so that we can do our job of protecting our elder clients' interests more effectively and more completely.

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Thank you.

Jack Anderson.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** J. Frederick Clarke, Jr.

*** City** Berkeley

*** State** California

*** Email address** (You will receive a copy of your comment submission.) jfclarke@pacbell.net

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Rule 1.14 Client with Diminished Capacity [N/A]

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- (●) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

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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.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization
- Yes
- No

*** Name** Shelly Conley

*** City** Visalia

*** State** California

***** Email address
(You will receive a copy of your comment submission.) shellyconley48@yahoo.com

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Proposed Rule 1.14: ..."except to the reference in section (a) to diminished capacity due to 'minority' has been deleted because California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes...Family Code Section 3150..."; within Family Code Section 3150 reference is made to Penal Code 11166 which specifically outlines children being taken from their parents..."Child abuse or neglect...includes physical injury...willful cruelty or unjustifiable punishment, unlawful corporal punishment or injury...." In recognition that the Rule 1.14 discusses the client with diminshed capacity referring primarily to mental health impairments. I have personally experienced inappropriate crisis intervention for myself and my children that dramatically altered our life. In addition, the juvenile jurisdiction reports stated: "there is no doubt she loves her children...and that I am the most responsible parent in facilitating the responsibilities needed in parenting, education, healthcare, basic needs...." I outlined and presented Discovery to the California Public Inquiry Unit, number 120559 addressing serious issues of concerns that I have had with the

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Proposed Rule 1.14: ..."except to the reference in section (a) to diminished capacity due to 'minority' has been deleted because California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes...Family Code Section 3150..."; within Family Code Section 3150 reference is made to Penal Code 11166 which specifically outlines children being taken from their parents..."Child abuse or neglect...includes physical injury...willful cruelty or unjustifiable punishment, unlawful corporal punishment or injury...." In recognition that the Rule 1.14 discusses the client with diminshed capacity referring primarily to mental health impairments. I have personally experienced inappropriate crisis intervention for myself and my children that dramatically altered our life. In addition, the juvenile jurisdiction reports stated: "there is no doubt she loves her children...and that I am the most responsible parent in facilitating the responsibilities needed in parenting, education, healthcare, basic needs...." I outlined and presented Discovery to the California Public Inquiry Unit, number 120559 addressing serious issues of concerns that I have had with the facilitating of crisis intervention in Tulare County, California. I have also communicated directly with the State Bar of California over concerns I had with particular local attorneys involved in the case(s): Attorney Mary C. Jarvis, Attorney Jamie Buttersworth, Attorney Khalil Esat, and additional concerns with Attorney Tom Moholt who represented my chidlren. I communciated directly with Investigator F. Jacobs, and Attorney Henderson; I then filed concerns directly with the California Supreme Court. My children and I received Victims Compensation Claim numbers as my daughter was a direct victim of a violent crime and my son and I were indirect victims of violent crime (and also my son and I were direct victims of a violent crime by the Visalia Police Department). Included in my Discovery I presented an emergency room report and the dispostion states: "qualified for an emergency due to threat to patient",which was me, as I had been knocked unconscious by Officer Brian Young, with the Visalia Police Department, furthermore, I have paperwork that cleared me under Title 9 Section 1820.205, which stated I did not qualify for inpateint or outpatient psychiatric care. However, the juvenile jurisdiction child welfare services and affiliated staff continued to harass and coerce my children and I. I am pleased to see that the California State Bar is updating the rules, however, I think that too often children have been wrongfully taken from their parents and the state has had to absorb unecessary bills as a result of the misconduct of the affiliated staff and their failure to observe the facts that are within the scope of the case. I am a recent graduate from the College of The Sequoias Paralegal program and these issues are very important to me. My children and I were victims of blatant misconduct by the local government officials involved in the case, however, not one person recognized this or worked toward a remedy. In updating rules of court and business and professions codes, it is only worthwhile if the attorneys are held to abide by the rules. For example, I presented a very clearly defined argument of concerns in my complaints to the California State Bar, however, even though the attorneys were in violation, there was no action taken. I was treated as if I had a mental impairment, and I was not given the proper duty of care, for example, Attorney Mary C. Jarvis should have prepared a "motion to traverse" as she established that I was not served with the appropriate paperwork when the local police department and child welfare services took my son. The only mental impairment I was suffering from was clearly documented in my Discovery. As I was cleared under Title 9 Section 1820.205 of the California Code of Regulations. For example, I had made numerous police reports of my concerns with inappropriate behavior by adults toward my children, and I went as far as to file claims with the city of Visalia for monetary damages. One of the claims the city of Visalia did not respond to and this was for 10,000,000.00. Updating rules of court looks good, and can passify the average citizen however, unless the accountability is upheld the rules are just words. (I would hope that the Discovery under Public Inquiry Unit 120559 could be accessed by those who are interested

in seeing the injustices that are done when agency(s) are not held accountable. However, again due to the privacy rules, and the fact that this involves a juvenile jurisdiction case, this may not be possible.) I have given my Discovery to Attorney Brenda Ballew Ward for "safekeeping" as when I am fully able to, I intend to bring this back to court, even if it has to be done in a civil manner because I am not willing to accept the injustices that have taken place to my family. The tort law damage continues and my family and I cannot get the time we lost back. I hold the Attorney(s) involved most accountable because they are held to a strict code of ethics to uphold the truth and support true justice. Instead, they end up being part of a game, with no regard to how their actions are affecting innocent families. (Attorney Jean Bourne of Visalia, California, has many cases that have been wrongfully prosecuted within the Juvenile Jurisdiction Courts, and the child welfare service worker involved in our case seems to be the primary cause of the wrongful prosecution cases.)

I appreciate the opportunity to voice my opinion, for whatever it is worth.

THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation On Behalf of Disability Rights California, Disability Righ

Commenting on behalf of an organization
- (●) Yes
- ( ) No

*** Name** Dara L. Schur

*** City** Oakland

*** State** California

*** Email address** (You will receive a copy of your comment submission.) dara.schur@disabilityrightsca.org

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Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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Rule 1.14 Client with Diminished Capacity [N/A]

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- (●) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

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See Attached Letter on behalf of 6 disability rights organizations.

Disability
Rights
California

California's protection and advocacy system

BAY AREA REGIONAL OFFICE
1330 Broadway, Suite 500
Oakland, CA 94612
Tel: (510) 267-1200
TTY: (800) 719-5798
Toll Free: (800) 776-5746
Fax: (510) 267-1201
www.disabilityrightsca.org

November 13, 2009

Commission for the Revision of the
Rules of Professional Responsibility
State Bar of California
180 Howard Street
San Francisco, California 94105

RE: Opposition to Proposed Rule 1.14
"Clients with Diminished Capacity"

Dear Members of the Commission:

Thank you for the opportunity to comment on proposed Rule 1.14. This letter in opposition to the proposed rule is submitted by 6 organizations in California with substantial experience in representing individuals with disabilities throughout the state: Disability Rights California, Disability Rights Education and Defense Fund, Disability Rights Legal Center, Law Foundation of Silicon Valley, Mental Health Advocacy Services, and the National Senior Citizen Law Center. Each of these organizations is deeply involved in representing people with disabilities in California, and elsewhere throughout the country, on a broad range of issues, including civil rights and discrimination issues. Each of the signatories is signing on behalf of their respective organization. A brief description of each organization follows.

Organizations Submitting These Comments

Disability Rights California was founded in 1978 and has provided advocacy services for Californians with disabilities for thirty years. It now has five offices (Sacramento, Fresno, Oakland, Los Angeles, and San

Diego) to serve its constituency. Disability Rights California provides legal counsel and direct representation in administrative and court proceedings to individuals with all categories of disability, including but not limited to physical/orthopedic, sensory, cognitive and psychiatric disabilities. It is designated as a Protection and Advocacy Agency under federal statutes establishing such agencies in every state to advocate for people with disabilities,[1] and has contracts with the State of California to serve people with developmental disabilities and people in state psychiatric hospitals.

Founded in 1979 by people with disabilities and parents of children with disabilities, the Disability Rights Education and Defense Fund (DREDF) is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. For three decades, DREDF has remained board- and staff-led by members of the disability community, pursuing its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for expertise in the interpretation of federal and California disability civil rights laws.

The Disability Rights Legal Center (DRLC) was founded in 1975. It is a private nonprofit organization whose mission is to promote the rights of people with disabilities and the public awareness of those rights by providing legal and related services. DRLC is committed to and has a history of advocacy in support of equal access to justice for people with disabilities.

The Law Foundation of Silicon Valley is a private non-profit based in San Jose, California, that sponsors five free legal services programs. Four of these programs, Health Legal Services, Fair Housing Law Project, Mental Health Advocacy Project, and Public Interest Law Firm have an interest in this matter. Through these programs, the Law Foundation promotes the

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[1] Disability Rights California provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001, PL 106-402; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §10801, PL 106-310; the Rehabilitation Act, 29 U.S.C. §794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. §3011,3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. §1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. §300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. §15461-62, PL 107-252.

rights of individuals with disabilities through individual client representation, impact litigation, policy advocacy, and community education.

Mental Health Advocacy Services is a non-profit organization jointly sponsored by the Los Angeles County Bar Association, the Beverly Hills Bar Association, and the Mental Health Association of California. MHAS has been providing free legal services to people with mental disabilities for over 30 years.

The National Senior Citizens Law Center is a non-profit organization that advocates before the courts, Congress and federal agencies to promote the independence and well-being of low-income elderly and disabled Americans.

Comments

We respectfully submit comments in opposition to Rule 1.14 (clients with diminished capacity) as proposed. The proposed Rule adapts ABA Model Rule 1.14 and, if adopted, would allow an attorney to "notify an individual or organization that has the ability to take action to protect the client" when the client has "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation," is "at risk of substantial physical or financial harm," and "cannot adequately act in his or her own interest."

We recognize the need for ethical guidance for attorneys who represent clients with diminished capacity—especially where such guidance aids attorneys in providing competent representation to the most vulnerable clients and client populations—and we commend the Commission for drafting a proposed Rule that is more protective of client interests than those under Rule 1.14 of the Model Rules of Professional Responsibility. However, we believe that the proposed California Rule is too vague and too broad and would allow attorneys to inappropriately compromise clients' personal autonomy and confidentiality in situations in which this is not warranted.

We believe that there is no need to revise the existing rules on confidentiality. However, to the extent that the Commission determines that a revised rule is necessary, we recommend that the Commission consider more targeted provisions for identified problems rather than

adopting a broad rule that risks detrimental unintended consequences for people with disabilities, the legal profession, and society as a whole. A more targeted rule could assist attorneys in navigating 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.

Additionally, we believe that an ethical rule regarding clients with diminished capacity should contain a more nuanced and instructive discussion of the appointment of guardians *ad litem,* the obligations to provide reasonable accommodations to individuals with disabilities under state and federal discrimination laws, and attorney training on issues related to representing clients with diminished capacity.

Although we are unable, in this limited time for comment, to propose specific alternatives, we would be happy to participate in further discussions about alternative approaches.

Erosion of Fundamental Right to Personal Autonomy

We have serious objections to the erosion of the fundamental personal autonomy of clients that we believe will result from the proposed Rule. Although the proposed Rule does not allow the attorney to seek conservatorship or other imposition of legal disability on the client, it does create situations in which the attorney's action could indirectly lead to such abridgment of the client's personal autonomy.

For example, if the attorney provides information about the client's diminished capacity to an individual or agency who, in turn, seeks conservatorship of the client, the adverse impacts on the client will extend far beyond the subject of the existing representation. In our experience, diagnostic labels are often substituted for realistic assessments of capacity, and individuals with mental health disabilities or developmental disabilities may face conservatorship or other proceedings that deprive them of their autonomy on the basis of their diagnoses alone.

As a result, they may lose their ability to make decisions about their finances, their living situations, and even their medical care when this is unwarranted. We have even faced arguments that a conservatee's inability to contract means that the person is unable to consent to patient advocacy

assistance in exerting his or her right to be free from involuntary psychiatric treatment.

Necessity of Maintaining Trust in Attorney-Client Relationship

We agree with the minority of the Commission that the policy of abrogating existing State confidentiality obligations is the wrong policy as it impairs the trust relationship between clients and lawyers.

Section 6068(e) of the California Business and Professions Code imposes upon attorneys a very broad duty to maintain client confidentiality, saying: "It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Cal. Bus. & Prof. Code § 6068(e)(1).) The only exception explicitly provided is that an attorney "may, but is not required to, reveal confidential information . . . to the extent that the attorney reasonably believes . . . necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death . . . or substantial bodily harm." (§ 6068(e)(2).)

Likewise, State Bar of California Rule 3-100 lists only two exceptions to the broad duty of confidentiality. The first allows release of information with "the informed consent of the client," and the second allows release to prevent a crime as allowed in section 60608(e). (Rule 3-100(A), (B).) The Rule allows the attorney to disclose "no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure." (Rule 3-100(D).) These provisions poignantly illustrate the importance of protecting client confidences.

The Discussion of Rule 3-100 emphasizes that the ethical duty to preserve confidentiality "applies to information relating to the representation, whatever its source." (Rule 3-100, Discussion, Paragraph 4.) Confidentiality is essential to the "trust that is the hallmark of the client-lawyer relationship." (Paragraph 1.)

In contrast to these appropriately strict professional obligations, the proposed Rule would allow attorneys to release, at their discretion, confidential client information. Thus, it could undermine the trust that is necessary for a successful relationship between the attorney and client. The guarantee of confidentiality is especially significant for clients with disabilities, such as psychiatric disabilities, who face ostracism and

disability-based discrimination in our society. We are very concerned that if this Rule is adopted, clients with disabilities may not seek legal advice for fear that their confidences could be divulged despite objections if the lawyer believes the unauthorized disclosure could serve the client's interest. Finally, we are concerned that the proposed rule would constitute the beginning of a slippery slope in undermining general trust in the inviolate nature of the attorney client relationship.

Clarification of Attorney Role in Guardian *Ad Litem*

Based on materials from the Commission, "the proposed Rule does not permit the lawyer to take steps to have a guardian, guardian *ad litem*, or conservator appointed for the client." (RRC – MR 1.14 – Compare – Comment Explanation – DFT3 (09-3-09) p. 7.)

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. This can be, moreover, an appropriate, protective alternative to the broader abridgement of rights to which the proposed rule may lead (as discussed above).

Client capacity varies according to the nature of the specific task. A client may have the capacity to approve appointment of a substitute decision-maker, such as a guardian *ad litem*, but not be capable of creating a trust document or decision-making in the rapidly changing environment of litigation. (See C. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It *And* What Do You Do About It?" *Journal of the American Academy of Matrimonial Lawyers*, Vol. 16, 2000, 481-505) [emphasis in original].)

Comment One to the proposed rule recognizes that "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."

Similarly, in our experience, many clients with severe cognitive impairments are able to communicate their desire to participate in litigation and their

willingness to have a guardian *ad litem* appointed to assist them even if they are not able to fully engage in every aspect of the case. Along similar lines, whether or not a client can consent to the appointment of a guardian *ad litem* or other action may also fall on a continuum; between affirmatively giving consent and affirmatively withholding consent lies a range of scenarios in which the client may be unable to understand what is being asked or to communicate a response. The Rule or its commentary should provide attorneys with guidance in these types of situations.

Need for Adequate Training on Client Communication and Obligations to Provide Reasonable Accommodations

Comment Two provides that a lawyer may be required "to use a manner and means of communication adapted to the client's ability to comprehend and deliberate." Clients with disabilities often complain to us about how little time their attorneys spend with them and that their attorneys are failing to provide clear and accessible information. Based on our experience, alterations in communication methods by attorneys could assist in maintaining a traditional client-lawyer relationship. In addition, attorneys have a duty under state and federal discrimination laws to provide reasonable accommodations to maintain the traditional attorney client relationship. Lawyer training on such communication methods and accommodations should be required as part of a lawyer's mandatory continuing education obligations.

Need for Adequate Training on Determining Client Capacity

We share the concern of the Commission's nonlawyer, public member that lawyers do not have adequate training to determine whether a client's mental capacity to make a specific decision in a case is "significantly diminished." Absent such expertise, even well-intentioned lawyers, emboldened by the Rule, could breach confidentiality to "protect the client," resulting in serious adverse consequences for the client.

Attorneys who are tasked with assessing client capacity and given some power to act on that assessment at the least should receive training on how to make capacity determinations and on representing elders and clients with disabilities. Comment Three to the proposed Rule directs lawyers to Probate Code section 811 for guidance on deficits in mental functioning that may render a client as having "substantially diminished capacity."

However, this list of deficits provides insufficient guidance to an attorney who must assess a client's capacity.

Even with training, however, we remain concerned that the Rule places too much burden on attorneys to assess a client's capacity, when they lack expertise to make such an assessment. Attorneys cannot acquire adequate expertise to assess a client's capacity in a few training sessions. Even if training can provide education, it cannot provide the years of practical experience necessary for attorneys to competently assess a client's capacity.

Current state laws regarding conservatorships recognize that determination of capacity is often a highly contested and nuanced matter, and that people can be capable of making some decisions and not others. If judges struggle to make these determinations after contested evidentiary hearings with expert testimony, how can we anticipate that untrained or lightly trained attorneys will make appropriate decisions?

Training, moreover, does not resolve the issue of attorney prejudice towards clients with disabilities in assessing their capacity. Like other minorities, people with disabilities have been historically subject to personal and public prejudice. Having the attorney assess a client's capacity, opens up the client to the attorney's personal prejudices about the client's disability, or whether the client has a disability. This creates the risk that an attorney may assess the client as having "substantially diminished capacity," simply because the client has a disability, or the attorney perceives the client to have a disability. Even if training can warn an attorney about exercising personal prejudice towards client, it cannot wholly eliminate the attorney's prejudice in the decision-making process.

Need for Bright Line on Attorney Action Contrary to Client Wish

If the Commission seeks to diminish the traditional protections of a client attorney relationship it should do so only in the most extreme contexts. Comment Four to the proposed rule provides that "the imminence of the harm is not a prerequisite to disclosure." Contrarily, a lawyer should be permitted to disclose confidential information contrary to the client's expressed interest only when substantial harm is imminent and that there are no less restrictive means of preventing it. Standards equivalent to the

strict standards for disclosure under section 60608(e)(2) and Rule 3-100(B) should apply here as well.

Comment Four also provides that the attorney may proceed under paragraph (b) if "the client refuses [to consent to such action] or is unable to give such permission…." after the attorney has explained the need to take such action to the client. While Comment Four provides factors for the attorney to consider before proceeding under paragraph (b) in such a situation, we have grave concerns that the Rule essentially permits the attorney to substitute her own judgment for the client's even over the client's refusal. This presents a false choice for a client; the refusal is meaningless in the event that the attorney perceives the client to have "substantially diminished capacity."

Additionally, Comment Four leaves open the possibility that the attorney may inform a client that the attorney can proceed under paragraph (b) long after the attorney has undertaken representation of the client. This risks unfair surprise to the client regarding their decision-making capacity during representation. If adopted, the Rule should require that attorneys discuss at the outset of representation the steps the attorney can take under paragraph (b) to protect the client's interests, in the event that the client has diminished capacity at any point during the representation. However, we have serious concerns that clients will be reluctant to be frank with their attorneys if they believe that their confidences or concerns can, at the attorney's discretion, result in the disclosure of those confidences and possibly ultimately the loss of their decision making capacity.

Need for Adequate Training on Third Party Assistance

Another training issue is raised by the proposed Rule's broad provision that a lawyer may "notify an individual or organization that has the ability to take action to protect the client." (Proposed Rule 1.14(b).) Comment Six expands on this provision, clarifying that a lawyer may consult with family members and refer to "adult-protective agencies or other individuals or entities that have the ability to protect the client." This presupposes that the lawyer has adequate training about the risks and benefits of notifying these individuals or agencies, or has any knowledge about whether a referral to a third party would be effective or appropriate.

As expressed above, we have grave concerns about lawyers being permitted to release confidential information above a client's objection. Without ignoring this objection, we think it is important to point out that the failure to train lawyers about how and when to use this provision would very likely result in the Rule being overused or misused. For instance, we feel that under this provision, lawyers will often seek third party involvement in a situation where he or she disagrees with a client's decision. Although making a decision that is contrary to his or her attorney's recommendation — or even contrary to his or her own best interest — does not necessarily mean that a client lacks capacity, the proposed Rule might tempt an attorney to take action to protect the client in such situations. In another example, lawyers may not know to ask the client whether he or she would authorize consultation with one third party over another. If the Commission ultimately decides to allow some third party notification, lawyer training and further clarification about the provision's appropriate use should be required.

Similar to Comment Six, Comment Five suggests that an attorney may permit "family members or other persons to participate in discussions with the [attorney]." Additionally, Comment Five suggests to attorneys that the participation of family members and third persons generally will not affect the applicability of the attorney-client privilege when it is "necessary to assist in the representation." We express concern that inclusion of family members and third persons in discussions with an attorney may open the door for inadvertent disclosure regarding confidential client information and waiver of the attorney-client privilege. Training should be provided as to when the participation of family members and third persons are necessary to assist in the representation, e.g., disability accommodation.

Moreover, while Comment Five does provide that the attorney "must keep the client's interests foremost," and generally look to the client for decisions on the client's behalf, the Comment should explicitly lay out common problems that the inclusion of family members and third persons present, e.g., undue influence, self-interest of family members. This will more clearly assist attorneys in determining whether inclusion of family members and third persons in attorney-client discussions is appropriate.

Additional Specific Comments

The language in proposed section (a) is ambiguous and potentially misleading. It is not clear what is meant by a "normal" client-lawyer relationship. If we mean the obligations to act professionally and in the client's interest, then there is no need to diminish that obligation with language saying "as far as reasonably possible." If we are saying that the only diminishment is set forth in part (b), then that should be explicit. It would be better to indicate here some of what is included in the comment: i.e. that the attorney has an obligation to provide accommodations in the manner in which the attorney communicates with the client. It is also unclear what I meant by "some other reason." This is a very broad phrase that encompasses more than disabilities.

The language in proposed section (b)(i) as to "adequately considered decisions in connection with a representation" is also ambiguous. Does this refer to decisions as to the desired outcome of the representation? As to specific litigation decisions?

The language in proposed section (b)(iii) and (c) is equally vague when it refers to the client's "interest". Who determines what the client's "own interest" is? Does this mean the client's expressed interest? The lawyer's interpretation of the client's "best interests"? What if the two conflict? We believe that the fundamental role of the attorney is to carry out the express wishes of the client even if the attorney disagrees with those wishes, so long as the client's goals are lawful.

We certainly agree with the provisions in Comment 1 that a client with diminished capacity may have the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's well-being.

In Comment 2, we are concerned that the inclusion of the term "as far as possible" diminishes the obligations of the attorney in ways that may exceed the specific exceptions at issue, and again we do not know what is meant by a "normal" relationship. We strongly support the language regarding the obligation to "use a manner and means of communication adapted to the client's ability to comprehend and deliberate," and believe this should be a specific prerequisite to disclosure in the rule, not just a Comment (and in fact is a component of the attorney's reasonable accommodation obligations).

In regards to Comments 6 and 7, as stated above we do not believe attorneys should be permitted to take "protective measures" over the objection of a client. However, if the rule were to allow such action, the lawyer should be obligated not just to notify the client but to consult with the client concerning preferences among various measures. This may require the attorney to educate himself or herself about those options before breaching any confidences. Further, in Comment 7, "other harm" is vague. The narrowest rule would be one relating to imminent physical harm.

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.

In regards to Comment 9, we note that circumstances surrounding lawyers appointed by a court to represent a client may in general raise issues that are different from those in which there is a voluntary attorney-client relationship. We also note that the rule appears to apply only to those circumstances in which a client has the capacity to and has entered into an attorney-client relationship.

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.

Incorporation of Comments into a Proposed Rule

Comments to the proposed Rule include important best practice guidance that would be better served in the Rule itself. For example, Comment Six provides that the lawyer may take a variety of protective measures such as "using voluntary surrogate decision-making tools such as durable powers of attorney." It is recognized "that the best strategy for dealing with capacity issues is a preventative one – one that may avoid the need to take control without client consent or direction." C. Sabatino, *supra* at 504.

For the above reasons, we urge the Commission to study this Rule further and incorporate amendments that address the concerns laid out here. We stand ready to participate in discussions about how to best improve this Rule. Thank you for the opportunity to comment on this important ethical issue.

Sincerely,

Dara L. Schur
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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: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney at law - sole practitioner

Commenting on behalf of an organization
- Yes
- No

*** Name** Ian M. Sammis

*** City** San Rafael, cA

*** State** California

***** Email address (You will receive a copy of your comment submission.) imsammis@IanMSAmmis.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

Rule 1.14 Client with Diminished Capacity [N/A]

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.

Th rule is needed and seems adequate to protect the client and the attorney.

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: NOVEMBER 13, 2009

Your Information

Professional Affiliation private attorney practicing in trusts & estates field

Commenting on behalf of an organization
- Yes
- No

*** Name** Edwarrd Daniels

*** City** Millbrae

*** State** California

***** Email address (You will receive a copy of your comment submission.) ead@coreylaw.com

---

The following proposed rules can be viewed by clicking on the links below:

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

Rule 1.14 Client with Diminished Capacity [N/A]

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 believe the proposed rule is a significant improvement. As attorneys, I believe our first obligation should be to act in the best interests of our clients, and that it is more important that one be able to trust one's attorney to act in the client's best interest than to be able to trust the attorney to remain silent as to matters covered by the rule in ALL circumstances, even if doing so would allow harm to come to the client. I strongly support adoption of the proposed rule.

Hollins, Audrey

From: Pete Pettler [pdpettler@vkfp.com]
Sent: Thursday, November 12, 2009 3:34 PM
To: Hollins, Audrey
Subject: COMMENT ON PROPOSED RULE 1.14
Attachments: pdpettler@vkfp.com.vcf

As an attorney who has practiced Estate Planning and Probate Law for over 35 years, I want to strongly support the proposed rule. Too often we design estate plans for our clients and then our hands are tied about helping them when they have lost capacity and in danger or financial or physical abuse.

Peter D. Pettler
041514

It is our opinion that this communication is not a "covered opinion" within the meaning of Internal Revenue Circular 230 because its principal purpose is not tax avoidance or tax evasion. To ensure compliance with requirements posed by the IRS, we inform you that any tax advice contained in this communication was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed on the taxpayer.

<<pdpettler@vkfp.com.vcf>>

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November 20, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.14 – Client with Diminished Capacity

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.14:

Proposed Rule 1.14 addresses a situation not covered by the existing rules. The issues raised when dealing with a client with diminished capacity often arise in the area of probate and trust law. However, similar issues can arise in all practice areas, particularly with the aging of the population. We believe that the adoption of rule 1.14, along with the necessary amendment to Section 6068(e) of the Business and Professions Code, are appropriate. We particularly commend the Commission for not adopting the ABA version of the rule, which goes much too far in allowing disclosures. We support the proposed rule and related comments, with the exception of the following 3 items:

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 the ADA and the Unruh Act require a lawyer dealing with a client with a disability not just to 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.

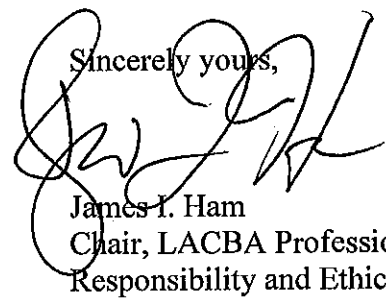
We suggest strengthening the language of 1.14(c) to make clearer that the information disclosed must be no greater than the minimum amount necessary to alert the 3rd party of the problem. A comment on this point might also be useful.

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.

Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

Sincerely yours,



James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

March 21, 2009 KEM E-mail #2 to RRC: 34
March 22, 2009 Kehr E-mail to KEM: 35
March 22, 2009 KEM E-mail to Kehr: 35
March 22, 2009 Kehr E-mail to RRC: 35
March 22, 2009 Sondheim E-mail to RRC: 36
March 22, 2009 Tuft E-mail to RRC: 36
March 23, 2009 Julien E-mail to Drafters, cc Chair & Staff: 37
March 23, 2009 Sapiro E-mail to RRC List: 37
March 24, 2009 KEM E-mail to RRC: 38
March 24, 2009 Meg Lodise & Peter Stern Memo to Sondheim, cc Peck, McCurdy & KEM: 38
March 25, 2009 KEM E-mail to RRC: 40
April 4, 2009 KEM E-mail to Drafters (Foy, Julien, Peck), cc Chair & Staff: 41
April 6, 2009 Peck E-mail to Drafters, cc Chair, Staff & KEM: 42
April 23, 2009 Julien E-mail to Drafters, cc Chair & Staff: 42
April 27, 2009 Foy E-mail to Drafters, cc Chair & Staff: 43
April 28, 2009 Peck E-mail to Drafters, cc Chair & Staff: 43
April 28, 2009 KEM E-mail to McCurdy, cc Drafters, Chair & Staff: 43
April 28, 2009 McCurdy E-mail to RRC: 44
April 28, 2009 Sondheim E-mail to RRC: 44
April 29, 2009 Sondheim E-mail to RRC: 44
May 6, 2009 Foy E-mail to McCurdy, cc KEM: 44
May 6, 2009 Sondheim E-mail #1 to RRC: 44
May 6, 2009 Sondheim E-mail #2 to RRC: 45
May 7, 2009 McCurdy E-mail to Sondheim, cc Drafters & Staff: 45
May 7, 2009 KEM E-mail to Chair, cc Drafters & Staff: 45
May 7, 2009 McCurdy E-mail to RRC: 46
May 7, 2009 Sondheim E-mail to KEM, cc RRC & Staff: 46
May 7, 2009 Sondheim E-mail to Foy & KEM, cc Staff: 46
May 7, 2009 Sondheim E-mail to RRC: 46
May 7, 2009 KEM E-mail to Meg Lodise & Peter Stern, cc Chair & Staff: 46
May 7, 2009 Meg Lodise E-mail to KEM, cc Peter Stern, Chair & Staff: 47
May 18, 2009 Julien E-mail (w/ Dissent) to KEM, cc Chair, Sapiro, Lamport & Tuft: 47
Dissenting View on 1.14 by JoElla L. Julien *47*
May 18, 2009 KEM E-mail to Julien, cc Chair, Sapiro, Lamport & Tuft: 48
May 19, 2009 Sapiro E-mail (w/ Dissent) to RRC & Staff: 49
May 20, 2009 Sondheim E-mail to Julien, cc Sapiro, Lamport, Tuft & Staff: 50
May 20, 2009 Sondheim E-mail to Difuntorum & KEM, cc Julien & Sapiro: 51
August 25, 2009 Julien E-mail to KEM: 52
August 26, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee: 52
August 26, 2009 KEM E-mail to Difuntorum, cc McCurdy & Lee: 52
August 27, 2009 KEM E-mail to Julien, cc Difuntorum: 52
December 14, 2009 McCurdy E-mail to Drafters (Foy, Julien & Peck), cc Chair, Vice-Chairs & Staff: 53
December 14, 2009 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff: 54
January 6, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff: 55

January 6, 2010 Foy E-mail to Drafters, cc Chair, Vice-Chairs & Staff: 55
January 8, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff: 55
January 11, 2009 Foy E-mail to McCurdy, cc Drafters, Chair & Staff: 55
January 12, 2009 KEM E-mail to McCurdy, cc Drafters, Chair & Staff: 55
January 17, 2010 Kehr E-mail to RRC: 56
January 17, 2010 Sondheim E-mail to RRC: 57
January 18, 2010 Vapnek E-mail to RRC: 58
January 19, 2010 KEM E-mail to Drafters, cc Chair & Staff: 58
January 19, 2010 Sondheim E-mail to KEM: 58
January 19, 2010 KEM E-mail to RRC: 58

December 14, 2009 McCurdy E-mail to Drafters (Foy, Julien & Peck), cc Chair, Vice-Chairs & Staff:

Rule 1.14 Drafting Team (FOY, Julien, Peck):

This message provides the assignment background materials for Rule 1.14 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – <u>use this clean version to make any changes to the rule</u>, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The "RRC Response" column on the public commenter chart should be filled in with the drafting team's recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. <u>Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.</u>

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:
RRC - [1-14] - Dashboard - ADOPT - DFT2 (09-03-09).doc
RRC - [1-14] - Compare - Introduction - DFT5 (09-03-09).doc
RRC - [1-14] - Compare - Rule Explanation - DFT3 (09-03-09).doc
RRC - [1-14] - Compare - Comment Explanation - DFT3 (09-03-09).doc
RRC - [1-14] - Rule - DFT11.2 (09-01-09) - CLEAN-LAND.doc
RRC - [1-14] - Public Comments Complete (12-14-09).pdf
RRC - [1-14] - Public Comment Chart - By Commenter - DFT1 (12-14-09)AT.doc
RRC - [1-14] - State Variations (2009).pdf

December 14, 2009 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Rule 1.14 Drafting Team: This message provides a copy of the transcript from the November 10, 2009 public hearing where this rule was addressed at length. Please consider the comments of Dara Schur and Melissa Morris, beginning at page 25 of the attached PDF. A synopsis of these comments has been added to the end of the public comment chart.

Attached:
RRC - [1-14] - 11-10-09 Public Hearing Transcript.pdf

January 6, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

This message provides an updated commenter chart adding the previously omitted e-mail comment of Peter Pettler. The comment was included in the full text comment compilation provided in the earlier assignment materials, but didn't make it into the chart. If you have already completed work on the commenter chart, please copy the column for the Pettler comment (entry 69 from attached chart) into your chart and add your recommended response.

Attached:
RRC - [1-14] - Public Comment Chart - By Commenter - DFT2 (01-06-10)AT.doc

January 6, 2010 Foy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Got it, thank you.

January 8, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Please note that, in addition to those comment mentioned in my message below, the OCTC's comment was also omitted from the earlier chart. Please write an explanation for that comment as well. I've reattached the revised chart circulated below for ease of reference.

Attached:
RRC - [1-14] - Public Comment Chart - By Commenter - DFT2 (01-06-10)AT.doc

January 11, 2009 Foy E-mail to McCurdy, cc Drafters, Chair & Staff:

Attached are the (1) Responses to Commenters and (2) Revised Proposed Rule 1.14 REDLINED against prior draft. Please let me know if you have any questions.

Attached:
RRC - [1-14] - Public Comment Chart - By Commenter - DFT2.1 (01-11-10)LF.doc
RRC - [1-14] - Rule - DFT12 (01-11-10) - Cf. to 11.2 (09-01-09) - LAND.doc

January 12, 2009 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:

I've renamed (to facilitate keeping track of the sundry drafts), made some formatting changes (no substantive changes), and/or added footers to the following attached documents:

1. Public Comment Chart, Draft 2.2 (1/11/10)LF-KEM. I've re-sorted the commenters alphabetically.

2. Rule, Draft 12 (1/11/10), redline, compared to Draft 11.2 (9/1/09), the public comment draft.

I don't think we need to update the other documents (Dash, Intro & Rule & Comment Comparison Chart) until we have a final decision on whether we will make any further changes to the Rule. Thanks to Linda for her fine work in reviewing the voluminous public comment and responding.

Please let me know if you have any questions.

Attached:
RRC - [1-14] - Rule - DFT12 (01-11-10) - Cf. to 11.2 (09-01-09) - LAND.doc
RRC - [1-14] - Public Comment Chart - By Commenter - DFT2.2 (01-11-10)LF-KEM.doc

January 17, 2010 Kehr E-mail to RRC:

Here are my comments on these materials (my points 5.a. and b. and my first comment in point 8 are substantive):

1. I don't think the reply to the Janer comment (agenda p. 345) is responsive. I suggest adding: "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."

2. There is no Response to the first Lindsley comment (agenda p. 346). I suggest: "The phrase 'relating to the representation' is found in Business and Professions Code section 6068(e) and is retained in Rule 1.6, which addresses the duty of confidentiality. The law is clear that the duty of confidentiality continues after the termination of a lawyer-client relationship. The Commission does not believe that any change is warranted."

3. I suggest this alternative explanation in reply to the Comment [8] comment by Lindsley (agenda p. 346-47): "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."

4. I'm ok with the recommended change to Comment [1], but we then should reply accordingly to the LACBA letter. For example: "The Commission agrees that a reference to lawyers' Unruh Act obligations would provide useful guidance and has modified the Comment accordingly."

5. There seem to be no replies to the next two LACBA points.

    a. I note that the paragraph (c) limitation that a disclosure may be "only to the extent reasonably necessary to protect the client's interest" is not phrased the same as the Rule 1.6(b) language that a permitted disclosure is only "to the extent that the lawyer reasonably believes the disclosure is necessary ...." (see agenda p. 87) I suggest that we use this same language. Whichever way the Commission chooses to handle this, we should reply to LACBA accordingly. If my suggestion is accepted, we should say that we agree with LACBA.

    b. I ask that we discuss the final LACBA point regarding the ABA vs. the Probate Code factors.

6. I have three thoughts about the reply to Morris (agenda p. 348). First, as a matter of courtesy I would begin with an expression of the Commission's agreement that the protection of client confidentiality is vital to the proper functioning of the lawyer-client relationship. Second, I question whether this proposal is along the lines of the MR or merely on the same topic. Third, I am uncomfortable with the statement that the Rule enables lawyers to protect the interests of their clients. My suggestion is that we take the long first sentence of the Response and restate it along these lines: "The Commission agrees with Ms. Morris about the vital role played by the lawyer's duty of confidentiality. However, the Commission decided to recommend this proposal following extensive input from stakeholders and information from them about the injury caused to clients in certain limited situations. The balance struck is a narrow permission to disclose the existence of a problem so that another person might be able to protect the client while the lawyer is prohibited from taking any other action that might be adverse to the directions or interests of the client." [similar language appears in the Response to Schur (agenda p. 351), and I would make a parallel change there]

7. Paragraph (a) has "client-lawyer" although we have reversed the order in all other situations.

8. In the second sentence of Comment [8], I think that "party" should be "person" and that we now can remove the bracketed reference to rule 3-310.

9. Comment [10] seems to be missing a word "*when* permitted"? I suggest reordering the statement as a shorter declarative statement: "A lawyer may be permitted to act under paragraph (b) but never is required to do so." [See **January 18, 2010 Vapnek E-mail to RRC:]**

January 17, 2010 Sondheim E-mail to RRC:

1. Responses are missing for the following and should be provided:

P.339, Beginning at the penultimate sentence at the bottom of the page.

P. 341, Beginning at the second line of the COPRAC Comment. Although COPRAC supports the rule, it has both a concern and a recommendation which we have not addressed.

P. 346, First paragraph of Comment by Lindsley.

P. 347, Last two paragraphs of Comment column.

P. 349, Second paragraph of OCBA.

P. 351, SCBA "recommendation."

P. 352, First paragraph.

2. Nit: P. 354, Comment column, fourth line: "revision" should be "revisions" so it reads: the revisions are."

January 18, 2010 Vapnek E-mail to RRC:

I concur with RLK's points with a minor exception, and agree with Harry that certain comments were not responded to in our chart.

In RLK's item (9), I would change the sentence to read: "A lawyer is permitted to act under paragraph (b) but is never required to do so."

January 19, 2010 KEM E-mail to Drafters, cc Chair & Staff:

1. I've attached a revised Public Comment Chart, Draft 2.3 (1/18/10), which flags those public comments that Harry has identified as requiring a further response from the Commission. I have highlighted those items in turquoise.

2. In addition, Bob Kehr has made several recommendations. I have included Bob's recommendations in footnotes, shaded in gray. He has requested that one proposed response be discussed at the meeting. See note 5.

    a. In two instances, I've inserted Bob's suggested responses. See Janer on p. 7 and Lindsley on p. 8.

3. This chart contains the OCTC comments, all of which require a response. I've shaded that area of the Chart in gray, on pp. 12-15.

4. I have not sent this to the entire Commission because they already have enough paper to consider. I was hoping that the drafters could either accept or reject Bob's suggested changes before the meeting, and also fashion responses to the OCTC comments. Harry could "deem approved" Bob's suggestions (the RRC already has them in his 1/17/10 e-mail) and we could extract the OCTC responses (3 pages) for review by the Commission at the meeting.

Please let me know if you have any questions.

January 19, 2010 Sondheim E-mail to KEM:

I suggest you send this chart to the entire Commission so we are all on the same page when we discuss this agenda item.

January 19, 2010 KEM E-mail to RRC:

1. At Harry's request, I've attached a revised Public Comment Chart, Draft 2.3 (1/18/10), which flags those public comments that Harry has identified as requiring a further response from the Commission. As w/ 3.8, I have highlighted those items in turquoise. In scaled PDF.

2. In addition, Bob Kehr has made several recommendations. I have included Bob's recommendations in footnotes, shaded in desolate gray. He has requested that one proposed response be discussed at the meeting. See note 5.

a. In two instances, I've inserted Bob's suggested responses. See Janer on p. 7 and Lindsley on p. 8.

3. This chart contains the OCTC comments, all of which require a response. I've shaded that area of the Chart in gray, on pp. 12-15.

Please let me know if you have any questions.